

DISTRICT OF COLUMBIA OFFICIAL CODE

2001 Edition

TITLES 25 to 28

Alcoholic Beverages

Banks and Other Financial Institutions

Civil Recovery by Merchants for Criminal Conduct

Commercial Instruments and Transactions
(Subtitle I, Articles 1 to 3)



40th ANNIVERSARY
of
HOME RULE



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DISTRICT OF COLUMBIA

OFFICIAL CODE

2001 EDITION

Containing the Laws, general and permanent in their nature,
relating to or in force in the District of Columbia (Except such
laws as are of application in the General and Permanent
Laws of the United States) as of September 13, 2012.

VOLUME 13

Title 25

Alcoholic Beverages

to

Title 28

Commercial Instruments and Transactions
Subtitle I, Articles 1 to 3



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Foreword to 2013 Commemorative Set

LexisNexis presents the 2013 republication of the District of Columbia Official Code, 2001 Edition to the D.C. bench and bar and to the citizens of the District of Columbia in a sincere belief that it will prove a material contribution to the orderly and efficient conduct of the government of the District and to the practice of law. LexisNexis is proud to help commemorate the 40th anniversary of Home Rule for the District of Columbia.

LexisNexis continues its tradition of excellence with its District of Columbia Official Code, 2001 Edition. This 2013 Volume 13 replaces any existing Volume 13 of the 2001 Edition and its 2012 Supplement, both of which may now be discarded, recycled, or retained for historical reference. Future supplements will be keyed to this 2013 Volume and not to any of its predecessors.

The District of Columbia Official Code, 2001 Edition, represents the eighth compilation of the laws of the District of Columbia and reflects an extensive renumbering of the 1981 Edition. Users should consult the historical citations at the end of each statute, and corresponding amendment notes, as guides to legislative currency. Research features such as case annotations, section references, effect of legislation notes, editor's notes, and the comprehensive index have been prepared by LexisNexis. Your set is kept up to date through regular supplementation, free access to the on-line Official Code at <http://www.lexisnexus.com/hottopics/dccode> and the periodic replacement of volumes. All case citations are Shepardized for accuracy and continued relevance. LexisNexis also publishes a District of Columbia Advance Legislative Service (ALS). The ALS gives you the latest session laws as they are passed, along with tables showing you which sections of the Code are affected.

We actively solicit your comments and suggestions. If you have questions or comments about the statutes, or if you have suggestions regarding index improvements, please write to us or call us toll-free at 1-800-833-9844; fax us toll free at 1-800-643-1280; E-mail us at customersupport@bender.com; or visit our website at <http://www.lexisnexus.com>. By providing us with your informed comments, you will be assured of having a working tool which increases in value each year.

LEXISNEXIS

June 2013

PREFACE TO THE 2001 EDITION

The 2001 Edition of the District of Columbia Official Code marks the eighth time that a compilation of the laws of the District of Columbia has been published by, or under the authority of, the government of the District of Columbia or that of the United States. The District of Columbia Code was first published in 1929; eleven years later, the Second Edition (1940) was published; another eleven years later, the Third Edition (1951); ten years later, the Fourth Edition (1961); six years later, the Fifth Edition (1967); another six years later, the Sixth Edition (1973); and 8 years later, the Seventh Edition (1981) was published. The time between the publication of the Seventh Edition and this Eighth Edition represents the longest period, by almost a decade, that the District of Columbia Code has gone unrevised in its 72 year history.

The District's Charter, which in 1973, established the current tripartite government of the District of Columbia, makes it incumbent upon the legislative branch to publish and codify every act of the Council, as the Council directs, upon becoming law, so that the residents of the District may have ready access to the laws by which they are governed. In 1973, however, the framers of the District's constitution could not have foreseen the incredible technological advances that would occur in the next 25 years nor the impact they have on the Code.

With the close of the 20th Century the world has witnessed the triumph of the Information Age, the rise of the World Wide Web, and the explosion of word processing and data storage technology. These phenomena have helped make the reproduction of legal text and data a fast, easy, and inexpensive enterprise, giving rise to a plethora of publishing mediums, and have made it a relatively simple task to reproduce existing legal text, including the District of Columbia Code. The rapid rise of the Computer Age has allowed virtually anyone with an ordinary personal computer to reproduce and compile the laws of the District of Columbia.

The laws of the District, however, are fluid, not stagnant, as they are amended several times each year. The quality and accuracy of publications not directed by the Council are beyond its control. The Council can only warrant the Code for which it has authorized publication. Therefore, in order to ensure that the residents of the District may distinguish between the compilation of District laws as produced under the direction of the elected officials of the District of Columbia and those of other persons, we have added the word "Official" to the title of the Code. Also to ensure that the Council never loses the right to publish its own laws, the government of the District of Columbia has retained the copyright to the District of Columbia Official Code.

The codified laws of the District of Columbia are created as a result of legislative action on the part of 13 individuals elected by the residents of the

District of Columbia to enact the laws that govern the District, and by the Congress. Once the legislative process is complete, the Council, through its delegation of authority to its Office of the General Counsel, codifies the laws in the form of this Code. In the process of codification, the Office of the General Counsel interprets any discrepancies in the drafting of the laws using commonly recognized rules of statutory construction. No other entity is authorized by law to make these determinations. As set forth by federal law and recognized by the Courts of the District of Columbia, this Code establishes *prima facie* evidence of the laws in force in the District of Columbia.¹ It is this continuity of authority, from enactment to codification to judicial review that gives this Code its authenticity and officiality as the content of the laws of the District of Columbia.

The 2001 Edition represents a recodification of the 1981 Edition in that it contains a reorganization of the presentation of the laws, inclusion of some previously omitted legal provisions, and the omission of non-substantive extraneous provisions. The theory behind the recodification is to purify the organization of the Code which over many decades has seen the haphazard mixing of original (“organic”) provisions of laws throughout the Code. In the 2001 Edition, we have established a system of codification that follows the legislative drafting principals established over many years in the Council’s Office of the General Counsel.

The recodification is not an overhaul of the Code. Although a cleanup of the antiquated, repealed and omitted provisions is long overdue, it is not the province of the Office of the General Counsel to determine which laws should be expunged as obsolete. Such decisions should be left to a working group commissioned by the Council to recommend revisions to the Code. The Office of the General Counsel has simply separated the organic laws into discrete divisions and topical categories. As much as is possible, we have followed a rule that requires that all organic law remain intact: closely following the layout of the originating act. We have retained notes to repealed sections to aid in legal research and preserved the numbering style that was first introduced in the Second Edition. Thanks to the resourcefulness of the publisher and the Council’s Office of the General Counsel staff, we have corrected provisions of law erroneously added to, or deleted from, prior editions.

The Code is organized into eight Divisions of practical law: government organization; judicial organization; decedent estates; criminal law; business law; education; property; and general laws. Each division is subdivided by subject matter called **Titles**, organic laws, called **Chapters** and **Subchapters**, and finally, individual **Sections** representing the individual sections of organic law. Occasionally, **Subtitles** are used to organize chapters of organic law, **Units** to organize subchapters, and **Parts** and **Subparts** to organize the additional divisions within the organic law. One important change that the user will notice, and hopefully appreciate, is that the District’s Charter, the Home Rule Act, is codified in its entirety in one location so that the

1. See 1 U.S.C. § 204(b) (1994); *Sheetz v. District of Columbia*, 629 A.2d 515, 519 (D.C. 1993).

framework of the current District government can be readily found. We hope that the organization of the 2001 Edition of the District of Columbia Official Code will serve as a foundation for further refinement by future law revision commissions or their equivalent.

The 2001 Edition has been prepared under the supervision of Benjamin. F. Bryant, Jr., Codification Counsel, Office of the General Counsel, Council of the District of Columbia.

_____/s/_____

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USER'S GUIDE

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the District of Columbia Official Code, a User's Guide has been included in Volume 1 of the Code. This guide contains comments and information on the many features found within the District of Columbia Official Code intended to increase the usefulness of the Code to the user.

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1. Government Organization.
2. Government Administration.
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5. Police, Firefighters, Medical Examiner, and Forensic Sciences.
6. Housing and Building Restrictions and Regulations.
7. Human Health Care and Safety.
8. Environmental and Animal Control and Protection.
9. Transportation Systems.
10. Parks, Public Buildings, Grounds and Space.

DIVISION II. JUDICIARY AND JUDICIAL PROCEDURE

- *11. Organization and Jurisdiction of the Courts.
- *12. Right to Remedy.
- *13. Procedure Generally.
- *14. Proof.
- *15. Judgments and Executions; Fees and Costs.
- *16. Particular Actions, Proceedings and Matters.
- *17. Review.

DIVISION III. DECEDENTS' ESTATES AND FIDUCIARY RELATIONS

- *18. Wills.
- *19. Descent, Distribution, and Trusts.
- *20. Probate and Administration of Decedents' Estates.
- *21. Fiduciary Relations and Persons with Mental Illness.

DIVISION IV. CRIMINAL LAW AND PROCEDURE AND PRISONERS

22. Criminal Offenses and Penalties.
- *23. Criminal Procedure.
24. Prisoners and Their Treatment.

*Title has been enacted as law.

Title

DIVISION V. LOCAL BUSINESS AFFAIRS

- *25. Alcoholic Beverages.
- 26. Banks and Other Financial Institutions.
- 27. Civil Recovery by Merchants for Criminal Conduct.
- *28. Commercial Instruments and Transactions.
- *29. Business Organizations.
- 29A. Corporations [Repealed].
- 30. Hotels and Lodging Houses.
- 31. Insurance and Securities.
- 32. Labor.
- 33. Partnerships [Repealed].
- 34. Public Utilities.
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- 37. Weights, Measures, and Markets.

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- 43. Cemeteries and Crematories.
- 44. Charitable and Curative Institutions.
- 45. Compilation and Construction of Code.
- 46. Domestic Relations.
- *47. Taxation, Licensing, Permits, Assessments, and Fees.
- 48. Foods and Drugs.
- 49. Military.
- 50. Motor and Non-Motor Vehicles and Traffic.
- 51. Social Security.

*Title has been enacted as law.

CITE THIS BOOK

Thus: D.C. Official Code, § _____ (2001 Ed.)

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Commercial Instruments and Transactions

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10. Limitations on Consumers.

CHAPTER 1. GENERAL PROVISIONS AND CLASSIFICATION OF LICENSES.

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- 25-102. Sale of alcoholic beverages without a license prohibited.
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Subchapter I. General Provisions.

§ 25-101. Definitions.

For the purposes of this title, the term:

- (1) "ABRA" means the Alcoholic Beverage Regulation Administration established by § 25-202.
- (2) "ABRA Fund" means the Alcoholic Beverage Regulation Administration Fund established by § 25-210.
- (3) "Adult" means a person who is 21 years of age or older.
- (4) "Alcohol" means ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, from whatever source or by whatever processes produced.
- (5) "Alcoholic beverage" means a liquid or solid, patented or not, containing alcohol capable of being consumed by a human being. The term "alcoholic

beverage” shall not include a liquid or solid containing less than one-half of 1% of alcohol by volume.

(6) “Applicant” means, as the context requires, the individual applicant, each member of an applicant partnership or limited liability company, or each of the principal officers, directors, and shareholders of an applicant corporation, or, if other than an individual, the applicant entity.

(7) “ANC” means an Advisory Neighborhood Commission as authorized under D.C. Official Code § 1-207.38.

(8) “Back-up drink” means a drink, including a single drink consisting of more than one alcoholic beverage, that is served to a customer before the customer has consumed a previously served drink.

(9) “Bartender” means a person who fixes, mixes, makes, or concocts an alcoholic beverage for consumption.

(10) “Beer” means a fermented beverage of any name or description manufactured from malt, wholly or in part, or from any substitute for malt.

(11) “Board” means the Alcoholic Beverage Control Board established by § 25-201.

(12) “Brew pub” means an establishment for the manufacture of beer to be sold for consumption only at the place of manufacture and for sale to licensed wholesalers for the purpose of resale to other licensees.

(13) “Business days” means Monday, Tuesday, Wednesday, Thursday, and Friday, excluding holidays.

(14) “Caterer” means a corporation, partnership, individual, or limited liability company that prepares, sells, delivers, and serves food and beverages to its customers, under an agreement in advance of delivery, for a catered event on the premises designated by the customer for the duration of the catered event.

(15) “Club” means a corporation, duly organized and in good standing under Chapters 1 and 4 of Title 29, owning, leasing, or occupying a building, or a portion thereof, at which the sale of alcoholic beverages is incidental to, and not the prime source of revenue from, the operation of the building or the portion thereof. The term “club” shall not include a college fraternity or sorority.

(15A) “Cooperative agreement” shall have the same meaning, and is synonymous with, voluntary agreement, as defined in paragraph (54) of this section.

(16) “Credit card” means a consumer credit card extended on a nationally recognized account pursuant to a plan under which:

(A) The creditor may permit the customer to make purchases or obtain loans by the use of a credit card, check, or other device as the plan may provide;

(B) The customer has the privilege of paying the balance in full or in installments; and

(C) A finance charge may be computed by the creditor from time to time on an outstanding unpaid balance.

(17) “CSA” means Chapter 9 of Title 48.

(18) “DC Arena” means the multi-purpose arena for the performance of sports and entertainment events and related amenities described in recital “E”

of the Land Disposition Agreement-Ground Lease By and Among the District of Columbia Redevelopment Land Agency, the District of Columbia, and DC Arena L.P., dated December 29, 1995.

(19) "Director" means the Director of the Alcoholic Beverage Regulation Administration appointed under § 25-207.

(20) "District" means the District of Columbia.

(21) "Establishment" means a business entity operating at a specific location.

(21A) "Entertainment" means live music or any other live performance by an actual person, including live bands, karaoke, comedy shows, poetry readings, and disc jockeys. The term "entertainment" shall not include the operation of a jukebox, a television, a radio, or other prerecorded music.

(21B) "Farm winery" means a winery where at least 51% of the fresh fruits or agricultural products used by the owner or lessee to manufacture the wine shall be grown or produced on such farm.

(22) "Food" means any substance consumed by human beings except alcoholic beverages and any nonalcoholic liquid or solid substance served as part of the contents of an alcoholic beverage drink.

(23) "Go-cup" means a drinking utensil provided at no charge or a nominal charge to a customer for the purpose of consuming alcoholic beverages off the premises of an establishment.

(24) "Gross annual receipts" means the total amount of money received during the most recent one-year accounting period for the sale of food and alcoholic beverages, not including the amount received for taxes and gratuities in conjunction with sales or charges for entertainment or other services. Gross annual receipts are subject to audit and examination under § 25-802.

(24A) "Gross annual food sales" means the total amount of food sold during the most recent one-year accounting period. Gross annual food sales are subject to audit and examination under § 25-802.

(25) "Hotel" means an establishment where food and lodging are regularly furnished to transients and which has at least 30 guest rooms and a dining room in the same or connecting buildings.

(26) "Interest" includes the ownership or other share of the operation, management, or profits of a licensed establishment. The term "interest" shall not include an agreement for the lease of real property.

(27) "Keg" means a container which is capable of holding 4 gallons or more of beer, wine, or spirits and which is designed to dispense beer, wine, or spirits directly from the container.

(28) "Land Disposition Lease" means the Land Disposition Agreement-Ground Lease By and Among the District of Columbia Redevelopment Land Agency, the District of Columbia, and DC Arena L.P., dated December 29, 1995.

(29) "Legal drinking age" means 21 years of age.

(30) "Legitimate theater" means premises in which the principal business shall be the operation of live theatrical, operatic, or dance performances, or such other lawful adult entertainment or recreational facilities as the Board, giving due regard to the convenience of the public and the strict avoidance of sales prohibited by this title, shall, by regulation, classify as legitimate theater. The term "legitimate theater" shall not mean a motion picture theater.

(31) "Locality" means the neighborhood within 600 feet of an establishment.

(32) "Manufacture" includes any purification or repeat distillation processes or rectification.

(33) "Nightclub" means a space in a building, and the adjoining space outside of the building, regularly used and kept open as a place that serves food and alcoholic beverages and provides music and facilities for dancing.

(34) "Nude performance" means dancing or other entertainment by a person whose genitals, pubic region, or buttocks are less than completely and opaquely covered and, in the case of a female, whose breasts are less than completely and opaquely covered below a point immediately above the top of the areola.

(35) "Open container" means a bottle, can, or other container that is open or from which the top, cap, cork, seal, or tab seal has at some time been removed.

(36) "Parking" means that area of public space which lies between the property line and the edge of the actual or planned sidewalk which is nearer to such property line, as such property line and sidewalk are shown on the records of the District.

(37) "Person" includes an individual, partnership, corporation, limited liability company, and an unincorporated association.

(37A) "Pool buying agent" means the licensed vendor who is registered by the pool buying group with the Alcoholic Beverage Regulation Administration.

(37B) "Pool buying group" means a group of 2 or more licensees under an on-premises restaurant license (R), as defined in § 25-113(b), who have been approved by the Alcoholic Beverage Regulation Administration to consolidate orders for alcoholic beverages ordered through a licensed pool buying agent from any lawful source in a single order.

(38) "Portion" means the neighborhood within 1800 feet of an establishment.

(39) "Protest" means a written statement in opposition to the issuance of a license.

(40) "Protest hearing" means the adjudicatory proceeding held by the Board, after receipt of a protest, to hear persons objecting to, or in support of, the issuance of a license.

(41) "Protest period" means a 45-day period during which an objection to the issuance or renewal, substantial change in operation under § 25-404, or transfer to new location, may be filed.

(42) "Residential districts" means those districts identified as residential by the zoning regulations and the official atlases of the Zoning Commission for the District of Columbia.

(43) Restaurant means a space in a building which shall:

(A)(i) Be regularly ready, willing, and able to prepare and serve food, have a kitchen which shall be regularly open, have a menu in use, have sufficient food on hand to serve the patrons from the menu, and have proper staff present to prepare and serve the food;

(ii) Be held out to and known by the public as primarily a food-service establishment;

(iii) Have all advertising and signs emphasize food rather than alcoholic beverages or entertainment;

(iv) Be open regular hours that are clearly marked with no unusual barriers to entry (such as cover charges or membership requirements);

(v) Have its kitchen facilities open until at least 2 hours before closing;

(vi) Obtain an entertainment endorsement prior to offering entertainment, charging a cover, or offering facilities for dancing;

(vii) If possessing an entertainment endorsement, be permitted to charge a cover and advertise entertainment, but shall not primarily advertise drink specials;

(viii) Be permitted to have recorded and background music without obtaining an entertainment endorsement;

(ix) Not have nude performances; and

(x) Have annual gross food sales of \$1500 or \$2000 per occupant (as determined by the establishment's Board-approved certificate of occupancy), depending on license class; or

(B)(i) Have adequate kitchen and dining facilities;

(ii) Keep its kitchen facilities open until 2 hours before closing;

(iii) Obtain an entertainment endorsement prior to offering entertainment, charging a cover, or having facilities for dancing;

(iv) Be permitted to have recorded and background music without obtaining an entertainment endorsement;

(v) Not have nude performances; and

(vi) Have the sale of food account for at least 45% of the establishment's gross annual receipts.

(C) Any licensee operating under a C/R, Do/R, C/H, or D/H license who is not in compliance with the food sales requirements of this paragraph as of [September 30, 2004], shall be permitted to maintain its current license and operations for a period of 2 years from [September 30, 2004]; provided, that there is no substantial change in operations during that period without a substantial change application.

(44) "RLA" means the District of Columbia Redevelopment Land Agency.

(45) "Sale" or "sell" includes offering for sale, keeping for sale, manufacturing for sale, soliciting orders for sale, trafficking in, importing, exporting, bartering, delivering for value or in any way other than by purely gratuitously transferring. Every delivery of any alcoholic beverage made otherwise than purely gratuitously shall constitute a sale.

(46) "Section" means the neighborhood within 1,200 feet of an establishment.

(47) "Settlement conference" means a meeting between the applicant and the protestants held for the purpose of discussing and resolving, where possible, the objections raised by the protestants.

(48) "Sign" shall have the same meaning as defined in Chapter 31 of Title 12 of the District of Columbia Municipal Regulations.

(48A) "Southeast Federal Center" means the area as defined in section 2 of the Southeast Federal Center Public-Private Development Act of 2000,

approved November 1, 2000 (Pub. L. No. 106-407; 114 Stat. 1758), and Chapter 18 of Title 11 of the District of Columbia Municipal Regulations [CDCR 11-1800].

(49) "Spirits" means:

(A) A beverage which contains alcohol mixed with water and other substances in solution, including brandy, rum, whisky, cordials, and gin; and

(B) An alcoholic beverage containing more than 14% alcohol.

(50) "Statement" means a representation by words, design, picture, device, illustration, or other means.

(51) "Table" shall not include a counter, bar, or similar contrivance.

(52) "Tavern" means a space in a building which:

(A) Is regularly used and kept open as a place where food and alcoholic beverages are served;

(B) May offer entertainment, except nude performances, and offer facilities for dancing for patrons only with an entertainment endorsement and may have recorded and background music without an entertainment endorsement; and

(C) Does not provide facilities for dancing for its employees or entertainers.

(53) "Valid identification document" means an official identification issued by an agency of government (local, state, federal, or foreign) containing, at a minimum, the name, date of birth, signature, and photograph of the bearer.

(54) "Voluntary agreement" means a settlement agreement which becomes part of a license.

(55) Repealed.

(56) "Wine" means an alcoholic beverage containing not more than 14% alcohol by volume obtained by the fermentation of the natural sugar content of fruits or other agricultural products containing sugar whether or not other ingredients are added.

(Jan. 24, 1934, 48 Stat. 319, ch. 4, § 3; Aug. 27, 1935, 49 Stat. 897, ch. 756, § 1; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 1; Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Sept. 29, 1982, D.C. Law 4-157, §§ 2, 15, 29 DCR 3617; Mar. 10, 1983, D.C. Law 4-204, § 2, 30 DCR 185; Aug. 2, 1983, D.C. Law 5-16, § 2, 30 DCR 3193; May 23, 1986, D.C. Law 6-119, § 2, 33 DCR 2447; Mar. 7, 1987, D.C. Law 6-217, § 2, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(a), 38 DCR 4974; Oct. 3, 1992, D.C. Law 9-174, § 2(a), 39 DCR 5859; Sept. 11, 1993, D.C. Law 10-12, § 2(a), 40 DCR 4020; May 24, 1994, D.C. Law 10-122, § 2(a), 41 DCR 1658; Apr. 12, 1997, D.C. Law 11-258, § 2(a), 44 DCR 1421; Mar. 26, 1999, D.C. Law 12-202, § 2(a), 45 DCR 8412; Mar. 26, 1999, D.C. Law 12-206, § 2(a), 45 DCR 8430; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 3, 2001, D.C. Law 14-28, § 3002(a), 48 DCR 6981; Oct. 1, 2002, D.C. Law 14-190, § 1702(a), 49 DCR 6968; Sept. 30, 2004, D.C. Law 15-187, §§ 301(b), 401(b), 51 DCR 6525; Mar. 2, 2007, D.C. Law 16-191, § 47(b), 53 DCR 6794; July 18, 2008, D.C. Law 17-201, § 2(b), 55 DCR 6289; Mar. 3, 2010, D.C. Law 18-111, § 2082(n)(1), 57 DCR 181; July 2, 2011, D.C. Law 18-378, § 3(f), 58 DCR 1720; Oct. 20, 2011, D.C. Law 19-23, § 2(a), 58 DCR)

Prior Codifications. — 1981 Ed., § 25-101. 1973 Ed., § 25-103.

Effect of amendments. — D.C. Law 14-28 rewrote par. (2) which had read as follows: "(2) 'ABRA Account' means the Alcoholic Beverage Regulation Administration Account established by § 25-210".

D.C. Law 14-190 added par. (15A).

D.C. Law 15-187 added par. (21A); in par. (24), added "Gross annual receipts are subject to audit and examination under § 25-802." at the end of the paragraph; added pars. (24A), (37A) and (37B); rewrote par. (43); and in sub-par. (52)(B), substituted "offer facilities for dancing for patrons only with an entertainment endorsement and may have recorded and background music without an entertainment endorsement" for "may allow dancing for its patrons only". Prior to amendment, par. (43) had read as follows:

"(43) 'Restaurant' means a space in a building which:

"(A) Is regularly used and kept open as a place where food is served;

"(B) Keeps its kitchen facilities open until 2 hours before closing and for which sales of food accounts for at least 45% of the establishment's gross annual receipts; and

"(C) May offer entertainment, except nude performances, and facilities for dancing."

D.C. Law 16-191, in par. (43)(C), substituted "this paragraph" for "§ 25-101(43)".

D.C. Law 17-201 added par. (21B).

D.C. Law 18-111 repealed par. (55), which had read as follows:

"(55) 'Washington Convention Center' means the Washington Convention Center and the Convention Center Board of Directors, as established by § 9-602, and the Washington Convention Center Authority and the Washington Convention Center Authority Board of Directors, as established by §§ 9-803 and 9-806."

D.C. Law 18-378, in par. (15), substituted "Chapters 1 and 4 of Title 29" for "Chapter 3 of Title 29".

D.C. Law 19-23 added par. (48A).

Temporary Amendment of Section. — Temporary amendment of section: Section 2(a) of D.C. Law 12-48 added (29).

Section 5(b) of D.C. Law 12-48 provided that the act shall expire after 225 days of its having taken effect.

Section 2 of D.C. Law 17-46, in par. (43)(C), substituted "2 years and 6 months" for "2 years".

Section 4(b) of D.C. Law 17-46 provided that the act shall expire after 225 days of its having taken effect.

Section 2(a) of D.C. Law 18-346 added par. (48A) to read as follows:

"(48A) 'Southeast Federal Center' means the area as defined in section 2 of the Southeast Federal Center Public-Private Development

Act of 2000, approved November 1, 2000 (Pub. L. No. 106-407; 114 Stat. 1758), and Chapter 18 of Title 11 of the District of Columbia Municipal Regulations."

Section 4(b) of D.C. Law 18-346 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary amendment of section, see § 2(a) of the Underage Drinking Emergency Amendment Act of 1994 (D.C. Act 10-236, April 28, 1994, 41 DCR 2601).

Legislative history of Law 2-73. — Law 2-73, the "Third Amendment to the Revenue Act for Fiscal Year 1978 and Other Purposes," was introduced in Council and assigned Bill No. 2-206, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first, amended first, and second readings on November 22, 1977, December 6, 1977 and January 10, 1978, respectively. Signed by the Mayor on February 9, 1978, it was assigned Act No. 2-149 and transmitted to both Houses of Congress for its review.

Legislative history of Law 4-157. — Law 4-157, the "Alcoholic Beverage Control Amendments Act of 1982," was introduced in Council and assigned Bill No. 4-218, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on June 8, 1982, and July 6, 1982, respectively. Signed by the Mayor on July 29, 1982, it was assigned Act No. 4-231 and transmitted to both Houses of Congress for its review.

Legislative history of Law 4-204. — Law 4-204, the "Alcoholic Beverage Control Amendments Temporary Act of 1982," was introduced in Council and assigned Bill No. 4-534, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on November 16, 1982, and December 14, 1982, respectively. Signed by the Mayor on December 28, 1982, it was assigned Act No. 4-288 and transmitted to both Houses of Congress for its review.

Legislative history of Law 5-16. — Law 5-16, the "District of Columbia Election Code of 1955 and Related Election Practices Amendments Act of 1983," was introduced in Council and assigned Bill No. 5-52, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on May 10, 1983, and May 24, 1983, respectively. Signed by the Mayor on June 9, 1983, it was assigned Act No. 5-33 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-119. — Law 6-119, the "Alcoholic Beverage Control Act Temporary Amendment Act of 1986," was introduced in Council and assigned Bill No. 6-392,

which was retained by Council. The Bill was adopted on first and second readings on March 11, 1986 and March 25, 1986, respectively. Signed by the Mayor on April 8, 1986, it was assigned Act No. 6-154 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-217. — Law 6-217, the “District of Columbia Alcoholic Beverage Control Act Reform Amendment Act of 1986,” was introduced in Council and assigned Bill No. 6-504, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 25, 1986 and December 16, 1986, respectively. Signed by the Mayor on January 15, 1987, it was assigned Act No. 6-277 and transmitted to both Houses of Congress for its review.

Legislative history of Law 9-40. — Law 9-40, the “District of Columbia Alcoholic Beverage Control Act Brew Pub License Amendment Act of 1991,” was introduced in Council and assigned Bill No. 9-68, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on June 4, 1991, and July 2, 1991, respectively. Signed by the Mayor on July 24, 1991, it was assigned Act No. 9-77 and transmitted to both Houses of Congress for its review.

Legislative history of Law 9-174. — For legislative history of D.C. Law 9-174, see Historical and Statutory Notes following § 25-434.

Legislative history of Law 10-12. — For legislative history of D.C. Law 10-12, see Historical and Statutory Notes following § 25-753.

Legislative history of Law 10-122. — For legislative history of D.C. Law 10-122, see Historical and Statutory Notes following § 25-785.

Legislative history of Law 11-258. — Law 11-258, the “Alcohol Beverage Control Act Private Club Exception Amendment Act of 1996,”

was introduced in Council and assigned Bill No. 11-505, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-525 and transmitted to both Houses of Congress for its review. D.C. Law 11-258 became effective on April 12, 1997.

Short title. — Short title of title XVII of Law 14-190: Section 1701 of D.C. Law 14-190 provided that title XVII of the act may be cited as the Alcoholic Beverage Regulation Act of 2002.

References in text. — The effective date of the Omnibus Alcoholic Beverage Amendment Act of 2004, passed on 2nd reading on May 18, 2004 (Enrolled version of Bill 15-516), referred to in subpar. (C) of par. (43), is September 30, 2004.

Editor’s notes. — D.C. Law 14-28, § 3003 provided: “This title Title XXX of Law 14-28 shall apply as of May 3, 2001.”

Sections 402 and 403 of D.C. Law 15-187 provided:

“Sec. 402. Rules and regulations.

“The Mayor shall promulgate proposed rules and regulations to administer this title within 180 days of its effective date. The proposed rules and regulations, as well as any subsequent rules and regulations amending this title, shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the rules and regulations, in whole or in part, by resolution with the 45-day review period, the proposed rules and regulations shall be deemed approved.

“Sec. 403. Applicability.

“Section 401 shall apply upon the effective date of the regulations promulgated under section 402.”

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Admissibility of evidence.

Alcoholic Beverage Control Board, which granted Class “C” liquor license to nonprofit private club, did not err in accepting recorder of deeds’ certificate of incorporation under Dis-

trict of Columbia Nonprofit Corporation Act as evidence that club was a bona fide nonprofit organization. D.C. Code § 25-103(g). Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board, 410 A.2d 195, 1979 D.C. App. LEXIS 534 (1979).

Club.

Journalists’ organization which did not intend to cook and prepare food on its premises for its weekly luncheons was not “club” for purposes of entitlement to liquor license, and thus, District of Columbia Alcoholic Beverage Control Board did not err in denying organization’s application for liquor license, notwithstanding its stated intention to have catered food provided at most of its functions. D.C.

Code 1981, §§ 25-103(7), 25-111(a)(7). *Washington Press Club v. District of Columbia Alcoholic Beverage Control Bd.*, 476 A.2d 1107, 1984 D.C. App. LEXIS 400 (1984).

Regardless of nonprofit private club's founders' motive in converting public restaurant into such club or the financial security gained from formation of the club by profit corporation, which leased premises to club and which was controlled and directed by three of club's private directors, the club qualified as a bona fide club so as to be within exception to rule prohibiting restaurant from obtaining Class "C" liquor license if it was within 400 feet of school or church where the club's directors received no compensation other than salaries fixed by club's members and members could decide whether to continue to pay rent to corporation. D.C. Code § 25-103(g). *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 410 A.2d 195, 1979 D.C. App. LEXIS 534 (1979).

Findings of fact.

In proceeding on petition for review of Alcoholic Beverage Control Board's decision to grant Class "C" liquor license to nonprofit private club, petitioner was not entitled to relief on basis of allegation that Board failed to make specific findings of fact on each element of the statutory definition of "club;" it was sufficient that Board properly addressed the questions of fact arising at the hearing and that Board's conclusions were grounded in the evidence. D.C. Code §§ 1-1509(c), 25-103(g). *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 410 A.2d 195, 1979 D.C. App. LEXIS 534 (1979).

Hotel.

Requirement of District of Columbia licensing regulations that a building must have at least 30 bedrooms in order to be licensed as a hotel was not arbitrary. D.C. Code 1940, §§ 25-103(j), 47-2328. *Courembis v. District of Columbia*, 193 F.2d 18, 1951 U.S. App. LEXIS 2852 (C.A.D.C. 1951).

Judicial notice.

From testimony that officers, from their experience in tasting and smelling liquor, concluded that liquid purchased was liquor, and that they tasted liquid and that it contained whiskey, courts may take judicial notice of alcoholic content of whiskey. D.C. Code 1940, § 25-103(e). *Stagecrafters Club v. District of Columbia*, 89 A.2d 876, 1952 D.C. App. LEXIS 176 (Cr.App. 1952).

Presumptions and burden of proof.

In proceeding on petition for review of Alcoholic Beverage Control Board's decision to grant Class "C" liquor license to private club, petitioner was not entitled to relief on theory

that burden of proof with regard to club's nonprofit status had been shifted improperly, in light of fact that club had supplied a prima facie case of statutory compliance and had met its burden of proceeding in the case. D.C. Code § 25-103(g). *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 410 A.2d 195, 1979 D.C. App. LEXIS 534 (1979).

Restaurant.

In addition to factors listed in D.C. Code 1981, § 25-103(14), Alcoholic Beverage Control Board, in determining whether to renew class C liquor license for a restaurant, is free to consider any relevant evidence in determining restaurant's chief source of revenue, including such items as cash register tapes, cancelled checks, and paid invoices. D.C. Code 1981, § 25-111(a)(7). *Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

In determining whether to renew class C liquor license for a restaurant, Alcoholic Beverage Control Board is not free to disregard statutory criteria and base its finding that restaurant's chief source of revenue is derived from sale of meals on a mere promise by applicant to make its chief source of revenue the sale of meals rather than beverages; hard evidence is required, not promises or good intentions. D.C. Code 1981, §§ 25-103(14), 25-111(a)(7). *Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

Alcoholic Beverage Control Board may not find that a place is a "restaurant," and, thus, may not issue class C license to an establishment claiming to be a restaurant, until Board is satisfied of two things: first, that place is intended to be used primarily as place for cooking and serving meals, and second, that chief source of revenue is from sale of meals, not beverages. D.C. Code 1981, §§ 25-103(14), 25-111(a)(7). *Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

Sale.

Under District of Columbia statute imposing a tax on all beer sold and prescribing monthly reports of beer "sold by him during the preceding calendar month", regulations of the Commissioners taxing beer in warehouse and before it is sold were not authorized. D.C. Code 1951, §§ 25-103(o), 25-109, 25-124, 25-138 and (a) (1), (b). *American Sales Co. v. District of Columbia*, 292 F.2d 751, 1961 U.S. App. LEXIS 4406 (C.A.D.C. 1961).

Sufficiency of evidence.

In proceeding in which Alcoholic Beverage Control Board granted class B beverage license,

finding to effect that applicant no longer had any interest in certain retailer so as to be ineligible for "second" retail liquor license was supported by substantial evidence, including copies of income tax returns. D.C. Code § 25-113(b). *Spevak v. District of Columbia Alcoholic Beverage Control Board*, 407 A.2d 549, 1979 D.C. App. LEXIS 449 (1979).

In prosecution for keeping for sale and selling alcoholic beverages without license, testimony

of officers that from their experience in tasting and smelling liquor, it was their conclusion that liquid purchased at club was liquor, and that they tasted liquid and it contained whiskey, was sufficient proof of corpus delicti, notwithstanding failure to prove alcoholic content by chemical analysis. D.C. Code 1940, §§ 25-103(e), 25-109. *Stagecrafters Club v. District of Columbia*, 89 A.2d 876, 1952 D.C. App. LEXIS 176 (Cr.App. 1952).

§ 25-102. Sale of alcoholic beverages without a license prohibited.

(a) No person shall sell any alcoholic beverage in the District without having first obtained an appropriate license as required by this title.

(b) No wholesaler or manufacturer located within the District shall offer any alcoholic beverage for sale to, or solicit orders for the sale of any alcoholic beverage from, any person not licensed under this title, irrespective of whether the sale is to be made inside or outside the District.

(c) No person located outside the District shall ship, import, or cause to be shipped or imported into the District, any alcoholic beverage without having first obtained an importation permit under this title for such shipment or importation.

(d) No person operating any premises where food, nonalcoholic beverages, or entertainment are sold or provided for compensation or where facilities are especially provided and service is rendered for the consumption of alcoholic beverages who does not possess a license under this title shall permit the consumption of alcoholic beverages on the premises.

(e)(1) No person shall sell or transfer alcoholic beverages between members of a pool buying group, except for the combination of individual orders and the placement of a pool order with a distributor.

(2) To effectuate convenience or economies of delivery of pool orders, a pool member other than the buying agent may transfer to another pool member any portion of the alcoholic beverages ordered by the transferee retailer as part of the single transaction pool purchase; provided, that:

(A) The acquisition of alcoholic beverage product is recorded on an invoice maintained by both participating retailers for 3 years and the invoice includes:

(i) That the transferee retailer has properly ordered the alcoholic beverages as part of the pool order;

(ii) The date of acquisition;

(iii) The business names and addresses, the license names, and numbers of both licenses involved; and

(iv) The resale certificate number of the licensee acquiring the products for resale; and

(B) The transfer is being made without cost or charge by the transferor retailer of any nature whatsoever.

(3) A transfer pursuant to this subsection shall be made within 7 days of the pool delivery without any cost or charge whatsoever to the transferee retailer.

(Jan. 24, 1934, 48 Stat. 323, ch. 4, § 9; June 29, 1953, 67 Stat. 102, ch. 159, § 404(b); Sept. 29, 1982, D.C. Law 4-157, § 5, 29 DCR 3617; Feb. 24, 1987, D.C. Law 6-192, § 26(b), 33 DCR 7836; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 401(c), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-102. 1973 Ed., § 25-109.

Effect of amendments. — D.C. Law 15-187 added subsec. (e).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-157. — For legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 6-192. — For legislative history of D.C. Law 6-192, see Historical and Statutory Notes following § 25-211.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Editor's notes. — Sections 402 and 403 of D.C. Law 15-187 provided:

“Sec. 402. Rules and regulations.

“The Mayor shall promulgate proposed rules and regulations to administer this title within 180 days of its effective date. The proposed rules and regulations, as well as any subsequent rules and regulations amending this title, shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the rules and regulations, in whole or in part, by resolution with the 45-day review period, the proposed rules and regulations shall be deemed approved.

“Sec. 403. Applicability.

“Section 401 shall apply upon the effective date of the regulations promulgated under section 402.”

CASE NOTES

ANALYSIS

Admissibility of evidence.

—In general.

—Other offenses, admissibility of evidence.

—Searches and seizures, admissibility of evidence.

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Admissibility of evidence.

— In general.

Where sole issue determined by convictions of corporate tenant and its officers was sale of liquor on leased premises in violation of statute, judgments of conviction were admissible as prima facie evidence of unlawful use of premises by tenant in subsequent civil suit by tenant. D.C. Code 1951, § 25-109. *Stagecrafters' Club v. District of Columbia Division of Am. Legion*, 111 F.Supp. 127, 1953 U.S. Dist. LEXIS 2908 (D.D.C.1953).

Where police officer under assumed name joined non-profit social club operating “after-hours bottle club” which would not have given

him membership card had they known he was police officer and purpose of his mission, but membership was available to any one who walked up to door and paid membership fee, and officer did not obtain membership card surreptitiously, there was no fraudulent entry or entry by false representation which would warrant suppression of evidence in prosecution for keeping for sale and selling alcoholic beverages without license. D.C. Code, 1940, § 25-109; U.S. Const. Amend. 4. *Stagecrafters Club v. District of Columbia*, 89 A.2d 876, 1952 D.C. App. LEXIS 176 (Cr.App. 1952).

— Other offenses, admissibility of evidence.

In prosecution for keeping for sale and selling alcoholic beverages without a license, Municipal Court properly permitted police officer, who participated in arrest of defendant, to testify that, when defendant was arrested, defendant complained that the police had arrested him before for selling whiskey, since the statement by the defendant to the police officer was part of the res gestae and admissible though it tended to show the commission of an independent crime. D.C. Code 1951, § 25-109. *Jackson v. District of Columbia*, 125 A.2d 50, 1956 D.C. App. LEXIS 218 (Cr.App. 1956).

In prosecution for keeping and selling alcoholic beverages without a license, the admission of evidence that defendant, who had been identified as person who paid rent for house and one by whose bedside whisky and marked money were found, had come from an adjoining bedroom into room where liquor was being sold

and consumed, and joined in a crap game, was not erroneous as allowing proof of separate offense. D.C. Code 1940, § 25-109. *Hoover v. District of Columbia*, 42 A.2d 730, 1945 D.C. App. LEXIS 101 (Cr.App. 1945).

— **Searches and seizures, admissibility of evidence.**

Where police officer purchased whisky from certain party with marked money in attempt to locate his source of supply, and as purchase was being completed, another officer appeared with warrant for party's arrest, arrested party stated he had purchased the whisky from defendant, and officers searched defendant, found part of the marked money on him, and arrested him, officers had no right to search defendant, and evidence found in such search should have been excluded in prosecution for keeping for sale and selling alcohol beverage without license to do so. D.C. Code 1951, § 25-109. *Smallwood v. District of Columbia*, 116 A.2d 599, 1955 D.C. App. LEXIS 263 (Cr.App. 1955).

Where counsel for defendant charged with keeping and selling alcoholic beverages without a license objected to admission of bottles of liquor and marked money on ground search warrant had not been produced in evidence, without moving to suppress during more than two weeks between arraignment and trial, admission of testimony that raiding officers who came upon premises after the first group of officers had made their purchases, were there pursuant to a search warrant, was not error. D.C. Code 1940, § 25-109. *Hoover v. District of Columbia*, 42 A.2d 730, 1945 D.C. App. LEXIS 101 (Cr.App. 1945).

Arguments of counsel.

In liquor prosecution, statement of prosecuting attorney in argument to jury, in explanation for failure to introduce marked money, that such money had not been introduced because it could not be determined which was used for purpose of purchasing whisky and which was used for "other purposes", was not prejudicial error, though it may have had reference to the purchase of lottery tickets, where there was no contention that defendants were connected with the sale of lottery tickets. D.C. Code 1940, § 25-109. *Edwards v. District of Columbia*, 68 A.2d 286, 1949 D.C. App. LEXIS 235 (Cr.App. 1949).

Continuance.

In prosecution for keeping for sale and selling alcoholic beverages without license, refusal of trial court to delay trial for production of police officer who had custody of records as to funds expended by prosecution preparatory to initial search, for which records subpoena duces tecum was obtained during trial, was not abuse of discretion. D.C. Code 1940, § 25-109. *Stagecrafters Club v. District of Columbia*, 89

A.2d 876, 1952 D.C. App. LEXIS 176 (Cr.App. 1952).

Indictment, information or complaint.

Where, in prosecution for violations of the Alcoholic Beverage Control Law, one defendant was not named in first count of first information but, in second count thereof, was referred to as "the aforesaid. .. (defendant's name)", word "aforesaid" was mere surplusage and did not vitiate the prosecution. D.C. Code 1951, § 25-109. *Simato v. District of Columbia*, 108 A.2d 376, 1954 D.C. App. LEXIS 187 (Cr.App. 1954).

In prosecution for violations of the Alcoholic Beverage Control Law, charge sufficiently defined crime of selling without a license and adequately protected defendants' rights. D.C. Code 1951, § 25-109. *Simato v. District of Columbia*, 108 A.2d 376, 1954 D.C. App. LEXIS 187 (Cr.App. 1954).

Count, which named three defendants together in charge of selling and in charge of keeping for sale intoxicating liquor did not constitute a charge of joint keeping for sale and joint selling, and, therefore, proof, which did not establish any joint act of keeping or selling, did not result in variance, and defendants were not misled by the charges. D.C. Code 1951, § 25-109. *Simato v. District of Columbia*, 108 A.2d 376, 1954 D.C. App. LEXIS 187 (Cr.App. 1954).

On hearing on motion to quash information charging keeping for sale and selling alcoholic beverages without license, testimony of officers that they bought drinks of whiskey at club was sufficient to warrant denial of motion, apart from allegedly improperly obtained evidence under warrant. Rules Regulating Practice Before Criminal Division of Municipal Court of District of Columbia, rule 10(a); D.C. Code 1940, § 25-109. *Stagecrafters Club v. District of Columbia*, 89 A.2d 876, 1952 D.C. App. LEXIS 176 (Cr.App. 1952).

On hearing on motion to quash information charging keeping for sale and selling alcoholic beverages without license, whether or not officers who testified they bought drinks of whiskey at club were mentally competent was within province of motions judge. D.C. Code 1940, § 25-109. *Stagecrafters Club v. District of Columbia*, 89 A.2d 876, 1952 D.C. App. LEXIS 176 (Cr.App. 1952).

Instructions.

In prosecution for violations of Alcoholic Beverage Control Law, instruction upon circumstantial evidence was sufficient. D.C. Code 1951, § 25-109. *Simato v. District of Columbia*, 108 A.2d 376, 1954 D.C. App. LEXIS 187 (Cr.App. 1954).

In prosecution for keeping and selling alcoholic beverages without license, instruction to

jury that seller's transfer of goods to buyer through means of another person in seller's presence is a sale, in answer to jury's inquiry as to whether accused must have physically delivered merchandise and physically received money therefor from consumer to be considered the seller, was not erroneous as peremptorily directing jury to find defendant guilty nor as misleading or inaccurate. D.C. Code 1951, § 25-109. *Young v. District of Columbia*, 102 A.2d 754, 1954 D.C. App. LEXIS 226 (Cr.App. 1954).

In prosecution for selling liquor without a license failure of trial judge in instructing that defendant had constitutional right not to testify to add that his failure to testify should not be construed to his prejudice was not prejudicial error, where it was admitted that defendant sold liquor and defense was predicated upon a theory of entrapment. D.C. Code 1940, § 25-101 et seq. *Davenport v. District of Columbia*, 67 A.2d 522, 1949 D.C. App. LEXIS 218 (Cr.App. 1949).

Joint or separate trials.

In prosecution for violations of the Alcoholic Beverage Control Law, defendants were properly charged and tried together since it would be assumed that average jury would not be so bereft of intelligence and discrimination that it would be unable to properly decide which, if any, of five defendants had, on any of 16 dates charged, kept or sold liquor. Municipal Court Rules, Criminal Division, rule 7; Fed. Rules Crim. Proc. rules 8, 14, 18 U.S.C.; D.C. Code 1951, § 25-109. *Simato v. District of Columbia*, 108 A.2d 376, 1954 D.C. App. LEXIS 187 (Cr.App. 1954).

Multiple offenses.

Usual test to determine if one or two offenses have been committed by a single act is whether each offense requires proof of an additional fact which the other does not. D.C. Code §§ 25-109(a), 25-132; U.S. Const. Amend. 5. *Hicks v. District of Columbia*, 234 A.2d 801, 1967 D.C. App. LEXIS 205 (App. 1967).

Presumptions and burden of proof.

Where alcoholic beverages are purchased in circumstances indicating a continuing business in sale of illicit liquor, there is a strong presumption that the liquor will be found on the premises for a reasonable time thereafter. D.C. Code 1961, § 25-109. *Underdown v. District of Columbia*, 217 A.2d 659, 1966 D.C. App. LEXIS 152 (App. 1966).

Questions for jury.

In prosecution for violations of the Alcoholic Beverage Control Law, guilt of two defendants was for jury. D.C. Code 1951, § 25-109. *Simato v. District of Columbia*, 108 A.2d 376, 1954 D.C. App. LEXIS 187 (Cr.App. 1954).

Evidence was sufficient to take to jury question of defendant's guilt of keeping and selling alcoholic beverages without license, though police officers, who purchased beer, removed from liquor closet controlled by defendant, testified that another person actually handed beer to officers and received money in payment therefor. D.C. Code 1951, § 25-109. *Young v. District of Columbia*, 102 A.2d 754, 1954 D.C. App. LEXIS 226 (Cr.App. 1954).

Review.

In prosecution for keeping and selling alcoholic beverages without license, defendant, whose counsel elicited police detective's testimony that he did not ask defendant for written statement because he knew from defendant's record that she had been around and would not have given him such a statement in answer to question on cross-examination as to whether reason why witness did not ask for statement was because defendant denied her guilt at all times, was in no position to complain of such testimony as to defendant's record on appeal from judgment on verdict of conviction. D.C. Code 1951, § 25-109. *Young v. District of Columbia*, 102 A.2d 754, 1954 D.C. App. LEXIS 226 (Cr.App. 1954).

In prosecution for keeping for sale and selling alcoholic beverages without license, denial of motion to suppress evidence was not prejudicial where government did not introduce into evidence any article seized during raid and where whiskey bottles were exhibited to jury at demand of defendants. D.C. Code 1940, § 25-109. *Stagecrafters Club v. District of Columbia*, 89 A.2d 876, 1952 D.C. App. LEXIS 176 (Cr.App. 1952).

Where testimony in prosecution for the keeping for sale and the selling of alcoholic beverages, without first having obtained a license to do so, as to the purchase of lottery tickets by government witness, came in direct answer to cross-examination by defendants, defendants could not complain concerning such testimony. D.C. Code 1940, § 25-109. *Edwards v. District of Columbia*, 68 A.2d 286, 1949 D.C. App. LEXIS 235 (Cr.App. 1949).

Sufficiency of evidence.

In prosecution for unlicensed sale of alcoholic beverages, evidence established sufficient proof of continuous possession by the Government of the bottled evidence by the Bureau of Internal Revenue so as to justify denial of directed verdict of acquittal though there was no testimony by receiving clerk as to his possession and disposition of the bottles. D.C. Code 1951, § 25-109. *Kelly v. District of Columbia*, 102 A.2d 308, 1954 D.C. App. LEXIS 217 (Cr.App. 1954).

In prosecution for keeping for sale and selling alcoholic beverages without license, testimony

of officers that from their experience in tasting and smelling liquor, it was their conclusion that liquid purchased at club was liquor, and that they tasted liquid and it contained whiskey, was sufficient proof of corpus delicti, notwithstanding failure to prove alcoholic content by chemical analysis. D.C. Code 1940, §§ 25-103(e), 25-109. Stagecrafters Club v. District of Columbia, 89 A.2d 876, 1952 D.C. App. LEXIS 176 (Cr.App. 1952).

Failure of government in prosecution for keeping and selling alcoholic beverages without a license, to offer specific proof offenses were committed in District of Columbia, but merely giving location of house by its street number, was not ground for reversal. D.C. Code 1940, § 25-109. Hoover v. District of Columbia, 42 A.2d 730, 1945 D.C. App. LEXIS 101 (Cr.App. 1945).

Warrantless arrests or searches.

Where defendant was a frequenter of an establishment where intoxicating liquor was being illegally sold and by doing so was guilty of a misdemeanor being committed in presence of officers, officers were within their proper duty in arresting defendant without a warrant, and as incident of arrest search of defendant was lawful, and narcotics then and there seized were properly admitted in evidence against him in prosecution for narcotics violations. D.C. Code 1961, §§ 22-3302, 22-3304, 25-109(a). Smith v. United States, 353 F.2d 877, 1965 U.S. App. LEXIS 4025 (C.A.D.C. 1965).

Warrants and affidavits.

Elapse of nine days between time police officer purchased liquor on premises and time officer made application for night search warrant based on policeman's affidavit describing sale of alcoholic beverages on premises without a license was not unreasonable under circum-

stances including showing that officer described the premises as having a bar and a bartender, tables enough for at least 20 persons and food and beverage service. D.C. Code 1961, §§ 25-109, 25-129(h). Underdown v. District of Columbia, 217 A.2d 659, 1966 D.C. App. LEXIS 152 (App. 1966).

Affidavits, which were submitted as basis for obtaining arrest warrants, and which revealed that defendants had been seen unloading bottles from car into a house, discussing bootleg business with others, selling whiskey on street, and coming from the house with bottles in their hands and pockets, were sufficient to establish probable cause for arrest. D.C. Code 1951, § 25-109. Simato v. District of Columbia, 108 A.2d 376, 1954 D.C. App. LEXIS 187 (Cr.App. 1954).

The keeping for sale or the selling of alcoholic beverages, without first having obtained a license to do so, was a "breach of the peace" within meaning of statute providing that no person or persons, on the Lord's day, shall serve or execute, or cause to be served, any writ, process, warrant, order, judgment or decree except in cases of treason, felony, or "breach of the peace". D.C. Code 1940, §§ 13-102, 25-109. Edwards v. District of Columbia, 68 A.2d 286, 1949 D.C. App. LEXIS 235 (Cr.App. 1949).

Witnesses.

On hearing on motion to quash information charging keeping for sale and selling alcoholic beverages without license, fact that officers who testified that they bought drinks at club were unable to recall from unprompted memory, and that parts of testimony gave conclusions of law, would not justify calling officers legally incompetent. D.C. Code 1940, § 25-109. Stagecrafters Club v. District of Columbia, 89 A.2d 876, 1952 D.C. App. LEXIS 176 (Cr.App. 1952).

§ 25-103. Exceptions to license requirement.

(a) A physician, dentist, veterinarian, or person in charge of an institution regularly conducted as a hospital or sanatorium for the care of persons in ill health, or as a home devoted exclusively to the care of aged people, may administer alcoholic beverages to a patient in their care receiving treatment.

(b) This title shall not apply to alcohol sold for use in the manufacture and sale of any of the following if they are unfit for beverage purposes:

(1) Denatured alcohol produced and used pursuant to Acts of Congress and regulations promulgated thereunder;

(2) Patent, proprietary, medicinal, pharmaceutical, antiseptic, and toilet preparations;

(3) Flavoring extracts, syrups, and food products; or

(4) Scientific, chemical, mechanical, and industrial products.

(Jan. 24, 1934, 48 Stat. 323, ch. 4, §§ 8, 9; June 29, 1953, 67 Stat. 102, ch. 159,

§ 404(b); Sept. 29, 1982, D.C. Law 4-157, § 5, 29 DCR 3617; Feb. 24, 1987, D.C. Law 6-192, § 26(b), 33 DCR 7836; Apr. 9, 1997, D.C. Law 11-255, § 21(a), 44 DCR 1271; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-103. 1973 Ed., §§ 25-108, 25-109.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-157. — For legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 6-192. — For legislative history of D.C. Law 6-192, see Historical and Statutory Notes following § 25-211.

Legislative history of Law 11-255. — Law

11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

CASE NOTES

ANALYSIS

Admissibility of evidence.
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Admissibility of evidence.

Alcoholic Beverage Control Board, which granted Class "C" liquor license to nonprofit private club, did not err in accepting recorder of deeds' certificate of incorporation under District of Columbia Nonprofit Corporation Act as evidence that club was a bona fide nonprofit organization. D.C. Code § 25-103(g). *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 410 A.2d 195, 1979 D.C. App. LEXIS 534 (1979).

Club.

Journalists' organization which did not intend to cook and prepare food on its premises for its weekly luncheons was not "club" for purposes of entitlement to liquor license, and thus, District of Columbia Alcoholic Beverage Control Board did not err in denying organization's application for liquor license, notwithstanding its stated intention to have catered food provided at most of its functions. D.C. Code 1981, §§ 25-103(7), 25-111(a)(7). *Washington Press Club v. District of Columbia Alcoholic Beverage Control Bd.*, 476 A.2d 1107, 1984 D.C. App. LEXIS 400 (1984).

Regardless of nonprofit private club's founders' motive in converting public restaurant into such club or the financial security gained from formation of the club by profit corporation, which leased premises to club and which was controlled and directed by three of club's pri-

vate directors, the club qualified as a bona fide club so as to be within exception to rule prohibiting restaurant from obtaining Class "C" liquor license if it was within 400 feet of school or church where the club's directors received no compensation other than salaries fixed by club's members and members could decide whether to continue to pay rent to corporation. D.C. Code § 25-103(g). *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 410 A.2d 195, 1979 D.C. App. LEXIS 534 (1979).

Findings of fact.

In proceeding on petition for review of Alcoholic Beverage Control Board's decision to grant Class "C" liquor license to nonprofit private club, petitioner was not entitled to relief on basis of allegation that Board failed to make specific findings of fact on each element of the statutory definition of "club;" it was sufficient that Board properly addressed the questions of fact arising at the hearing and that Board's conclusions were grounded in the evidence. D.C. Code §§ 1-1509(c), 25-103(g). *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 410 A.2d 195, 1979 D.C. App. LEXIS 534 (1979).

Hotel.

Requirement of District of Columbia licensing regulations that a building must have at least 30 bedrooms in order to be licensed as a hotel was not arbitrary. D.C. Code 1940, §§ 25-103(j), 47-2328. *Courembis v. District of Columbia*, 193 F.2d 18, 1951 U.S. App. LEXIS 2852 (C.A.D.C. 1951).

Judicial notice.

From testimony that officers, from their experience in tasting and smelling liquor, concluded that liquid purchased was liquor, and that they tasted liquid and that it contained whiskey, courts may take judicial notice of

alcoholic content of whiskey. D.C. Code 1940, § 25-103(e). *Stagecrafters Club v. District of Columbia*, 89 A.2d 876, 1952 D.C. App. LEXIS 176 (Cr.App. 1952).

Presumptions and burden of proof.

In proceeding on petition for review of Alcoholic Beverage Control Board's decision to grant Class "C" liquor license to private club, petitioner was not entitled to relief on theory that burden of proof with regard to club's non-profit status had been shifted improperly, in light of fact that club had supplied a prima facie case of statutory compliance and had met its burden of proceeding in the case. D.C. Code § 25-103(g). *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 410 A.2d 195, 1979 D.C. App. LEXIS 534 (1979).

Restaurant.

Alcoholic Beverage Control Board may not find that a place is a "restaurant," and, thus, may not issue class C license to an establishment claiming to be a restaurant, until Board is satisfied of two things: first, that place is intended to be used primarily as place for cooking and serving meals, and second, that chief source of revenue is from sale of meals, not

beverages. D.C. Code 1981, §§ 25-103(14), 25-111(a)(7). *Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

Sale.

Under District of Columbia statute imposing a tax on all beer sold and prescribing monthly reports of beer "sold by him during the preceding calendar month", regulations of the Commissioners taxing beer in warehouse and before it is sold were not authorized. D.C. Code 1951, §§ 25-103(o), 25-109, 25-124, 25-138 and (a) (1), (b). *American Sales Co. v. District of Columbia*, 292 F.2d 751, 1961 U.S. App. LEXIS 4406 (C.A.D.C. 1961).

Sufficiency of evidence.

In prosecution for keeping for sale and selling alcoholic beverages without license, testimony of officers that from their experience in tasting and smelling liquor, it was their conclusion that liquid purchased at club was liquor, and that they tasted liquid and it contained whiskey, was sufficient proof of corpus delicti, notwithstanding failure to prove alcoholic content by chemical analysis. D.C. Code 1940, §§ 25-103(e), 25-109. *Stagecrafters Club v. District of Columbia*, 89 A.2d 876, 1952 D.C. App. LEXIS 176 (Cr.App. 1952).

§ 25-104. Board authority to grant licenses.

(a) The Board may issue licenses to persons who meet the requirements set forth in this title.

(b) All licenses issued under this title, except for a temporary license issued under § 25-115, shall be valid for a term of 3 years and may be renewed upon completion of the procedures set forth in this title and payment of the required fees.

(c) A license to sell alcoholic beverages in the District can be granted only by the Board upon completion of the application and review process as contained in this title.

(d) Except as set forth in subchapter II of this chapter, each license or permit shall particularly describe the place where the rights of the license are to be exercised.

(e) The Board, in issuing licenses, may require that certain conditions be met if it determines that the inclusion of the conditions will be in the best interest of the locality, section, or portion of the District where the licensed establishment is to be located. The Board, in setting the conditions, shall state, in writing, the rationale for the determination.

(f) Unincorporated associations, other than limited liability companies, shall not be issued a license other than a temporary license.

(Jan. 24, 1934, 48 Stat. 324, ch. 4, §§ 10, 13; Aug. 24, 1935, 49 Stat. 900, ch. 756, § 8; June 29, 1953, 67 Stat. 103, ch. 159, § 404(c); Dec. 8, 1970, 84 Stat. 1394, Pub. L. 91-535, § 5; Oct. 26, 1977, D.C. Law 2-27, § 2, 24 DCR 3720;

Mar. 5, 1981, D.C. Law 3-157, § 2(c), 27 DCR 5117; July 26, 1986, D.C. Law 6-130, § 2, 33 DCR 3405; Mar. 7, 1987, D.C. Law 6-217, § 8, 34 DCR 907; May 24, 1994, D.C. Law 10-122, § 2(d), 41 DCR 1658; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 1, 2002, D.C. Law 14-190, § 1702(b), 49 DCR 6968; Sept. 30, 2004, D.C. Law 15-187, § 101(a), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-104. 1973 Ed., §§ 25-110, 25-114.

Effect of amendments. — D.C. Law 14-190 rewrote subsec. (f) which had read as follows: “(f) Unincorporated associations shall be not be issued a license.

D.C. Law 15-187, in subsec. (b), substituted “a term of 3 years” for “a term of 2 years”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 1702(b) of Fiscal Year 2003 Budget Support Emergency Act of 2002 (D.C. Act 14-453, July 23, 2002, 49 DCR 8026).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 2-27. — Law 2-27, the “Variable Licensing Periods Act of 1977,” was introduced in Council and assigned Bill No. 2-126, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on June 28, 1977 and July 12, 1977, respectively. Signed by the Mayor on August 1, 1977, it was assigned Act No. 2-61 and transmitted to both Houses of Congress for its review.

Legislative history of Law 3-157. — For legislative history of D.C. Law 3-157, see Historical and Statutory Notes following § 25-211.

Legislative history of Law 6-130. — Law 6-130, the “Wholesale Liquor Industry Storage Act of 1986,” was introduced in Council and assigned Bill No. 6-329, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first, amended first and second readings on April 15, 1986, April 29, 1986 and May 13, 1986, respectively. Signed by the Mayor on May 29, 1986, it was assigned Act No. 6-168 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-217. — For legislative history of D.C. Law 6-217, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 10-122. — For legislative history of D.C. Law 10-122, see Historical and Statutory Notes following § 25-785.

Legislative history of Law 14-190. — For Law 14-190, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Subchapter II. Classification of Licenses.

§ 25-110. Manufacturer’s licenses.

(a) The following licenses shall be issued to manufacturers of alcoholic beverages:

(1)(A) A manufacturer’s license, class A, shall authorize the licensee to:

(i) Operate a rectifying plant, at the place therein described, for the manufacture of the products of rectification by purifying or combining alcohol, spirits, wine, or beer; a distillery for the manufacture of alcohol or spirits by distillation or redistillation; or a winery for the manufacture of wine; and

(ii) Sell the products manufactured under the license from the licensed establishment to another licensee under this title for resale or to a dealer licensed under the law of any state or territory of the United States for resale.

(B) A manufacturer operating a facility where more than 50% of alcohol produced is sold for nonbeverage purposes qualifies for a reduced license rate.

(2)(A) A manufacturer’s license, class B, shall authorize the licensee to operate a brewery for the manufacture of beer at the establishment described in the license.

(B) The license shall authorize the licensee to sell the beer manufac-

tured under the license to (i) another licensee under this title for resale; (ii) to a dealer licensed under the laws of any state or territory of the United States for resale; and (iii) to a consumer. The licensee may sell beer to the consumer only in barrels, kegs, and sealed bottles, which shall not be opened after sale, or the contents consumed, on the premises where sold.

(b) A separate license shall be required for each establishment under subsection (a)(1)(A)(i) of this section.

(Jan. 24, 1934, 48 Stat. 324, ch. 4, § 11; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 1; June 18, 1934, 48 Stat. 997, ch. 588; July 2, 1935, 49 Stat. 444, ch. 359; Aug. 27, 1935, 49 Stat. 898, 899, ch. 756, §§ 3-7; June 15, 1938, 52 Stat. 691, ch. 396, §§ 1, 2; May 27, 1949, 63 Stat. 133, ch. 146, title V, § 501; June 29, 1953, 67 Stat. 103, ch. 159, § 404(d); May 31, 1962, 76 Stat. 89, Pub. L. 87-470, § 1; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 2; Apr. 6, 1977, D.C. Law 1-102, § 2(a), (b), 23 DCR 8732; Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Mar. 5, 1981, D.C. Law 3-157, § 2(b), 27 DCR 5117; Sept. 29, 1982, D.C. Law 4-157, §§ 6, 15, 29 DCR 3617; Mar. 10, 1983, D.C. Law 4-204, § 2, 30 DCR 185; Aug. 2, 1983, D.C. Law, 5-16, § 3, 30 DCR 3193; Mar. 8, 1984, D.C. Law 5-51, § 2(a), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 5, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(b), 38 DCR 4974; May 24, 1994, D.C. Law 10-122, § 2(e), 41 DCR 1658; Mar. 26, 1999, D.C. Law 12-202, § 2(b), 45 DCR 8412; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(1), 46 DCR 3142; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-110. 1973 Ed., § 25-111.

Temporary Amendment of Section. — Section 2(b) of D.C. Law 12-48, in (a), substituted “23” for “22” in the introductory language; and added (7)(G-i).

Section 5(b) of D.C. Law 12-48 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary amendment of section, see § 2(b)(2) of the Alcoholic Beverage Control DC Arena Emergency Amendment Act of 1997 (D.C. Act 12-121, August 1, 1997, 44 DCR 4645), § 2(b) of the Alcoholic Beverage Control DC Arena Legislative Review Emergency Amendment Act of 1997 (D.C. Act 12-174, October 30, 1997, DCR 6914), § 2(b) of the Alcoholic Beverage Control DC Arena Congressional Recess Emergency Amendment Act of 1998 (D.C. Act 12-290, February 27, 1998, 45 DCR 1749), § 2(b) of the Alcoholic Beverage Control DC Arena Emergency Amendment Act of 1998 (D.C. Act 12-478, October 28, 1998, 45 DCR 8010), and § 2(b) of the Alcoholic Beverage Control DC Arena Second Emergency Amendment Act of 1998 (D.C. Act 12-551, December 24, 1998, 45 DCR 517).

For temporary amendment of § 5 of the Alcoholic Beverage Control DC Arena Second Emergency Amendment Act of 1998 (D.C. Act 12-551, December 24, 1998, 45 DCR 517), see § 3 of the Omnibus Regulatory Reform and

Alcoholic Beverage Control DC Arena Clarifying Emergency Amendment Act of 1999 (D.C. Act 13-1, January 29, 1999, 46 DCR 2284).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 1-102. — Law 1-102, the “Standing Up Service Act,” was introduced in Council and assigned Bill No. 1-329, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on September 15, 1976 and October 12, 1976, respectively. Signed by the Mayor on November 8, 1976, it was assigned Act No. 1-171 and transmitted to both Houses of Congress for its review.

Legislative history of Law 2-73. — For legislative history of D.C. Law 2-73, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 3-157. — For legislative history of D.C. Law 3-157, see Historical and Statutory Notes following § 25-211.

Legislative history of Law 4-157. — For legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 4-204. — For legislative history of D.C. Law 4-204, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 5-16. — For legislative history of D.C. Law 5-16, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 5-51. — For legislative history of D.C. Law 5-51, see Historical and Statutory Notes following § 25-206.

Legislative history of Law 6-217. — For legislative history of D.C. Law 6-217, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 9-40. — For legislative history of D.C. Law 9-40, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 10-122. — For legislative history of D.C. Law 10-122, see Historical and Statutory Notes following § 25-785.

Legislative history of Law 12-48. — For legislative history of D.C. Law 12-48 and D.C.

Law 12-202, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 12-261. — Law 12-261, the “Second Omnibus Regulatory Reform Amendment Act of 1998,” was introduced in Council and assigned Bill No. 12-845, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 1, 1998, and December 15, 1998, respectively. Signed by the Mayor on December 31, 1998, it was assigned Act No. 12-615 and transmitted to both Houses of Congress for its review. D.C. Law 12-261 became effective on April 20, 1999.

§ 25-111. Wholesaler’s licenses.

(a) A wholesaler’s license shall authorize the licensee to sell beverages from the establishment described to (1) another licensee under this title for resale; (2) a dealer licensed under the law of any state or territory of the United States for resale; and (3) in the case of beer or wine, to a consumer. The licensee shall sell beer to the consumer only in barrels, kegs, sealed bottles, and other closed containers, which shall not be opened after sale, or the contents consumed, on the premises where sold.

(b) No licensee, except a wholesale druggist or a wholesale grocer, shall be engaged in a business on the premises for which the license is issued other than the sale of alcoholic and nonalcoholic beverages.

(c) There shall be 2 classes of wholesalers licenses:

(1) A wholesaler’s license, class A, shall authorize the licensee to sell spirits, wine, and beer.

(2) A wholesaler’s license, class B, shall authorize the licensee to sell beer and wine.

(Jan. 24, 1934, 48 Stat. 324, ch. 4, § 11; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 1; June 18, 1934, 48 Stat. 997, ch. 588; July 2, 1935, 49 Stat. 444, ch. 359; Aug. 27, 1935, 49 Stat. 898, 899, ch. 756, §§ 3-7; June 15, 1938, 52 Stat. 691, ch. 396, §§ 1, 2; May 27, 1949, 63 Stat. 133, ch. 146, title V, § 501; June 29, 1953, 67 Stat. 103, ch. 159, § 404(d); May 31, 1962, 76 Stat. 89, Pub. L. 87-470, § 1; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 2; Apr. 6, 1977, D.C. Law 1-102, § 2(a), (b), 23 DCR 8732; Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Mar. 5, 1981, D.C. Law 3-157, § 2(b), 27 DCR 5117; Sept. 29, 1982, D.C. Law 4-157, §§ 6, 15, 29 DCR 3617; Mar. 10, 1983, D.C. Law 4-204, § 2, 30 DCR 185; Aug. 2, 1983, D.C. Law, 5-16, § 3, 30 DCR 3193; Mar. 8, 1984, D.C. Law 5-51, § 2(a), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 5, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(b), 38 DCR 4974; May 24, 1994, D.C. Law 10-122, § 2(e), 41 DCR 1658; Mar. 26, 1999, D.C. Law 12-202, § 2(b), 45 DCR 8412; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(1), 46 DCR 3142; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-111.
1973 Ed., § 25-111.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-112. Off-premises retailer's licenses.

(a) An off-premises retailer's license shall authorize the licensee to sell alcoholic beverages from the place described and to deliver the same in the barrel, keg, sealed bottle, or other closed container in which the same was received by the licensee.

(b) The barrel, keg, sealed bottle, or other closed container shall not be opened, or the contents consumed, at the licensed establishment.

(c) The license shall not authorize the licensee to sell to other licensees for resale; provided, that the licensee under an off-premises retailer's license, class A, may sell to:

(1) Caterers licensed under § 25-113(i); and

(2) [Expired]

(3) If the licensee that is a member of a pool buying group, to other members of the same pool buying group any alcoholic beverages if:

(A) A pool member other than the buying agent transfers to another pool member any portion of the alcoholic beverages ordered by the transferee retailer as part of the single transaction pool purchase;

(B) A transfer pursuant to this section is made within 7 days of the pool delivery without any cost or charge whatsoever being made against the transferee retailer;

(C) The acquisition of alcoholic beverage products is recorded in an invoice maintained by both participating retailers for 3 years and includes:

(i) Business name, address, and license number of each licensee;

(ii) Names, sizes, and quantities of the products transferred;

(iii) Date that the delivery of products was received;

(iv) Date that the physical transfer of products was made;

(v) Unique identifier that links the record with a specific pool order;

and

(vi) The resale certificate number of the licensee acquiring the products for resale.

(d) There shall be 2 classes of off-premises retailer's licenses:

(1) A retailer's license, class A, shall authorize the licensee to sell spirits, beer, and wine.

(2) A retailer's license, class B, shall authorize the licensee to sell beer and wine.

(e) The licensee under an off-premises retailer's license, class B, who qualifies for the license as a result of the application of § 25-303(c), § 25-331(d), § 25-332(c), or § 25-333(c), shall:

(1) File with the Board, within 60 days after the end of each year, a statement of expenditures and receipts by the licensed establishment containing the following:

(A) The total amount of receipts for the sale of alcoholic beverages, indicating the amount received for the sale of alcoholic beverages, the amount received for the sale of food, and the percentage of the total amount of receipts represented by each amount;

(B) A statement indicating the method used to compute the amounts and percentages; and

(C) An affidavit, executed by the individual licensee, partner of an applicant partnership, or the appropriate officer of an applicant corporation or limited liability company, attesting to the truth of the annual statement.

(2) The annual accounting period, for the purposes of the annual report, shall correspond to each of the 3 years for which a license is issued.

(3) The making of a false statement on an annual statement shall constitute grounds on which the Board may deny the renewal of a license, or subsequently revoke the license, if the renewal of the license is based in whole or in part on the contents of the false statement.

(Jan. 24, 1934, 48 Stat. 324, ch. 4, § 11; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 1; June 18, 1934, 48 Stat. 997, ch. 588; July 2, 1935, 49 Stat. 444, ch. 359; Aug. 27, 1935, 49 Stat. 898, 899, ch. 756, §§ 3-7; June 15, 1938, 52 Stat. 691, ch. 396, §§ 1, 2; May 27, 1949, 63 Stat. 133, ch. 146, title V, § 501; June 29, 1953, 67 Stat. 103, ch. 159, § 404(d); May 31, 1962, 76 Stat. 89, Pub. L. 87-470, § 1; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 2; Apr. 6, 1977, D.C. Law 1-102, § 2(a), (b), 23 DCR 8732; Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Mar. 5, 1981, D.C. Law 3-157, § 2(b), 27 DCR 5117; Sept. 29, 1982, D.C. Law 4-157, §§ 6, 15, 29 DCR 3617; Mar. 10, 1983, D.C. Law 4-204, § 2, 30 DCR 185; Aug. 2, 1983, D.C. Law, 5-16, § 3, 30 DCR 3193; Mar. 8, 1984, D.C. Law 5-51, § 2(a), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 5, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(b), 38 DCR 4974; May 24, 1994, D.C. Law 10-122, § 2(e), 41 DCR 1658; Mar. 26, 1999, D.C. Law 12-202, § 2(b), 45 DCR 8412; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(1), 46 DCR 3142; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, §§ 101(b), 401(d), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-112. 1973 Ed., § 25-111.

Effect of amendments. — D.C. Law 15-187, in subsec. (c), added par. (3); and in par. (2) of subsec. (e), substituted “each of the 3 years” for “each of the 2 years”.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Editor’s notes. — Paragraph (2) of subsection (c) of this section expired 18 months after May 3, 2001.

Sections 402 and 403 of D.C. Law 15-187 provided:

“Sec. 402. Rules and regulations.

“The Mayor shall promulgate proposed rules

and regulations to administer this title within 180 days of its effective date. The proposed rules and regulations, as well as any subsequent rules and regulations amending this title, shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the rules and regulations, in whole or in part, by resolution with the 45-day review period, the proposed rules and regulations shall be deemed approved.

“Sec. 403. Applicability.

“Section 401 shall apply upon the effective date of the regulations promulgated under section 402.”

CASE NOTES

In general.

Alcoholic Beverage Control Board’s denial of application for Class B retailer’s license was supported by substantial evidence; testimony of three witnesses, including Board’s own investigator, supported findings that elementary school was less than 46 feet from applicants’

store, that school playground was littered with broken glass, beer bottles, beer cans, and soda bottles, and that in immediate area, seven businesses already held retailer’s licenses. D.C. Code 1981, § 25-111(a)(6). *Park v. District of Columbia Alcoholic Beverage Control Bd.*, 555 A.2d 1029, 1989 D.C. App. LEXIS 49 (1989).

§ 25-113. On-premises retailer's licenses.

(a)(1) On-premises retailer's licenses shall be classified by the type of establishment licensed, as follows: restaurant, tavern, nightclub, hotel, club, multipurpose facility, and common carrier.

(2) For each type of establishment listed in paragraph (1) of this section, there shall be 2 classes of on-premises retailer's license:

(A) Except as otherwise provided, an on-premises retailer's license, class C, shall authorize the licensee to sell spirits, wine, and beer at the licensed establishment for consumption only at the licensed establishment.

(B) Except as otherwise provided, an on-premises retailer's license, class D, shall authorize the licensee to sell wine and beer at the licensed establishment for consumption only at the licensed establishment.

(3) The licensee of any kind of on-premises retailer's licenses, class C or D, shall not sell or serve alcoholic beverages in any closed container; provided that:

(A) A hotel may sell and serve alcoholic beverages in closed containers in the private rooms of registered guests; and

(B) A club may sell and serve alcoholic beverages in closed containers in any room or area available only to members of the club or their guests.

(4)(A) Except as provided in subparagraph (B) of this paragraph, nothing in the license classifications in this section shall be construed as prohibiting or restricting a restaurant from offering entertainment or facilities for dancing, preventing or restricting a tavern from offering entertainment, or preventing or restricting a nightclub from offering food. A licensee who offers food, entertainment, or facilities for dancing may advertise the food, entertainment, or facilities for dancing that are offered, regardless of the kind of license held.

(B) No licensed establishment other than a nightclub or a legitimate theater may provide entertainment by nude performers.

(b)(1) A restaurant license (R) shall be issued only for a restaurant. It shall be a secondary tier violation for a restaurant to not keep its kitchen facilities open until 2 hours before closing.

(2)(A) The licensee shall file with the Board quarterly statements, on the dates and in the manner prescribed by the Board, reporting for the preceding quarter: the gross receipts for the establishment; its gross receipts for sales of alcoholic beverages; its gross receipts for the sale of food; its total expenses for the purchase of food and alcoholic beverages; its expenses for the purchase of food; and its expenses for the purchase of alcoholic beverages.

(B) The Board shall make a licensee's quarterly statements available for the purpose of allowing a protestant of a license to determine the gross annual receipts of a licensee.

(3)(A) There shall be 2 classes of restaurant licenses:

(i) Class C/R (spirits, wine, and beer); and

(ii) Class D/R (wine and beer).

(B)(i) A class C/R license may be issued to:

(I) An establishment which qualifies as a restaurant under § 25-101(43)(A) and has gross annual food sales of at least \$2000 per occupant (as determined by the establishment's Board-approved certificate of occupancy); or

(II) An establishment which qualifies as a restaurant under § 25-101(43)(B).

(ii) A class D/R license may be issued to:

(I) An establishment which qualifies as a restaurant under § 25-101(43)(A) and has gross annual food sales of at least \$1500 per occupant (as determined by the establishment's Board-approved certificate of occupancy); or

(II) An establishment which qualifies as a restaurant under § 25-101(43)(B).

(iii) The Board shall, by rule, adjust for inflation the gross annual food sales per occupant requirements established under subparagraphs (B)(i)(I) and (B)(ii)(I) of this paragraph once every 5 years. The first adjustment shall be effective January 1, 2010. In determining the appropriate inflation index to be applied, the Board may consider the inflation indices customarily employed by the federal and District governments for similar purposes.

(4) The Board, in its sound discretion, may require that a restaurant (R) licensee file a security plan with the Board. A restaurant (R) licensee so required shall comply with the terms of its security plan.

(5)(A) Notwithstanding any other provision of this subchapter, a restaurant license (R) under this section shall authorize the licensee to permit a patron to remove one partially consumed bottle of wine for consumption off premises.

(B) A partially consumed bottle of wine that is to be removed from the premises must be securely resealed by the licensee or its employee before removal from the premises.

(C) The partially consumed bottle shall be placed in a bag or other container that is secured in such a manner that it is visibly apparent if the container has been subsequently opened or tampered with, and a dated receipt for the bottle of wine shall be provided by the licensee and attached to the container.

(c)(1) A tavern license (T) shall be issued only for a tavern.

(2) The size of the dance floor in a tavern that does not possess an entertainment endorsement shall not exceed 140 square feet; provided, that the licensee whose establishment on September 30, 1986 contained a regularly used dance floor in excess of 140 square feet and who is occupying the same establishment shall not be disqualified under this limitation.

(3) There shall be 2 classes of tavern licenses:

(A) Class C/T (spirits, wine, and beer); and

(B) Class D/T (beer and wine).

(4) The Board, in its sound discretion, may require that a tavern (T) licensee file a security plan with the Board. A tavern (T) licensee so required shall comply with the terms of its security plan.

(d)(1) A nightclub license (N) shall be issued only to a nightclub with a security plan. The holder of a nightclub license shall comply with the terms of its security plan.

(2) There shall be two classes of nightclub licenses:

(A) Class C/N (spirits, wine, and beer); and

(B) Class D/N (beer and wine).

(e)(1) A hotel license (H) shall be issued only for a hotel license.

(2) The license shall authorize the sale and service of alcoholic beverages for consumption in the dining rooms, lounges, banquet halls, and other similar facilities on the licensed premises, and in the private rooms of registered guests.

(3) The license shall not authorize the sale and service of alcoholic beverages for consumption in a nightclub on the premises of the hotel. The licensee may also be issued a nightclub license on the premises of the hotel.

(4)(A) The licensee shall file with the Board quarterly statements, on the dates and in the manner prescribed by the Board, reporting for the preceding quarter: the gross receipts for the establishment; its gross receipts for sales of alcoholic beverages; its gross receipts for the sale of food; its total expenses for the purchase of food and alcoholic beverages; its expenses for the purchase of food; and its expenses for the purchase of alcoholic beverages.

(B) The Board shall make a licensee's quarterly statements available for the purpose of allowing a protestant to determine the gross annual receipts of a licensee.

(5)(A) There shall be 2 classes of hotel licenses:

(i) Class C/H (spirits, beer, and wine); and

(ii) Class D/H (beer and wine).

(B)(i) A class C/H license may be issued to:

(I) An establishment that has annual gross food sales in a hotel dining room of at least \$2000 per occupant (as determined by the establishment's Board-approved certificate of occupancy); or

(II) An establishment that has sales of food in a hotel dining room which accounts for at least 45% of gross annual receipts from the operation of the dining room; provided, that in the case of a hotel that has 200 or fewer rooms and was built before January 1, 1940, sales of food shall account for at least 25% of gross annual receipts from the operation of the dining room.

(ii) A class D/H license may be issued to:

(I) An establishment that has annual gross food sales in a hotel dining room of at least \$1500 per occupant (as determined by the establishment's Board-approved certificate of occupancy); or

(II) An establishment that has sales of food in a hotel dining room which accounts for at least 45% of gross annual receipts from the operation of the dining room; provided, that in the case of a hotel that has 200 or fewer rooms and was built before January 1, 1940, sales of food shall account for at least 25% of gross annual receipts from the operation of the dining room.

(f)(1) A club license shall be issued only for a club.

(2) No license shall be issued to a club which has not been incorporated for at least one year immediately before the filing of an application for the license.

(3) The licensee may permit consumption of alcoholic beverages on the parts of the licensed premises as may be approved by the Board.

(4) There shall be 2 classes of club licenses:

(A) Class C (spirits, beer, and wine); and

(B) Class D (beer and wine).

(g)(1) A multipurpose facility license shall be issued only to legitimate theaters, universities, museums, conference centers, art galleries, or facilities

(such as the Lincoln Theatre or the D.C. Arena) for the performance of sports, cultural, or tourism-related activities.

(2) The licensee may permit consumption of alcoholic beverages on the parts of the licensed premises as may be approved by the Board.

(3) There shall be 2 classes of multipurpose facility licenses:

(A) Class C (spirits, beer, and wine); and

(B) Class D (beer and wine).

(4) The Board, in its sound discretion, may require that a multipurpose facility licensee file a security plan with the Board. A multipurpose facility licensee so required shall comply with the terms of its security plan.

(h)(1) A common carrier license shall be issued only for a passenger-carrying marine vessel serving food or a railroad club or dining car.

(2) Any person operating a railroad in interstate commerce of 100 miles or more may be issued a single license covering all of the railroad's dining and club cars. The license shall identify the railroad dining cars and club cars covered by the license and shall be kept on display at the licensee's principal place of business in the District.

(3) Any person operating a passenger-carrying marine vessel line in the District may be issued a single license covering all of its passenger-carrying marine vessels serving food and its dockside waiting areas for its passengers. The license shall identify the passenger-carrying marine vessels and dockside waiting areas covered by the license and shall be kept on display at the licensee's principal place of business in the District. The license issued shall not cover any permanently berthed vessel.

(4) There shall be 2 classes of common carrier licenses:

(A) Class C (spirits, beer, and wine); and

(B) Class D (beer and wine).

(i)(1) A caterer's license shall be issued only to a caterer.

(2) Notwithstanding any provision of this title, a caterer's license under this subsection shall authorize the licensee to sell, deliver and serve alcoholic beverages for consumption on the premises of a catered event at which the licensee is also serving prepared food.

(3) A caterer's license shall be valid for 3 years.

(4) A caterer licensed under this subsection shall file records with, and maintain records for inspection by, the Board in such manner as the Board shall determine by regulation promulgated under § 25-211(b); provided, that commercial or financial information considered by the Board to be proprietary information or trade secrets, the disclosure of which would result in harm to the competitive position of the licensee, shall not be made available to the public.

(5) Wholesalers and off-premises retailers, class A, may sell alcoholic beverages to caterers licensed under this subsection for catered events of 100 persons or less. Only off-premises retailers, class A, may sell alcoholic beverages to caterers licensed under this subsection for catered events in excess of 100 persons.

(j)(1) Cover charges or the sale of items other than food or beverage shall not be included in determining an establishment's gross annual food sales or

whether the sale of food accounts for at least 45% of the establishment's gross annual receipts; provided, that minimum charges that are readily identifiable as food or beverage shall be included in calculating whether the establishment is meeting the food sales requirements set forth in § 25-101(43) and this section.

(2) Off-site food sales by a licensee under a license, class C/R, D/R, C/H, or D/H, shall also not be included for purposes of calculating whether the establishment is meeting the food sales requirement set forth in either § 25-101(43) or this section.

(3)(A) Each licensee under a license, class C/R, D/R, C/H, or D/H, shall keep and maintain on the premises for a period of 3 years adequate books and records showing all sales, purchase invoices, and dispositions, including the following:

(i) Sales information that includes the date, the price of food sold, the price of alcoholic beverages sold, and the amount of total sales;

(ii) Purchase information that includes the date and quantity of the purchase, the name, address, and phone number of the wholesaler and or vendor with the original invoice; and

(iii) Register receipts or guest checks, which may be kept daily or weekly that include the food sold, the alcoholic beverages sold, and the amount of total sales.

(B) Any licensee may file a written request with the Board to have his books and records, except the day to day records or register receipts, kept at an accountant's office or the licensee's office; provided, that the records are made available within 3 days of request by ABRA staff.

(C) The failure of a licensee under a license, class C/R, D/R, C/H, or D/H, to keep and maintain records as required by this section shall be subject to the following penalties:

(i) One-quarter of non-compliance shall result in a penalty not to exceed \$3,000 and ABRA monitoring;

(ii) Non-compliance after 2 quarters shall result in a penalty not to exceed \$4,500 or license suspension for a period not to exceed 5 days; or

(iii) Non-compliance after 3 or more quarters shall result in a show cause hearing for revocation or a mandatory change in license class.

(D) A violation of this section shall also be a primary tier violation under § 25-830(c).

(Jan. 24, 1934, 48 Stat. 324, ch. 4, § 11; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 1; June 18, 1934, 48 Stat. 997, ch. 588; July 2, 1935, 49 Stat. 444, ch. 359; Aug. 27, 1935, 49 Stat. 898, 899, ch. 756, §§ 3-7; June 15, 1938, 52 Stat. 691, ch. 396, §§ 1, 2; May 27, 1949, 63 Stat. 133, ch. 146, title V, § 501; June 29, 1953, 67 Stat. 103, ch. 159, § 404(d); May 31, 1962, 76 Stat. 89, Pub. L. 87-470, § 1; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 2; Apr. 6, 1977, D.C. Law 1-102, § 2(a), (b), 23 DCR 8732; Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Mar. 5, 1981, D.C. Law 3-157, § 2(b), 27 DCR 5117; Sept. 29, 1982, D.C. Law 4-157, §§ 6, 15, 29 DCR 3617; Mar. 10, 1983, D.C. Law 4-204, § 2, 30 DCR 185; Aug. 2, 1983, D.C. Law, 5-16, § 3, 30 DCR 3193; Mar. 8, 1984, D.C. Law

5-51, § 2(a), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 5, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(b), 38 DCR 4974; May 24, 1994, D.C. Law 10-122, § 2(e), 41 DCR 1658; Mar. 26, 1999, D.C. Law 12-202, § 2(b), 45 DCR 8412; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(1), 46 DCR 3142; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, §§ 101(c), 301(c), 51 DCR 6525; Apr. 13, 2005, D.C. Law 15-354, § 102(a)(2), 52 DCR 2638; Mar. 2, 2007, D.C. Law 16-191, § 47(c), 53 DCR 6794; July 18, 2008, D.C. Law 17-201, § 2(c), 55 DCR 6289; Mar. 25, 2009, D.C. Law 17-353, § 241, 56 DCR 1117; Mar. 25, 2009, D.C. Law 17-361, § 2(a), 56 DCR 1204; Mar. 3, 2010, D.C. Law 18-111, § 2082(n)(2), 57 DCR 181.)

Prior Codifications. — 1981 Ed., § 25-113.
1973 Ed., § 25-111.

Effect of amendments. — D.C. Law 15-187 rewrote par. (3) of subsec. (b); in par. (2) of subsec. (c), substituted “a tavern that does not possess an entertainment endorsement shall” for “a tavern shall”; rewrote pars. (1) and (5) of subsec. (e); rewrote par. (1) of subsec. (g); in par. (3) of subsec. (i), substituted “be valid for 3 years” for “be valid for 2 years”; and added subsec. (j).

D.C. Law 15-354, in subsec. (e)(5)(B), validated a previously made technical correction.

D.C. Law 16-191 substituted “this section” for “§ 25-113”.

D.C. Law 17-201 added subsecs. (b)(4), (5), (c)(4), and (g)(4); and rewrote subsec. (d)(1), which had read as follows: “(d)(1) A nightclub license (N) shall be issued only for a nightclub.”

D.C. Law 17-353 validated a previously made technical correction in subsec. (g)(4).

D.C. Law 17-361, in subsec. (b)(1), added the second sentence.

D.C. Law 18-111, in subsec. (g)(1), deleted “the Washington Convention Center,” following “such as”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2082(n)(2) of Fiscal Year 2010 Budget Support Second Emergency Act of 2009 (D.C. Act 18-207, October 15, 2009, 56 DCR 8234).

For temporary (90 day) amendment of section, see § 2082(n)(2) of Fiscal Year Budget Support Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-260, January 4, 2010, 57 DCR 345).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 15-354. — Law 15-354, the “Technical Amendments Act of 2004”, was introduced in Council and assigned Bill No. 15-1130 which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 7, 2004, and December 21, 2004, respectively. Signed by the Mayor on February 9, 2005, it was assigned Act No. 15-770 and transmitted to both Houses of Congress for its review. D.C. Law 15-354 became effective on April 13, 2005.

Legislative history of Law 16-191. — For Law 16-191, see notes following § 25-101.

Legislative history of Law 17-201. — For Law 17-201, see notes following § 25-101.

Legislative history of Law 17-353. — Law 17-353, the “Technical Amendments Act of 2008”, was introduced in Council and assigned Bill No. 17-994 which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 2, 2008, and December 16, 2008, respectively. Signed by the Mayor on January 15, 2009, it was assigned Act No. 17-687 and transmitted to both Houses of Congress for its review. D.C. Law 17-353 became effective on March 25, 2009.

Legislative history of Law 17-361. — Law 17-361, the “Alcoholic Beverage Enforcement Act of 2008”, was introduced in Council and assigned Bill No. 17-983 which was referred to the Committee on Public Works and Environment. The Bill was adopted on first and second readings on December 2, 2008, and December 16, 2008, respectively. Signed by the Mayor on January 16, 2009, it was assigned Act No. 17-696 and transmitted to both Houses of Congress for its review. D.C. Law 17-361 became effective on March 25, 2009.

Legislative history of Law 18-111. — For Law 18-111, see notes following § 25-101.

CASE NOTES

ANALYSIS

Club.
In general.
Restaurant.

Waiting period.

Club.

Applicant that was registered for tax purposes as a nonprofit organization satisfied re-

quirements of Club Exception Act, which provided a six-month "window" for pre-existing private clubs located within residentially-zoned districts to apply for licensure, despite any moratorium on issuance of new licenses; Act did not require assessment of whether applicant currently operated as a nonprofit organization. *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic Bev. Control Bd.*, 766 A.2d 59, 2001 D.C. App. LEXIS 18 (2001).

Applicant's cigarette license satisfied Club Exception Act's requirement that applicant seeking a retailer's club license to sell alcohol, during moratorium period, hold a valid business license, as well as Act's evident purpose to limit the class of applicants to established clubs already regulated by some form of licensure. *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic Bev. Control Bd.*, 766 A.2d 59, 2001 D.C. App. LEXIS 18 (2001).

Undisputed testimony regarding applicant's combining parts of two adjoining contiguous townhouses was sufficient evidence that applicant seeking retailer's club license had been "established" at its location for at least three-years, as was required by Club Exception Act, which provided a six-month "window" for pre-existing private clubs located within residentially-zoned districts to apply for licensure, despite any moratorium on issuance of new licenses. *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic Bev. Control Bd.*, 766 A.2d 59, 2001 D.C. App. LEXIS 18 (2001).

Journalists' organization which did not intend to cook and prepare food on its premises for its weekly luncheons was not "club" for purposes of entitlement to liquor license, and thus, District of Columbia Alcoholic Beverage Control Board did not err in denying organization's application for liquor license, notwithstanding its stated intention to have catered food provided at most of its functions. D.C. Code 1981, §§ 25-103(7), 25-111(a)(7). *Washington Press Club v. District of Columbia Alcoholic Beverage Control Bd.*, 476 A.2d 1107, 1984 D.C. App. LEXIS 400 (1984).

In general.

Erroneous findings of Alcoholic Beverage Control Board regarding the status of public hall license and allegations that patrons left establishment in intoxicated state were not prejudicial, where Board's conclusion that establishment was inappropriate place for reissuance of liquor license was supported by findings concerning noise, litter, public urination and defecation by patrons, illegal parking, inadequate parking facilities, vandalism, and neighborhood opposition. D.C. Code 1981, §§ 25-111(a)(7), 25-115(a)(6). *LCP, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 499 A.2d 897, 1985 D.C. App. LEXIS 525 (1985).

Issuance of class "F" liquor licenses by the Alcoholic Beverage Control Board did not pre-judge issues in class "D" proceeding, where Board had already received all evidence in class "D" application at time it issued its order in class "F" proceeding and applications raised completely different issues. D.C. Code 1973, §§ 25-111(j), 25-115. *Haight v. District of Columbia Alcoholic Beverage Control Bd.*, 439 A.2d 487, 1981 D.C. App. LEXIS 410 (1981).

In proceedings on application for issuance of Class C liquor license, District of Columbia Alcoholic Beverage Control Board was not required to define relevant neighborhood as being coextensive with boundaries of advisory neighborhood commission which opposed issuance of license. D.C. Code §§ 1-1509(e), 1-1510(3)(E), 25-111(g). *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

Where statement of chairman of Alcoholic Beverage Control Board indicated that Board, or some of its members, obtained and considered, and may have relied upon, information from staff investigative reports not made a matter of record in proceeding which culminated in granting of retail class C liquor license, case would be remanded to Board for further proceedings in which it would be required to enter into the record all information in reports which was relevant and material to statutory criteria for issuance or denial of license and which would be relied upon in any degree by the Board. D.C. Code §§ 1-1510, 25-111. *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 288 A.2d 666, 1972 D.C. App. LEXIS 358 (1972).

Restaurant.

Alcoholic Beverage Control Board erred in allowing one of its members to elicit testimony concerning race and residency of restaurant's patrons at hearing to determine whether to renew restaurant's liquor license, but error was not reversible, where Board did not rely on the testimony in its findings of fact and conclusions of law. D.C. Code 1981, §§ 25-111(a)(7), 25-115(a)(6). *K.G.S., Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 531 A.2d 1001, 1987 D.C. App. LEXIS 454 (1987).

In addition to factors listed in D.C. Code 1981, § 25-103(14), Alcoholic Beverage Control Board, in determining whether to renew class C liquor license for a restaurant, is free to consider any relevant evidence in determining restaurant's chief source of revenue, including such items as cash register tapes, cancelled checks, and paid invoices. D.C. Code 1981, § 25-111(a)(7). *Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

In determining whether to renew class C liquor license for a restaurant, Alcoholic Beverage Control Board is not free to disregard statutory criteria and base its finding that restaurant's chief source of revenue is derived from sale of meals on a mere promise by applicant to make its chief source of revenue the sale of meals rather than beverages; hard evidence is required, not promises or good intentions. D.C. Code 1981, §§ 25-103(14), 25-111(a)(7). *Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

Alcoholic Beverage Control Board may not find that a place is a "restaurant," and, thus, may not issue class C license to an establishment claiming to be a restaurant, until Board is satisfied of two things: first, that place is intended to be used primarily as place for cooking and serving meals, and second, that chief source of revenue is from sale of meals, not beverages. D.C. Code 1981, §§ 25-103(14), 25-111(a)(7). *Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

Waiting period.

Period of over two years prior to association's incorporation, during which association's ser-

vice of alcoholic beverages was prohibited by law, was not part of three-month waiting period after incorporation of association as club required before club can receive retailer's license to serve alcohol. D.C. Code 1981, § 25-111(a)(7)(G). *Chase v. District of Columbia Alcoholic Beverage Control Bd.*, 669 A.2d 1264, 1995 D.C. App. LEXIS 232 (1995).

Reliance of association that applied for liquor license on resolution by agency regulating liquor licenses of whether period of association's existence prior to its incorporation met qualification for receiving license, that association be incorporated for three months prior to filing for license, was not reasonable, in light of fact that resolution in association's favor required non-literal construction of unambiguous statute by agency, and so association was not entitled to exception to filing requirement on basis that it had been lulled by agency's erroneous construction of statute into not filing new, valid and timely application at time after it had been incorporated for three months, and thus become eligible for license, but before moratorium on granting new licenses became effective. D.C. Code 1981, § 25-111(a)(7)(G)(ii). *Chase v. District of Columbia Alcoholic Beverage Control Bd.*, 669 A.2d 1264, 1995 D.C. App. LEXIS 232 (1995).

§ 25-113a. License endorsements.

(a) All license endorsements shall be placed on the applicant's license.

(b) The licensee under a license, class C/R, D/R, C/H, D/H, C/T, and D/T, shall obtain an entertainment endorsement from the Board to be eligible to have entertainment, a cover charge, or offer facilities for dancing.

(c) The licensee under an on-premises license, class C/R, D/R, C/H, D/H, C/T, D/T, C/N, and D/N, shall obtain a sidewalk café endorsement or summer garden endorsement from the Board to be eligible to conduct business operations on a sidewalk café or summer garden, which may include the sale, service, and consumption of alcoholic beverages on outdoor public or private space.

(Sept. 30, 2004, D.C. Law 15-187, § 301(c), 51 DCR 6525; designated § 301(d), Apr. 13, 2005, D.C. Law 15-354, § 102(a)(1), 52 DCR 2638.)

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 15-354. — For Law 15-354, see notes following § 25-113.

§ 25-114. Arena C/X license requirements and qualifications; special provisions for on-premises retail licenses, class C, at DC Arena.

(a) A retailer's license, class Arena C/X, shall be issued only for the DC Arena and shall permit the storage and sale of spirits, wine, and beer for consumption on the premises of the DC Arena. The license shall not permit the

sale or dispensing of alcoholic beverages in unbroken packages for the purpose of permitting the packages to be carried off the premises.

(b)(1) Upon application by an applicant as set forth in Chapter 4 [of this title], the Board shall issue one or more retailer's licenses, class Arena C/X, to the lessee under the Land Disposition Lease.

(2) At the option of the lessee, the licenses may be issued to concessionaires and tenants of the lessee, as may be requested from time to time by the lessee.

(3) Licenses may be canceled by the Board at the request of the RLA if the lessee ceases to operate the DC Arena.

(4) If the lessee assigns its interest in the Land Disposition Lease, the Board shall, at the request of the RLA, transfer the licenses to the lessee's assignee, upon application under Chapter 4 and approval by the Board.

(d) One or more retailer's licenses, class Arena C/X, shall be issued either as the license for all alcoholic beverage operations at the DC Arena or individually for concession stands, portable bars, and other non-fixed locations, and suite and club suite service.

(e) One or more on-premises retailer's licenses, class C, may be issued to concessionaires or tenants of the DC Arena for suitable locations within the DC Arena, approved by the Board, where food and alcoholic beverages are served.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-115. Temporary license requirements and qualifications.

(a) A temporary license shall authorize the licensee temporarily to sell or permit the consumption of alcoholic beverages at the specific premises described for consumption on the premises where sold. The license may be issued for a banquet, picnic, bazaar, fair, or similar public gathering where food is served for consumption on the premises. No alcoholic beverages shall be sold or served to a customer in an unopened container.

(b) A temporary license shall be issued for no more than 4 consecutive days.

(c) The issuance of a temporary license shall be solely in the discretion of the Board.

(d) If the applicant has failed to control the environment of a previous event associated with a temporary license or has sustained community complaints or police action, the Board may deny the license application.

(e) There shall be 2 classes of temporary licenses:

(1) Class F (beer and wine); and

(2) Class G (spirits, beer, and wine).

(Jan. 24, 1934, 48 Stat. 324, ch. 4, § 11; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 1; June 18, 1934, 48 Stat. 997, ch. 588; July 2, 1935, 49 Stat. 444, ch. 359; Aug. 27, 1935, 49 Stat. 898, 899, ch. 756, §§ 3-7; June 15, 1938, 52 Stat. 691, ch. 396, §§ 1, 2; May 27, 1949, 63 Stat. 133, ch. 146, title V, § 501; June 29,

1953, 67 Stat. 103, ch. 159, § 404(d); May 31, 1962, 76 Stat. 89, Pub. L. 87-470, § 1; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 2; Apr. 6, 1977, D.C. Law 1-102, § 2(a), (b), 23 DCR 8732; Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Mar. 5, 1981, D.C. Law 3-157, § 2(b), 27 DCR 5117; Sept. 29, 1982, D.C. Law 4-157, §§ 6, 15, 29 DCR 3617; Mar. 10, 1983, D.C. Law 4-204, § 2, 30 DCR 185; Aug. 2, 1983, D.C. Law, 5-16, § 3, 30 DCR 3193; Mar. 8, 1984, D.C. Law 5-51, § 2(a), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 5, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(b), 38 DCR 4974; May 24, 1994, D.C. Law 10-122, § 2(e), 41 DCR 1658; Mar. 26, 1999, D.C. Law 12-202, § 2(b), 45 DCR 8412; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(1), 46 DCR 3142; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 1, 2002, D.C. Law 14-190, § 1702(c), 49 DCR 6968.)

Prior Codifications. — 1981 Ed., § 25-115. 1973 Ed., § 25-111.

Effect of amendments. — D.C. Law 14-190 rewrote subsec. (b) which had read as follows: “(b) A temporary license may be issued for no more than 2 consecutive days.”

Emergency legislation. — For temporary (90 day) amendment of section, see § 1702(c) of

Fiscal Year 2003 Budget Support Emergency Act of 2002 (D.C. Act 14-453, July 23, 2002, 49 DCR 8026).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 14-190. — For Law 14-190, see notes following § 25-101.

§ 25-116. Solicitor’s license requirements and qualifications.

A solicitor’s license shall authorize the licensee to sell any alcoholic beverage on behalf of the vendor whose name appears upon the license and whom the solicitor represents. A license shall be issued for only one vendor and a license shall be issued to the solicitor for each vendor whom the solicitor represents. A solicitor’s license shall allow the licensee to transport samples to and from licensed establishments.

(Jan. 24, 1934, 48 Stat. 324, ch. 4, § 11; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 1; June 18, 1934, 48 Stat. 997, ch. 588; July 2, 1935, 49 Stat. 444, ch. 359; Aug. 27, 1935, 49 Stat. 898, 899, ch. 756, §§ 3-7; June 15, 1938, 52 Stat. 691, ch. 396, §§ 1, 2; May 27, 1949, 63 Stat. 133, ch. 146, title V, § 501; June 29, 1953, 67 Stat. 103, ch. 159, § 404(d); May 31, 1962, 76 Stat. 89, Pub. L. 87-470, § 1; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 2; Apr. 6, 1977, D.C. Law 1-102, § 2(a), (b), 23 DCR 8732; Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Mar. 5, 1981, D.C. Law 3-157, § 2(b), 27 DCR 5117; Sept. 29, 1982, D.C. Law 4-157, §§ 6, 15, 29 DCR 3617; Mar. 10, 1983, D.C. Law 4-204, § 2, 30 DCR 185; Aug. 2, 1983, D.C. Law, 5-16, § 3, 30 DCR 3193; Mar. 8, 1984, D.C. Law 5-51, § 2(a), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 5, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(b), 38 DCR 4974; May 24, 1994, D.C. Law 10-122, § 2(e), 41 DCR 1658; Mar. 26, 1999, D.C. Law 12-202, § 2(b), 45 DCR 8412; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(1), 46 DCR 3142; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; July 18, 2008, D.C. Law 17-201, § 2(d), 55 DCR 6289.)

Prior Codifications. — 1981 Ed., § 25-116. 1973 Ed., § 25-111.

Effect of amendments. — D.C. Law 17-201 inserted “A solicitor’s license shall allow the licensee to transport samples to and from licensed establishments.”

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 17-201. — For Law 17-201, see notes following § 25-101.

§ 25-117. Brew pub permit requirements and qualifications.

(a) A brew pub permit shall authorize the licensee to brew malt beverages at one location for consumption at a licensed restaurant or tavern and for sale to licensed wholesalers for the purpose of resale to other licensees. The location used to brew malt beverages shall be on or immediately adjacent to the restaurant or tavern licensed to the brew pub owner in accordance with subsection (b) of this section.

(b) A brew pub permit shall be issued only to the licensee under an on-premises restaurant or tavern retailer’s license, class C or D, or in conjunction with the issuance of an on-premises restaurant or tavern retailer’s license, class C or D.

(c) A brew pub permit shall be void if:

(1) The restaurant or tavern ceases to be operated as a restaurant or tavern; or

(2) The licensee’s on-premises retailer license, class C or D, is revoked or cancelled.

(d) A brew pub permit shall be automatically suspended whenever and for the same period of time that the licensee’s retailer’s license, class C or D, is suspended.

(Jan. 24, 1934, 48 Stat. 324, ch. 4, § 11; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 1; June 18, 1934, 48 Stat. 997, ch. 588; July 2, 1935, 49 Stat. 444, ch. 359; Aug. 27, 1935, 49 Stat. 898, 899, ch. 756, §§ 3-7; June 15, 1938, 52 Stat. 691, ch. 396, §§ 1, 2; May 27, 1949, 63 Stat. 133, ch. 146, title V, § 501; June 29, 1953, 67 Stat. 103, ch. 159, § 404(d); May 31, 1962, 76 Stat. 89, Pub. L. 87-470, § 1; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 2; Apr. 6, 1977, D.C. Law 1-102, § 2(a), (b), 23 DCR 8732; Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Mar. 5, 1981, D.C. Law 3-157, § 2(b), 27 DCR 5117; Sept. 29, 1982, D.C. Law 4-157, §§ 6, 15, 29 DCR 3617; Mar. 10, 1983, D.C. Law 4-204, § 2, 30 DCR 185; Aug. 2, 1983, D.C. Law, 5-16, § 3, 30 DCR 3193; Mar. 8, 1984, D.C. Law 5-51, § 2(a), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 5, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(b), 38 DCR 4974; May 24, 1994, D.C. Law 10-122, § 2(e), 41 DCR 1658; Mar. 26, 1999, D.C. Law 12-202, § 2(b), 45 DCR 8412; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(1), 46 DCR 3142; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-117. 1973 Ed., § 25-111.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-118. Tasting permit requirements and qualifications.

(a) A tasting permit shall be issued only to a licensee under a manufacturer's license, class B, a retailer's license, class A and B, or an applicant which is a full service grocery store and meets the requirements of § 25-303(c)(1), (2), and (3), to utilize a portion of their licensed premises for the tasting of products as listed in subsection (c) of this section.

(b) Containers of alcoholic beverages used for sampling purposes shall be labeled as such and may not be sold.

(c) A licensee shall not provide to a customer, in one day, samples greater than the following quantities:

- (1) 3 ounces of spirits;
- (2) 6 ounces of wines; and
- (3) 12 ounces of beer.

(d) A tasting permit shall be valid for 3 years.

(e) The holder of a manufacturer's license, class B, may utilize a portion of the licensed premises for the sampling of beer between the hours of 1:00 p.m. and 9:00 p.m., Thursday through Saturday.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(d), 51 DCR 6525; July 18, 2008, D.C. Law 17-201, § 2(e), 55 DCR 6289; Oct. 20, 2011, D.C. Law 19-25, § 2, 58 DCR 6513.)

Effect of amendments. — D.C. Law 15-187, in subsec. (a), substituted "class A, or an applicant which is a full service grocery store and meets the requirements of § 25-303(c)(1), (2), and (3)" for "class A"; and added subsec. (d).

D.C. Law 17-201, in subsec. (a), substituted "class A and B" for "class A"; and, in subsec. (d), substituted "3 years" for "2 years".

D.C. Law 19-25, in subsec. (a), substituted "manufacturer's license, class B, a retailer's license, class A and B, or an applicant" for "retailer's license, class A and B, or an applicant"; and added subsec. (e).

Temporary Amendment of Section. — Section 2 of D.C. Law 19-17, in subsec. (a), substituted "manufacturer's license, class B; retailer's license, class A and B; or an applicant" for "retailer's license, class A and B, or an applicant"; and added subsec. (e) to read as follows:

"(e) The holder of a manufacturer's license, class B, may utilize a portion of the licensed premises for the sampling of alcoholic beverages between the hours of 1:00 p.m. and 9:00 p.m., Thursday through Saturday."

Section 4(b) of D.C. Law 19-17 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2 of Brewery Manufacturer's Tasting Permit Amendment Emergency Act of 2011 (D.C. Act 19-71, May 19, 2011, 58 DCR 4235).

For temporary (90 day) amendment of section, see § 2 of Brewery Manufacturer's Tasting Permit Congressional Review Emergency Act of 2011 (D.C. Act 19-148, August 9, 2011, 58 DCR 6830).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 17-201. — For Law 17-201, see notes following § 25-101.

Legislative history of Law 19-25. — Law 19-25, the "Brewery Manufacturer's Tasting Permit Amendment Act of 2011", was introduced in Council and assigned Bill No. 19-118, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on June 7, 2011, and July 12, 2011, respectively. Signed by the Mayor on July 28, 2011, it was assigned Act No. 19-102 and transmitted to both Houses of Congress for its review. D.C. Law 19-25 became effective on October 20, 2011.

§ 25-119. Importation permit requirements and qualifications.

(a) An importation permit shall authorize the licensee to import, transport, or cause to be imported or transported, alcoholic beverages into the District. An importation permit shall be issued to the licensee under a retailer's license, class A, B, C, or D, and a pool buying agent if the Board is satisfied that the alcoholic beverages bearing the same brand or trade name are not obtainable by the licensee from a licensed manufacturer or wholesaler in the District in sufficient quantity to reasonably satisfy the immediate needs of the licensee and when the licensee has paid the appropriate taxes as imposed by Chapter 9.

(b) The permit shall specifically set forth the quantity, character, and brand or trade name of the alcoholic beverage to be transported and the names and addresses of the seller and the licensee.

(c) The permit shall accompany the alcoholic beverages during transportation in the District to the licensed premises of the licensee and shall be exhibited upon the demand of any police officer or duly authorized inspector of the Board.

(d) The permit shall, immediately upon receipt of the alcoholic beverages by the retail licensee, be marked "canceled" by the licensee.

(Jan. 24, 1934, 48 Stat. 332, ch. 4, § 23; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 3; June 18, 1934, 48 Stat. 1014, 1015, ch. 600, §§ 1, 2; Aug. 27, 1935, 49 Stat. 901, 903, ch. 756, §§ 11, 17; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; May 27, 1949, 63 Stat. 135, ch. 146, title V, § 505; May 18, 1954, 68 Stat. 113, ch. 218, title VIII, § 801; Mar. 31, 1956, 70 Stat. 81, ch. 154, title III, §§ 301, 302(a); July 25, 1958, 72 Stat. 418, Pub. L. 85-558, §§ 1-5; Sept. 14, 1961, 75 Stat. 510, Pub. L. 87-238, §§ 1-5; Mar. 2, 1962, 76 Stat. 17, Pub. L. 87-408, § 401; Sept. 30, 1966, 80 Stat. 855, Pub. L. 89-610, title I, § 101(a); Oct. 31, 1969, 83 Stat. 175, Pub. L. 91-106, title V, § 501(a), (b); Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Sept. 29, 1982, D.C. Law 4-157, § 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(9), 30 DCR 5927; Mar. 14, 1985, D.C. Law 5-159, § 25(b), (c), 32 DCR 30; July 25, 1989, D.C. Law 8-17, § 7(a), 36 DCR 4160; May 4, 1990, D.C. Law 8-119, § 2, 37 DCR 1738; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 401(e), 51 DCR 6525; Mar. 2, 2007, D.C. Law 16-191, § 47(d)(1), 53 DCR 6794.)

Prior Codifications. — 1981 Ed., § 25-119. 1973 Ed., § 25-124.

Effect of amendments. — D.C. Law 15-187, in subsec. (a), substituted "An importation permit shall be issued to the licensee under a retailer's license, class A, B, C, or D, and a pool buying agent" for "An importation permit shall be issued to the licensee under a retailer's license, class A, B, C, or D,".

D.C. Law 16-191, in subsec. (a), validated a previously made technical correction.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 16-191. — For Law 16-191, see notes following § 25-101.

Editor's notes. — Sections 402 and 403 of D.C. Law 15-187 provided:

"Sec. 402. Rules and regulations.

"The Mayor shall promulgate proposed rules and regulations to administer this title within

180 days of its effective date. The proposed rules and regulations, as well as any subsequent rules and regulations amending this title, shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the rules and regulations, in whole or

in part, by resolution with the 45-day review period, the proposed rules and regulations shall be deemed approved.

“Sec. 403. Applicability.

“Section 401 shall apply upon the effective date of the regulations promulgated under section 402.”

§ 25-120. Manager's license requirements and qualifications.

(a) A manager's license shall authorize the licensee to manage a licensed business.

(b) A licensee may be employed by one or more licensed businesses without further investigation, subject to compliance by the licensed businesses.

(c) A manager's license shall be valid for 2 years or until surrendered, suspended, or revoked. The fee for both years of the manager's license shall be paid at the time of application.

(d) A manager shall complete an alcohol training and education certification program conducted by a Board-approved provider. The manager shall be recertified every 2 years from the date of the initial certification.

(e) A manager who is licensed on or before May 3, 2001, shall complete a certification program within 6 months of May 3, 2001.

(f) A manager licensed under this section after May 3, 2001, shall complete the certification program prior to receiving his or her manager's license.

(g) Subsection (e) of this section shall not apply to a manager licensed on or before May 3, 2001, who provides proof of his or her prior certification within 2 years prior to May 3, 2001.

(h) A manager required to complete an alcohol training and education certification program under this section shall submit proof of certification to the Board on a form supplied by a Board-approved training provider.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 26, 2001, D.C. Law 14-42, § 6(a), 48 DCR 7612; Oct. 1, 2002, D.C. Law 14-190, § 1702(d), 49 DCR 6968; Sept. 30, 2004, D.C. Law 15-187, § 101(e), 51 DCR 6525.)

Effect of amendments. — D.C. Law 14-42 validated the previously made technical corrections in subsecs. (e) and (g).

D.C. Law 14-190, in subsec. (c), substituted “The fee for both years of the manager's license shall be paid at the time of application” for “The license fee shall be paid as provided under Chapter 5”.

D.C. Law 15-187, in subsec. (f), substituted “prior to receiving” for “within 90 days after receiving”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 6(a) of Technical Amendments Emergency Act of 2001 (D.C. Act 14-108, August 3, 2001, 48 DCR 7622).

For temporary (90 day) amendment of section, see § 1702(d) of Fiscal Year 2003 Budget

Support Emergency Act of 2002 (D.C. Act 14-453, July 23, 2002, 49 DCR 8026).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 14-42. — Law 14-42, the “Technical Correction Amendment Act of 2001”, was introduced in Council and assigned Bill No. 14-216, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 5, 2001, and June 26, 2001, respectively. Signed by the Mayor on July 24, 2001, it was assigned Act No. 14-107 and transmitted to both Houses of Congress for its review. D.C. Law 14-42 became effective on October 26, 2001.

Legislative history of Law 14-190. — For Law 14-190, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

§ 25-121. Alcohol training and education certification providers.

The Board shall approve providers of alcohol training and education certification programs for the purposes of:

- (1) The certification of managers licensed under § 25-120; and
- (2) Providing alcohol training and education to a licensee as a result of an order of the Board.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-122. Pool buying groups.

(a) A pool buying group shall be created in the following manner:

(1) Prior to commencing operations, a pool buying group shall file with ABRA a copy of the agreement under which the pool buying group will operate. The ABRA shall review the agreement and, if the requirements of applicable law and rules are met, shall approve the agreement.

(2) Any proposed amendment to a pool buying group agreement shall be filed with, and be approved by, ABRA in the same manner as original agreements before the proposed amendments shall be effective.

(3) Pool buying agreements shall include:

- (A) The name and address the cooperative or pool buying group;
- (B) The name of the buying agent for the group;
- (C) The cooperative buying group's bylaws;
- (D) For each member, the licensee's name, business name, business address, business phone number, license number, and the date each licensee joined the group;
- (E) The signatures of all the members of the pool buying group;
- (F) An attestation that the licensee is not a member of more than one pool buying group at that time; and
- (G) The license status of each member.

(b) The buying agent shall be a licensed retailer of alcoholic beverages in the District.

(c) A member of the pool buying group shall not be eligible to place an order with the group until the member has executed the pool buying agreement and the licensee's name, business name, license number, and the date of membership have been filed with, and approved by, the ABRA.

(d) Any addition or termination to the membership of the pool buying group shall be provided to ABRA under the signature of the buying agent. The notice shall include the effective date of the addition of a new member or the termination of an existing member. The notice may be in letter form or on official forms which may be promulgated by ABRA.

(e) The transfer, suspension, or revocation of a license held by a member of a pool buying group shall automatically terminate the licensee from membership in the pool buying group.

(Sept. 30, 2004, D.C. Law 15-187, § 401(f), 51 DCR 6525.)

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Editor's notes. — Sections 402 and 403 of D.C. Law 15-187 provided:

“Sec. 402. Rules and regulations.

“The Mayor shall promulgate proposed rules and regulations to administer this title within 180 days of its effective date. The proposed rules and regulations, as well as any subsequent rules and regulations amending this title, shall be submitted to the Council for a

45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the rules and regulations, in whole or in part, by resolution with the 45-day review period, the proposed rules and regulations shall be deemed approved.

“Sec. 403. Applicability. Section 401 shall apply upon the effective date of the regulations promulgated under section 402.”

§ 25-123. Farm winery retail license.

(a) A farm winery retail license shall be issued to a farm winery to authorize the licensee to sell wine:

(1) From the place described for consumption off-premises and to deliver the same in the sealed bottle or other closed container in which the same was received by the licensee at the licensed establishment; and

(2) At the licensed establishment for consumption at the licensed establishment.

(b) A licensee under a farm winery retail license may sell and deliver alcoholic beverages for off-premises consumption only during the hours of sale and delivery specified for a class B off-premises retail licensee under § 25-722, and may sell and serve alcoholic beverages for on-premises consumption except as restricted by § 25-724.

(c) The provisions of §§ 25-725, 25-741(a) and (b), 25-742, and 25-753 shall apply to a farm winery retail license.

(July 18, 2008, D.C. Law 17-201, § 2(f), 55 DCR 6289.)

Legislative history of Law 17-201. — For Law 17-201, see notes following § 25-101.

CHAPTER 2. ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION.

Sec.	Sec.
25-201. Establishment of the Alcoholic Beverage Control Board — Appointment and responsibilities.	25-204.01. Board — Open meetings.
25-202. Establishment of the Alcoholic Beverage Regulation Administration.	25-205. Board record-keeping responsibilities.
25-203. Transfer of functions of Alcoholic Beverage Control Division of the Department of Consumer and Regulatory Affairs.	25-206. Board member qualifications; term of office; chairperson; conflict of interest.
25-204. Board — Functions and duties.	25-207. ABRA Director and staff.
	25-208. Office of the General Counsel.
	25-209. Community resource officer.
	25-210. ABRA funding.
	25-211. Regulations.

§ 25-201. Establishment of the Alcoholic Beverage Control Board — Appointment and responsibilities.

(a) There is established an Alcoholic Beverage Control Board. The Board shall be composed of 7 members. The Mayor, with the advice and consent of the Council and according to the requirements set forth in § 25-206, shall nominate persons to serve on the Board. A nomination shall be submitted to the Council for a 90-day period of review, excluding days of Council recess. If the Council does not approve or disapprove the nomination by resolution within this 90-day review period, the nomination shall be deemed disapproved.

(b) The Board shall administer and enforce the provisions of this title and regulations issued under this title.

(c) The Board shall:

- (1) Oversee ABRA;
- (2) Receive and evaluate applications for licenses, transfers of licenses to new owners, and renewals of licenses;
- (3) Issue, transfer, and renew licenses to qualified applicants;
- (4) Regularly conduct inspections of the premises and the books and records of all licensees during day and evening hours and, on a reasonable number of occasions, without prior notification to the licensee or the licensee's employees, for compliance with the requirements of this title and regulations issued under this title;
- (5) Establish procedures to receive and respond timely to complaints from any person alleging a violation of any provision of this title or regulations issued under this title;
- (6) Conduct investigations, on its own initiative or on the basis of valid complaints, to identify violations of this title or regulations issued under this title;
- (7) Suspend or revoke licenses and impose civil fines as authorized by this title and regulations issued under this title; and
- (8) Refer evidence of criminal misconduct to the Inspector General of the District of Columbia, the Corporation Counsel, or the United States Attorney for the District, for investigation and prosecution.

(Jan. 24, 1934, 48 Stat. 321, ch. 4, §§ 4, 6; Aug. 27, 1935, 49 Stat. 897, ch. 756, § 2; Apr. 20, 1948, 62 Stat. 176, ch. 217, § 2; Oct. 28, 1949, 63 Stat. 972, ch. 782, title XI, § 1106(a); Mar. 3, 1979, D.C. Law 2-139, § 3205(h), 25 DCR 5740;

Sept. 29, 1982, D.C. Law 4-157, §§ 3, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(1), (2), 30 DCR 5927; Sept. 26, 1984, D.C. Law 5-119, § 2, 31 DCR 4040; Mar. 14, 1985, D.C. Law 5-159, § 25(a), 32 DCR 30; Mar. 7, 1987, D.C. Law 6-217, § 3, 34 DCR 907; May 24, 1994, D.C. Law 10-122, § 2(b), (c), 41 DCR 1658; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; June 12, 2003, D.C. Law 14-310, § 10, 50 DCR 1092.)

Prior Codifications. — 1981 Ed., § 25-201. 1973 Ed., §§ 25-104, 25-106.

Effect of amendments. — D.C. Law 14-310, in subsec. (a), substituted “deemed disapproved” for “deemed approved”.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-157. — For legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 5-51. — For legislative history of D.C. Law 5-51, see Historical and Statutory Notes following § 25-206.

Legislative history of Law 6-217. — For legislative history of D.C. Law 6-217, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 10-122. — For legislative history of D.C. Law 10-122, see Historical and Statutory Notes following § 25-785.

Legislative history of Law 14-310. — Law 14-310, the “Criminal Code and Miscellaneous Technical Amendments Act of 2002”, was introduced in Council and assigned Bill No. 14-954, which was referred to the Committee on Whole. The Bill was adopted on first and second readings on December 3, 2002, and December 17, 2002, respectively. Signed by the Mayor on January 22, 2003, it was assigned Act No. 14-622 and transmitted to both Houses of Congress for its review. D.C. Law 14-310 became effective on June 12, 2003.

CASE NOTES

ANALYSIS

Grounds for denial of application.

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Grounds for denial of application.

Alcoholic Beverage Control Board is authorized to make finding that two liquor stores within 300 feet proximity are inappropriate for particular neighborhood, notwithstanding absence of any formal regulation promulgated by District Commissioners regarding necessary distances between liquor stores. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. *Pollack v. Simonson*, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

Rejection by the Alcoholic Beverage Control Board, of application for a retailers' Class “C” license on ground that area was adequately serviced, was arbitrary and capricious, in absence of any evidence on the point. D.C. Code 1940, §§ 25-106, 25-115(a). *Clore Restaurant v. Payne*, 72 F.Supp. 677, 1947 U.S. Dist. LEXIS 2366 (D.D.C.1947).

Hearings.

Alcoholic Beverage Control Board may, in its

discretion, hold formal comparative hearing, or follow some other procedure to inform itself in choosing between mutually exclusive applicants. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. *Pollack v. Simonson*, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

Alcoholic Beverage Control Act does not explicitly require hearing before denial of application for transfer of license. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. *Pollack v. Simonson*, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

Alcohol Beverage Control Board's disqualifying member, who had previously testified before the Board in opposition to applicant's earlier application for an alcoholic beverage license, once member declined the request to recuse himself was not an abuse of discretion; member's alleged bias stemmed from a source other than prior service as a Board member and his public pronouncements on essentially the same factual issue he would be judging as Board member gave rise to a reasonable question as to his impartiality. *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic Bev. Control Bd.*, 766 A.2d 59, 2001 D.C. App. LEXIS 18 (2001).

Alcohol Beverage Control Board had no reason to disqualify member who had been replaced as chair of the Board, but continued to hold position on Board, from proceeding on application for retailer's license. *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic*

Bev. Control Bd., 766 A.2d 59, 2001 D.C. App. LEXIS 18 (2001).

Petitioner who complained that nightclub violated Alcohol Beverage Control Act, related regulations, and his constitutional rights when it excluded him for his failure to present identification proving he was 21 years of age or older did not have statutory or constitutional right to hearing before Alcoholic Beverage Control Board and, therefore, did not have any right of judicial review of Board's decision. D.C. Code 1981, §§ 1-1502(8), 1-1510(a), 11-722, 25-106, 25-121. *Jones v. District of Columbia Alcoholic Beverage Bd.*, 621 A.2d 385, 1993 D.C. App. LEXIS 54 (1993).

In general.

Where statute providing for issuance of license to sell alcoholic beverages also provided for transfer and assignment of such license, the license was a "property right" subject to levy, under execution, to satisfy a judgment of municipal court. D.C. Code 1940, §§ 11-326, 15-209, 15-210, 15-212, 25-106, 25-107. *Rowe v. Colpoys*, 137 F.2d 249, 1943 U.S. App. LEXIS 2788 (1943).

The Court of Appeals accords considerable deference to Alcoholic Beverage Control Board's construction of Alcoholic Beverage Regulation Administration statute, and will uphold board's interpretation of statute and legislative enactments affecting it as long as the interpretation is reasonable and not plainly wrong or inconsistent with the legislative purpose. *800 Water St., Inc. v. D.C. Alcoholic Bev. Control Bd.*, 992 A.2d 1272, 2010 D.C. App. LEXIS 204 (2010).

Injunction.

In suit to enjoin alcoholic beverage control board from putting into effect its decision denying renewal of liquor license, which decision was based upon statutory ground that licensee did not have necessary good moral character and was not generally fit for the trust to be reposed in him by renewal, question before court was whether findings of board were so arbitrary or capricious, or so unsupported by evidence, as to be unwarranted as matter of law. D.C. Code 1951, §§ 25-104, 25-106, 25-115(a) (1). *Minkoff v. Payne*, 210 F.2d 689, 1953 U.S. App. LEXIS 3681 (C.A.D.C. 1953).

An injunction against enforcement of order of Alcoholic Beverage Control Board revoking liquor license should not issue for any period while failure of Board of Commissioners of District of Columbia to reach a decision on appeal is caused by unavoidable circumstances such as absence of a commissioner or necessary delay in considering and deciding the case. D.C. Code 1940, § 25-106. *Lambros v. Young*, 145 F.2d 341, 1944 U.S. App. LEXIS 2508 (1944).

Where statute provided that decision of Board of Commissioners of District of Columbia

on questions of fact on appeal from Alcoholic Beverage Control Board should be final, but order revoking liquor license was upheld by a one to one vote, an injunction would be granted against enforcement of order which would terminate when appeal was reinstated, and after appeal was reinstated the license would stand suspended during time reasonably necessary for commissioners to reach a final decision. D.C. Code 1940, § 25-106. *Lambros v. Young*, 145 F.2d 341, 1944 U.S. App. LEXIS 2508 (1944).

Under circumstances disclosed, including showing that net effect of board's failure to prescribe adequate rules and regulations had been to by-pass wishes of community, plaintiffs were entitled to preliminary injunction against operation of liquor store pending review of board's grant of application for transfer of liquor license. D.C. Code 1951, §§ 25-106, 25-115(a) 5. *Palisades Citizens Ass'n v. Weakly*, 166 F.Supp. 591, 1958 U.S. Dist. LEXIS 3580 (D.D.C.1958).

Mandamus.

In action in the nature of a petition for writ of mandamus to require Alcoholic Beverage Control Board to issue a retailers' Class "C" license to petitioning restaurant, question before the court was whether action of the board was based upon substantial evidence, and if it was, mandamus would not lie, whereas if it was not, next question was whether action of board was arbitrary or capricious. Federal Rules of Civil Procedure, rule 81(b), 18 U.S.C.; D.C. Code 1940, § 25-106. *Clare Restaurant v. Payne*, 72 F.Supp. 677, 1947 U.S. Dist. LEXIS 2366 (D.D.C.1947).

Notice of requirements.

Where it was not suggested at separate hearings on applications to transfer liquor licenses that the two applications were mutually exclusive and no formal regulation required that liquor stores be situated more than 300 feet apart, denial of plaintiffs' application on sole ground that license of other applicant had been issued for location less than 300 feet from plaintiffs' proposed location was improper for failure of Alcoholic Beverage Control Board to give proper notice to plaintiffs that it considered applications mutually exclusive. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. *Pollack v. Simonson*, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

Presumptions and burden of proof.

Presumption of regularity is accorded to administrative proceedings of Alcoholic Beverage Control Board. *Schiffmann v. District of Columbia Alcoholic Beverage Control Board*, 302 A.2d 235, 1973 D.C. App. LEXIS 249 (1973).

Questions of fact.

Under statute governing appeal to Board of Commissioners of District of Columbia from

Alcoholic Beverage Control Board, provision that decision of commissioners on questions of fact should be final means that the Board of Commissioners must actually make a decision. D.C. Code 1940, § 25-106. *Lambros v. Young*, 145 F.2d 341, 1944 U.S. App. LEXIS 2508 (1944).

A one to one vote of Board of Commissioners of District of Columbia upholding order of Alcoholic Beverage Control Board revoking liquor license did not constitute a "decision of fact" within statute providing that decision of commissioners on question of fact should be final. D.C. Code 1940, § 25-106. *Lambros v. Young*, 145 F.2d 341, 1944 U.S. App. LEXIS 2508 (1944).

Renewal of license.

Decision of alcoholic beverage control board rejecting application for renewal of liquor license was not reviewable by commissioners of the District of Columbia. D.C. Code 1951, §§ 25-106, 25-114, 25-115(b, c), 25-118. *Minkoff v. Payne*, 210 F.2d 689, 1953 U.S. App. LEXIS 3681 (C.A.D.C. 1953).

In application for renewal of liquor license, board properly followed procedure applicable to application for license in first instance, rather than that prescribed for revocation or suspension of license already issued. D.C. Code 1951, §§ 25-106, 25-114, 25-115(b, c), 25-118. *Minkoff v. Payne*, 210 F.2d 689, 1953 U.S. App. LEXIS 3681 (C.A.D.C. 1953).

Alcoholic Beverage Control Board erred in allowing one of its members to elicit testimony concerning race and residency of restaurant's patrons at hearing to determine whether to renew restaurant's liquor license, but error was not reversible, where Board did not rely on the testimony in its findings of fact and conclusions of law. D.C. Code 1981, §§ 25-111(a)(7), 25-115(a)(6). *K.G.S., Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 531 A.2d 1001, 1987 D.C. App. LEXIS 454 (1987).

In addition to factors listed in D.C. Code 1981, § 25-103(14), Alcoholic Beverage Control Board, in determining whether to renew class C liquor license for a restaurant, is free to consider any relevant evidence in determining restaurant's chief source of revenue, including such items as cash register tapes, cancelled checks, and paid invoices. D.C. Code 1981, § 25-111(a)(7). *Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

In determining whether to renew class C liquor license for a restaurant, Alcoholic Beverage Control Board is not free to disregard statutory criteria and base its finding that restaurant's chief source of revenue is derived from sale of meals on a mere promise by applicant to make its chief source of revenue the sale

of meals rather than beverages; hard evidence is required, not promises or good intentions. D.C. Code 1981, §§ 25-103(14), 25-111(a)(7). *Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

Notwithstanding claim of citizens association that Alcoholic Beverage Control Board erred in not conditioning reissuance of a Class "C" liquor license to restaurant on restoration of valet parking service, findings of Board that there were 20 parking spaces behind building which could be used by customers, that no complaints had ever been received with respect to adequacy of such facilities, and that there was not enough business to justify keeping an employee for purpose of parking customers' vehicles were supported by substantial evidence, and Board's ultimate decision to reissue license to restaurant was within scope of its statutory discretion. D.C. Code §§ 1-1510, 25-106. *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 280 A.2d 309, 1971 D.C. App. LEXIS 184 (1971).

Review.

Where statute governing appeal to Board of Commissioners of District of Columbia from Alcoholic Beverage Control Board provided that decision of commissioners on questions of fact should be final, the judicial rule which requires affirmation of judgment or order of trial court when an appellate court is evenly divided was inapplicable. D.C. Code 1940, § 25-106. *Lambros v. Young*, 145 F.2d 341, 1944 U.S. App. LEXIS 2508 (1944).

The Court of Appeals accords great weight to Alcoholic Beverage Control Board's construction of ambiguous provisions of Alcoholic Beverage Regulation Administration statute, and will defer to and uphold board's interpretation of statute and legislative enactments affecting it as long as the interpretation is reasonable and not plainly wrong or inconsistent with the legislative purpose. *Holzager v. D.C. Alcoholic Bev. Control Bd.*, 979 A.2d 52, 2009 D.C. App. LEXIS 363 (2009).

Court of Appeals may not disturb any action of Alcoholic Beverage Control Board in exercise of its statutory powers, unless that action is plainly wrong or without support of substantial evidence in administrative record. D.C. Code 1981, § 25-106(a). *Muir v. District of Columbia Alcoholic Beverage Control Bd.*, 450 A.2d 412, 1982 D.C. App. LEXIS 430 (1982).

Where Alcoholic Beverage Control Board's denial of application for retailer's liquor license was unsupported by substantial evidence, and twice during history of litigation Board had filed motions to remand proceeding to permit applicant to seek reconsideration and to permit Board to make supplemental findings, Court of

Appeals would remand proceeding to Board with order to show cause why application should not be granted forthwith. *Jameson's Liquors, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 384 A.2d 412, 1978 D.C. App. LEXIS 442 (1978).

Under statutes, findings of Alcoholic Beverage Control Board of District of Columbia can be overturned by District of Columbia Court of Appeals upon review only if they are without substantial evidence to support them. D.C. Code §§ 1-1510, 25-106. *Sophia's Inc. v. Alcoholic Beverage Control Board*, 268 A.2d 799, 1970 D.C. App. LEXIS 333 (App. 1970).

Separate violations.

Where separate suspensions of liquor license for 21 days in the first case and 17 days in the second case were not strictly for separate acts constituting violations on separate days but for a continuous course of conduct, and investigation in both cases was completed 30 days before hearing in first case, the two cases should have been treated as one case and licensee was

entitled to review of suspension by commissioners on theory that license was suspended for period of more than 30 days. D.C. Code §§ 25-106, 25-118. *James Bakalis & Nickie Bakalis, Inc. v. Simonson*, 434 F.2d 515, 1970 U.S. App. LEXIS 7873 (C.A.D.C. 1970).

Transfer of license.

Under statute providing that Alcoholic Beverage Control Board may consider character of premises, its surroundings and wishes of persons residing or owning property in neighborhood in reviewing application for transfer of license, if Board finds that two liquor stores within 300 feet proximity are inappropriate for particular neighborhood and must necessarily choose between competing applicants, each applicant must be given opportunity to show that his application should be favored so that specific public standards, not unbridled discretion, will control Board's consideration of license application. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. *Pollack v. Simonson*, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

§ 25-202. Establishment of the Alcoholic Beverage Regulation Administration.

There is established an Alcoholic Beverage Regulation Administration ("ABRA") as an independent agency of the District to provide professional, technical, and administrative staff assistance to the Board in the performance of its functions. ABRA shall carry out its functions under the supervision of the Board.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-203. Transfer of functions of Alcoholic Beverage Control Division of the Department of Consumer and Regulatory Affairs.

All positions, property, records, and unexpended balances of appropriations, allocations, assessments, and other funds available or to be made available to the Alcoholic Beverage Control Division of the Department of Consumer and Regulatory Affairs relating to the duties and functions assigned herein are transferred to ABRA.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-204. Board — Functions and duties.

All duties and responsibilities in respect to the regulation of alcoholic beverage control establishments that previously have been given to the Alcoholic Beverage Control Division of the Department of Consumer and Regulatory Affairs, established by Reorganization Plan No. 1 of 1983, shall be assumed by the Board.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Emergency legislation. — For temporary (90 day) provisions, see § 3 of Mt. Pleasant, Targeted Ward 2, and Targeted Ward 6 Single Sales Moratorium Congressional Review Emergency Act of 2008 (D.C. Act 17-564, October 27, 2008, 55 DCR 12024).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Editor's notes. — Section 3 of D.C. Law 17-287 provided: "Sec. 3. Subsidies for officers.

As of July 28, 2008, the Alcoholic Beverage Regulation Administration shall provide subsidies for officers that participate in the Pilot Subsidy Program for Reimbursable Details, in entertainment areas during late night closing times and approved special events. Receipts for weekend nights prior to July 28, 2008 shall be considered under the law in place prior July 28, 2008."

§ 25-204.01. Board — Open meetings.

(a) This section shall be construed broadly to maximize public access to meetings. Exceptions to open meetings shall be construed narrowly.

(b)(1) "For the purposes of this section, the term "meeting" means any gathering of a quorum of the members of the Board, including hearings and roundtables, whether regular, special, or emergency, at which the members consider, conduct, or advise on public business, including gathering information, taking testimony, discussing, and voting.

(2) A chance meeting or social encounter does not constitute a meeting unless it is held to evade the letter or spirit of this section.

(3) The term "meeting" does not include:

(A) Discussions by members of the Board on logistical and procedural methods to schedule and regulate a meeting;

(B) Any on-site inspection of any project or program; and

(C) General discussions among Board members on issues of interest to the public held in a planned or unplanned social, educational, informal, ceremonial, or similar setting when there is no intent to conduct public business, nor for the discussion to lead to an official action, even if a quorum is present and public business is discussed.

(c)(1) Except as provided in paragraph (2) of this subsection, a meeting shall be open to the public.

(2) A meeting, or portion of a meeting, may be exempt from the requirement in paragraph (1) of this subsection because of the following:

(A) Statute or court order;

(B) Contract negotiations;

(C) Attorney-client privilege: To consult with an attorney, in order to preserve the attorney-client privilege between an attorney and the Boards, and to approve settlement agreements; provided, that nothing herein shall be construed to permit the Board to close a meeting that would otherwise be open merely because the Board's attorney is a participant;

(D) Personnel matters. Discussion of the appointment, employment, assignment, promotion, performance evaluation, compensation, discipline, demotion, removal, or resignation of government appointees, employees, or officials, unless the person requests a public meeting;

(E) Quasi-judicial functions: Meetings held by the Board exercising quasi-judicial functions that are held solely for the purpose of deliberating or making a decision in an adjudication action or proceeding;

(F) Enforcement: To plan, conduct, discuss, or hear reports concerning investigations of alleged criminal or civil misconduct or violations of federal or District law; or

(G) Executive functions: To discuss the administration of a current District or federal statute, regulation, or procedure.

(3) A public body that meets in closed session may not discuss or consider any official matter other than matters listed in paragraph (2) of this subsection.

(4) No resolution, rule, act, regulation, or other official action shall be effective unless taken, made, or enacted at an open meeting.

(d)(1) Before a meeting or portion of a meeting may be closed, the Board shall meet in public session at which a majority of the members of the public body who are present vote in favor of a motion for closure pursuant to an exemption listed under subsection (c)(2) of this section.

(2) The motion shall state the reason for closing the meeting and include a listing of the topics to be discussed. The Chairperson of the Board shall conduct and record a roll call vote on the motion.

(3) At the conclusion of the closed meeting, the Board shall reconvene in public session, to summarize, to the extent consistent with the applicable reason for closure, the matters discussed or considered at the closed session, and, if appropriate, take official action.

(July 18, 2008, D.C. Law 17-201, § 3(b), 55 DCR 6289.)

Legislative history of Law 17-201. — For Law 17-201, see notes following § 25-101.

§ 25-205. Board record-keeping responsibilities.

(a) The Board shall maintain complete and accurate records of all action taken on:

(1) Applications for licenses; and

(2) Recommendations for, and remonstrances against, the granting of licenses.

(b) The Board shall maintain the records in a manner readily accessible for inspection by the public during normal business hours.

(c) The Board shall provide to the Director and the Council annual reports detailing the activities of the Board for the previous year regarding the following items:

(1) Licenses, including the number of licenses outstanding; the number of new alcohol licenses and permits issued; the number of alcohol licenses and

permits renewed; the number of licenses suspended; and the number of licenses revoked;

(2) Enforcement, including the number of regulatory inspections performed and the number of investigations conducted;

(3) The workload of the Board, including the number of adjudicated cases processed; the number of hearings conducted; and the number of show cause cases pending;

(4) Community notification efforts, including the number of ANC notifications issued; the number of ANC meetings attended by Board members; and the number of community meetings attended by Board members; and

(5) Revenue generated by Board actions, including revenue generated by the Board from permits and licenses and from fines.

(d) The Board shall provide to the office of each ANC, on a quarterly basis, a list of all licenses due to expire during the ensuing 6 months.

(Jan. 24, 1934, 48 Stat. 322, ch. 4, § 6; Aug. 27, 1935, 49 Stat. 897, ch. 756, § 2; Sept. 29, 1982, D.C. Law 4-157, §§ 3, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(2), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 3, 34 DCR 907; May 24, 1994, D.C. Law 10-122, § 2(c), 41 DCR 1658; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(f), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-205. 1973 Ed., § 25-106.

Effect of amendments. — D.C. Law 15-187 rewrote subsec. (d) which had read as follows: “(d) The Board shall provide to each ANC office, on a quarterly basis, a list of licenses due to

expire in the areas that the ANC will represent during the ensuing 6 months.”

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

§ 25-206. Board member qualifications; term of office; chairperson; conflict of interest.

(a) Each member of the Board shall be a resident of the District for at least 3 years immediately preceding his or her appointment and, during that period, have claimed a principal residence nowhere else.

(b) No member of the Board shall hold any other full-time employment with the District government during his or her term of service on the Board.

(c) Each member of the Board shall have a demonstrated record of substantial involvement in issues related to the community impact of licensed establishments before his or her appointment to the Board.

(d) All appointments shall be for a term of 4 years, except appointments made for the remainder of unexpired terms. Vacancies caused by death, resignation, or otherwise shall be filled by the Mayor, with the advice and consent of the Council, under § 25-201. The Mayor may remove a board member for just and reasonable cause.

(e) Board members may be reappointed.

(f)(1) The Mayor, with the advice and consent of the Council as provided by 25-201, shall appoint one member of the Board as chairperson.

(2) The chairperson shall have a demonstrated knowledge of the laws and

regulations relating to the sale and delivery of alcoholic beverages in the District.

(g) No member or employee of the Board, directly or indirectly, individually, or as a member of a partnership, association, or limited liability company, or a shareholder in a corporation, shall have any interest in selling, transporting, or storing alcoholic beverages, or receive a commission or profit from any person licensed under this title to sell alcoholic beverages; provided, that a Board member or employee may purchase, transport, or keep in his or her possession an alcoholic beverage for his or her personal use or the use of the members of his or her family or guests.

(h) Former board members may not represent a client before the Board for a period of one year following their service on the Board. Former board members may appear before the Board as an applicant for licensure, a protestant, or a witness during a protest hearing during this time period. This provision shall be applicable to future board members and for board members who are serving on the Board on May 3, 2001.

(Jan. 24, 1934, 48 Stat. 321, ch. 4, §§ 4, 5; Apr. 20, 1948, 62 Stat. 176, ch. 217, § 2; Oct. 28, 1949, 63 Stat. 972, ch. 782, title XI, § 1106(a); Mar. 3, 1979, D.C. Law 2-139, § 3205(h), 25 DCR 5740; Sept. 29, 1982, D.C. Law 4-157, § 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(1), 30 DCR 5927; Sept. 26, 1984, D.C. Law 5-119, § 2, 31 DCR 4040; Mar. 14, 1985, D.C. Law 5-159, § 25(a), 32 DCR 30; May 24, 1994, D.C. Law 10-122, § 2(b), 41 DCR 1658; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-206. 1973 Ed., §§ 25-104, 25-105.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 2-139. — Law 2-139, the “District of Columbia Government Comprehensive Merit Personnel Act of 1978,” was introduced in Council and assigned Bill No. 2-10, which was referred to the Committee on Government Operations. The Bill was adopted on first and second readings on October 17, 1978 and October 31, 1978, respectively. Signed by the Mayor on November 22, 1978, it was assigned Act No. 2-300 and transmitted to both Houses of Congress for its review.

Legislative history of Law 4-157. — For legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 5-51. — Law 5-51, the “Alcoholic Beverage Control Act Amendments Act of 1983,” was introduced in Council and assigned Bill No. 5-248, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on October 4, 1983, and October 18, 1983, respectively. Signed by the Mayor on November 9, 1983, it was as-

signed Act No. 5-77 and transmitted to both Houses of Congress for its review.

Legislative history of Law 5-119. — Law 5-119, the “Alcoholic Beverage Control Act Amendments Act of 1984,” was introduced in Council and assigned Bill No. 5-298, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on June 26, 1984, and July 10, 1984, respectively. Signed by the Mayor on July 13, 1984, it was assigned Act No. 5-171 and transmitted to both Houses of Congress for its review.

Legislative history of Law 5-159. — Law 5-159, the “End of Session Technical Amendments Act of 1984,” was introduced in Council and assigned Bill No. 5-540, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 20, 1984, and December 4, 1984, respectively. Signed by the Mayor on December 10, 1984, it was assigned Act No. 5-224 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-122. — For legislative history of D.C. Law 10-122, see Historical and Statutory Notes following § 25-785.

§ 25-207. ABRA Director and staff.

(a) The Board, with the advice and consent of the Council, shall appoint a Director of ABRA for a renewable 4-year term. The Director shall be removed by the Board for just and reasonable cause.

(b) The Director shall organize the personnel and property transferred by § 25-203 and, within the limits provided in this chapter and annual appropriations, shall employ staff as needed to carry out the function of ABRA.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Short title. — Short title: Section 6022 of D.C. Law 17-219 provided that subtitle H of title VI of the act may be cited as the “Targeted Grant-Making Authority for the Director of the Alcoholic Beverage Regulation Administration Act of 2008”.

Editor’s notes. — Section 6023 of D.C. Law

17-219 provided: “Notwithstanding any other provision of law, the Director of the Alcoholic Beverage Regulation Administration shall have the authority to issue grants, as directed in the Fiscal Year 2009 Budget Request Act, passed on final reading on May 13, 2008 (Enrolled version of Bill 17-679) (“Act”), to effectuate the purposes of the Act.”

§ 25-208. Office of the General Counsel.

There shall be established within ABRA an Office of the General Counsel. The head of the office shall be the General Counsel, who shall be an attorney admitted to the practice of law in the District and who shall be appointed by, and serve at the pleasure of, the Mayor. The General Counsel shall advise the Board regarding all legal matters. The Office of the General Counsel shall also be available to provide mediation services or a professional mediator, as a delegate, if the parties to a settlement conference require or request assistance.

(Jan. 24, 1934, 48 Stat. 321, ch. 4, § 4; Apr. 20, 1948, 62 Stat. 176, ch. 217, § 2; Oct. 28, 1949, 63 Stat. 972, ch. 782, title XI, § 1106(a); Mar. 3, 1979, D.C. Law 2-139, § 3205(h), 25 DCR 5740; Sept. 29, 1982, D.C. Law 4-157, § 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(1), 30 DCR 5927; Sept. 26, 1984, D.C. Law 5-119, § 2, 31 DCR 4040; Mar. 14, 1985, D.C. Law 5-159, § 25(a), 32 DCR 30; May 24, 1994, D.C. Law 10-122, § 2(b), 41 DCR 1658; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-206. 1973 Ed., § 25-104.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Delegation of Authority. — Delegation of Authority Pursuant to D.C. Law 13-298, the Title 25, D.C. Code Enactment and Related

Amendments Act of 2001, see Mayor’s Order 2001-96, June 28, 2001 (48 DCR 6277).

Partial Rescission of Delegation of Authority Pursuant to D.C. Law 13-298, the Title 25, DC Code Enactment and Related Amendments Act of 2001, see Mayor’s Order 2001-102, July 23, 2001 (48 DCR 7792).

§ 25-209. Community resource officer.

The Director shall appoint an employee to be a community resource officer, who shall serve as the primary contact for members of the community, both residents and businesses, wishing to submit complaints or to protest a license. The community resource officer shall provide information to citizens and the

business community about the license application process, qualifications, complaint or protest process, and the citizen's or businesses' responsibilities and options in each step of the process.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-210. ABRA funding.

(a) There is established a fund designated as the Alcoholic Beverage Regulation Administration Fund, which shall be separate from the General Fund of the District of Columbia. All funds obtained from alcoholic beverage licensing and permitting fees shall be deposited into the ABRA Fund without regard to fiscal year limitation pursuant to an act of Congress. All fees deposited into the ABRA Fund shall not revert to the General Fund of the District of Columbia at the end of any fiscal year or at any other time, but shall be continually available for the uses and purposes set forth in this subsection, subject to authorization by Congress in an appropriations act. The funds deposited in the ABRA Account shall be used to fund the expenses of ABRA in the discharge of its administrative and regulatory duties. Funds obtained from penalties and fines, as prescribed by Chapter 8 of this title, shall be credited to the General Fund of the District of Columbia.

(b) The Mayor shall submit to the Council, as part of the annual budget, a budget for ABRA and a request for an appropriation for expenditures from the ABRA Fund. This estimate shall include expenditures for salaries, fringe benefits, overhead charges, training, supplies, technical, professional, and any and all other services necessary to discharge the duties and responsibilities of ABRA.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 3, 2001, D.C. Law 14-28, § 3002(b), 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 59, 51 DCR 881.)

Effect of amendments. — D.C. Law 14-28 substituted "ABRA Fund" for "ABRA Account" in subsec. (b); and rewrote subsec. (a) which had read as follows: "(a) There is established within the General Fund of the District of Columbia an account designated as the Alcoholic Beverage Regulation Administration Account, to which all funds obtained from alcoholic beverage taxes and licensing and permitting fees shall be credited. Any monies deposited in the ABRA Account but not expended in a fiscal year shall be returned to the General Fund. Subject to the applicable laws relating to the appropriation of District funds, monies received and credited to the ABRA Account shall be used to fund the expenses of ABRA in the discharge of its administrative and regulatory duties. Funds obtained from

penalties and fines, as prescribed by Chapter 8, shall be credited to the General Fund."

D.C. Law 15-105, in subsec. (a), validated a previously made technical correction.

Emergency legislation. — For temporary (90 day) amendment of section, see §§ 2702(b) and 2703 of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 14-28. — For Law 14-28, see notes following § 25-101.

Legislative history of Law 15-105. — Law 15-105, the "Technical Amendments Act of 2003", was introduced in Council and assigned Bill No. 15-437, which was referred to the Committee of the Whole. The Bill was adopted

on first and second readings on November 4, 2003, and December 2, 2003, respectively. Signed by the Mayor on January 6, 2004, it was assigned Act No. 15-291 and transmitted to both Houses of Congress for its review. D.C. Law 15-105 became effective on March 13, 2004.

Editor's notes. — D.C. Law 14-28, § 3003 provided: "This title Title XXX of Law 14-28 shall apply as of May 3, 2001."

Section 9026 of D.C. Law 19-21 provided: "Sec. 9026. ABC—Keg Registration Fees. "Notwithstanding any other law, the funds which

are deposited in the fund designated for accounting purposes by the Office of the Chief Financial Officer as fund 6018 within the Alcoholic Beverage Regulation Administration shall be deposited in the Alcoholic Beverage Regulation Administration Fund, established by D.C. Official Code § 25-210(a), and shall not be accounted for by a separate fund or account. Any unexpended funds in fund 6018 on the effective date of this subtitle shall be transferred to the Alcoholic Beverage Regulation Administration Fund."

§ 25-211. Regulations.

(a)(1) Within 180 days after May 3, 2001, the Mayor shall issue conforming regulations necessary or appropriate to carry out the provisions of this title.

(2) The Mayor shall submit the proposed regulations to the Council for a 45-day period of review. The Council may approve the proposed regulations in whole or in part. If the Council has not approved the regulations upon expiration of the 45-day review period, the regulations shall be deemed disapproved.

(3) The current regulations in Chapter 23 of the District of Columbia Municipal Regulations shall remain in effect until the Council approves new regulations as provided in this subsection.

(b)(1) The Mayor shall submit other proposed regulations to the Council for a 90-day period of review.

(2) The Council may approve the proposed regulations in whole or in part. If the Council has not approved the regulations upon expiration of the 90-day review period, the regulations shall be deemed disapproved.

(3) The Mayor may submit proposed regulations under this subsection regarding the regulation of promotional events such as pub crawls.

(c) The Mayor may in any time of public emergency, without previous notice or advertisement, prohibit the sale of any or all alcoholic beverages.

(d)(1) Any regulations promulgated under this section shall become effective 5 days after being published in the District of Columbia Register.

(2) Within 30 days after their promulgation, the regulations shall also be published in a newspaper of general circulation in the District. Failure to do so shall not affect the validity of the regulations.

(e) Within 180 days after May 3, 2001, the Board shall implement a process to provide additional notification, via electronic media, to the public and Advisory Neighborhood Commissions of the publication of proposed and adopted regulations.

(f) The Board shall establish, under subsection (b) of this section, procedures to implement § 25-601 to:

(1) Receive written complaints from the public, regarding community concerns about the activity at a site;

(2) Conduct protest hearings regarding community concerns filed under paragraph (1) of this subsection; and

(3) Place restrictions upon the number, nature, or size of events permitted at a site, based on findings of fact and conclusions of law determining that

events at the site have violated District of Columbia law and created parking, trash, noise, congestion or other alcohol-related problems which have been substantially injurious to neighborhood residents.

(Jan. 24, 1934, 48 Stat. 322, ch. 4, § 7, June 29, 1953, 67 Stat. 102, ch. 159, § 404(a); Oct. 4, 1961, 75 Stat. 820, Pub. L. 87-389, § 3; Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 403; Sept. 22, 1970, 84 Stat. 853, Pub. L. 91-405, title II, § 204(f); Jan. 5, 1971, 84 Stat. 1940, Pub. L. 91-650, title VII, § 706; Mar. 5, 1981, D.C. Law 3-157, § 2(a), 27 DCR 5117; July 24, 1982, D.C. Law 4-131, § 501, 29 DCR 2418; Sept. 29, 1982, D.C. Law 4-157, §§ 4, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(3), 30 DCR 5927; Feb. 24, 1987, D.C. Law 6-192, § 26(a), 33 DCR 7836; Mar. 7, 1987, D.C. Law 6-217, § 4, 34 DCR 907; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 26, 2001, D.C. Law 14-42, § 6(b), 48 DCR 7612; Mar. 13, 2004, D.C. Law 15-105, § 26(b)(1), 51 DCR 881; Sept. 30, 2004, D.C. Law 15-187, § 101(g), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-211. 1973 Ed., § 25-107.

Effect of amendments. — D.C. Law 14-42 validated the previously made technical corrections in § 25-211.

D.C. Law 15-105 validated a previously made technical correction.

D.C. Law 15-187, in subsec. (b), substituted “90-day period of review” for “45-day period of review” in par. (1), and substituted “90-day review period, the regulations shall be deemed disapproved” for “45-day review period, the regulations shall be deemed approved” in par. (2).

Emergency legislation. — For temporary (90 day) amendment of section, see § 6(b) of Technical Amendments Emergency Act of 2001 (D.C. Act 14-108, August 3, 2001, 48 DCR 7622).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 3-157. — Law 3-157, the “Alcoholic Beverage Control Act Amendments of 1980,” was introduced in Council and assigned Bill No. 3-256, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on October 14, 1980 and October 28, 1980, respectively. Signed by the Mayor on November 10, 1980, it was assigned Act No. 3-284 and transmitted to both Houses of Congress for its review.

Legislative history of Law 4-131. — For legislative history of D.C. Law 4-131, see Historical and Statutory Notes following § 25-907.

Legislative history of Law 4-157. — For legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 5-51. — For legislative history of D.C. Law 5-51, see Historical and Statutory Notes following § 25-206.

Legislative history of Law 6-192. — Law 6-192, the “Technical Amendments Act of 1986,” was introduced in Council and assigned Bill No. 6-544, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 5, 1986 and November 18, 1986, respectively. Signed by the Mayor on December 10, 1986, it was assigned Act No. 6-246 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-217. — For legislative history of D.C. Law 6-217, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 14-42. — For Law 14-42, see notes following § 25-120.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 25-210.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Delegation of Authority. — Delegation of authority, see Mayor’s Order 88-42, February 16, 1988.

Delegation of Authority Pursuant to D.C. Law 13-298, the Title 25, D.C. Code Enactment and Related Amendments Act of 2001, see Mayor’s Order 2001-96, June 28, 2001 (48 DCR 6277).

Resolutions. — Resolution 15-339, the “Revised Alcoholic Beverage Regulations Approval and Disapproval Resolution of 2003,” was approved effective December 2, 2003.

Resolution 16-292, East Dupont Circle Liquor License Moratorium Approval Resolution of 2005, was approved effective September 20, 2005.

Resolution 16-350, the “West Dupont Circle Liquor License Moratorium Rulemaking Approval Resolution of 2005,” was approved effective November 1, 2005.

Resolution 17-266, the “Adams Morgan Liquor License Moratorium Amendment Ap-

proval Resolution of 2007", was approved effective July 10, 2007.

Resolution 17-336, the "H Street Moratorium Emergency Approval Resolution of 2007", was approved effective July 10, 2007.

Resolution 17-516, the "Administrative Review Process Approval Resolution of 2008", was approved effective February 5, 2008.

Resolution 17-910, the "Glover Park Liquor

License Moratorium Approval Resolution of 2008", was approved effective December 16, 2008.

Editor's notes. — Brew-Pub Zone Expansion Resolution of 1997: Proposed Resolution 12-0114, the "Brew-Pub Zone Expansion Resolution of 1997" was deemed approved, effective Feb. 5, 1997.

CASE NOTES

ANALYSIS

Businesses near schools.
Construction and application.
Credit sales to liquor retailer.
Notice of requirements.
Taxation.

Businesses near schools.

Section of the District of Columbia Code giving Commissioners authority to make regulations for issuance of liquor licenses and to forbid issuance of liquor licenses for businesses established subsequent to January 24, 1934, near or around schools, precluded promulgation of regulations forbidding liquor licenses to businesses established prior to January 24, 1934, because they are near schools, and prohibitory regulation was inapplicable to a restaurant business established in 1928. D.C. Code 1961, § 25-107. *Hensel v. Alcoholic Beverage Control Board*, 321 F.2d 754, 1963 U.S. App. LEXIS 4738 (C.A.D.C. 1963).

Construction and application.

Alcoholic Beverage Control Board's interpretation of regulations restricting credit terms to retailers of alcoholic beverages was neither consistent nor long-standing, and, thus, Board was not entitled to judicial deference usually accorded interpretation by agencies of statutes or regulations which they administer. D.C. Code 1981, §§ 25-101 et seq., 25-119, 25-120. *Superior Beverages, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 567 A.2d 1319, 1989 D.C. App. LEXIS 264 (1989).

Credit sales to liquor retailer.

Regulation of Alcoholic Beverage Control Board prescribing the terms upon which credit may be extended to liquor retailer by wholesalers and manufacturers was valid. D.C. Code 1961, § 25-107. *Press Liquors, Inc. v. Weakley*, 317 F.2d 135, 1963 U.S. App. LEXIS 6143 (C.A.D.C. 1963).

Term "payment in full," as used in regulations restricting terms of credit which wholesalers of alcoholic beverages may extend to retailers, refers only to terms of parties' purchase agreement and does not apply to actual amount wholesaler charges or retailer agrees to pay. D.C. Code 1981, §§ 25-101 et seq., 25-119, 25-120. *Superior Beverages, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 567 A.2d 1319, 1989 D.C. App. LEXIS 264 (1989).

Regulations restricting terms of credit which wholesalers of alcoholic beverages may extend to retailers are concerned only with time by which retailers must pay for goods and do not prohibit discounts to retailers who pay in cash. D.C. Code 1981, §§ 25-101 et seq., 25-119, 25-120. *Superior Beverages, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 567 A.2d 1319, 1989 D.C. App. LEXIS 264 (1989).

Notice of requirements.

Where it was not suggested at separate hearings on applications to transfer liquor licenses that the two applications were mutually exclusive and no formal regulation required that liquor stores be situated more than 300 feet apart, denial of plaintiffs' application on sole ground that license of other applicant had been issued for location less than 300 feet from plaintiffs' proposed location was improper for failure of Alcoholic Beverage Control Board to give proper notice to plaintiffs that it considered applications mutually exclusive. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. *Pollack v. Simonson*, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

Taxation.

Under District of Columbia statute imposing a tax on all beer sold and prescribing monthly reports of beer 'sold by him during the preceding calendar month', regulations of the Commissioners taxing beer in warehouse and before it is sold were not authorized. *American Sales Company v. District of Columbia*, D.C. Cir., 292 F.2d 751, 1961 U.S. App. LEXIS 4406 (1961).

CHAPTER 3. REQUIREMENTS TO QUALIFY FOR LICENSE.

Subchapter I. Applicant Qualifications

Sec.

- 25-301. General qualifications for all applicants.
- 25-302. Special qualifications for wholesaler's or retailer's licenses.
- 25-303. Restrictions on holding a conflicting interest.

Subchapter II. Qualification of Establishment

- 25-311. General provisions — Qualification of establishment.
- 25-312. Defining size of area relevant to determination of appropriateness.
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- 25-314. Additional considerations for new license application or transfer of license to a new location.
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- 25-316. Additional considerations for transfer of licensed establishment to new owner.
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Subchapter III. Denial of License

- 25-331. Quotas — Off-premises retail licenses.
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Sec.

- 25-338. Limitation on successive applications after denial.
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- 25-340.01. Special restrictions for Ward 4.
- 25-341. Targeted Ward 4 Moratorium Zone.
- 25-341.01. Targeted Ward 4 Moratorium Zone.
- 25-342. Special restrictions for off-premises retailer's license in Ward 7.
- 25-343. Special restrictions for off-premises retailer's license in Ward 8.
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- 25-346. Ward 6 restrictions for off-premises retailer's license.

Subchapter IV. Board-Created Moratoria

- 25-351. Board-created moratoria.
- 25-352. Procedures to request a moratorium.
- 25-353. Notice requirements for moratorium proceedings.
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Subchapter V. Involuntary Transfer

- 25-361. Involuntary transfer.

Subchapter VI. Moratorium on Establishments Which Permit Nude Dancing

- 25-371. Moratorium on establishments which permit nude dancing.
- 25-372. Nude dancing performances.
- 25-373. Transfer of ownership of establishments which permit nude dancing.
- 25-374. Transfer of location of establishments which permit nude dancing.

Subchapter I. Applicant Qualifications.

§ 25-301. General qualifications for all applicants.

(a) Before issuing, transferring to a new owner, or renewing a license, the Board shall determine that the applicant meets all of the following criteria:

- (1) The applicant is of good character and generally fit for the responsibilities of licensure.
- (2) The applicant is at least 21 years of age.
- (3) The applicant has not been convicted of any felony in the 10 years before filing the application.
- (4) The applicant has not been convicted of any misdemeanor bearing on fitness for licensure in the 5 years before filing the application.
- (5) Except in the case of an application for a solicitor's license, the applicant is the true and actual owner of the establishment for which the

license is sought, and he or she intends to carry on the business for himself or herself and not as the agent of any other individual, partnership, association, limited liability company, or corporation not identified in the application.

(6) The licensed establishment will be managed by the applicant in person or by a Board-licensed manager.

(7) The applicant has complied with all the requirements of this title and regulations issued under this title.

(b) Notwithstanding § 47-2861(1)(B), the Board shall not issue a license or permit to an applicant if the applicant has failed to file required District tax returns or owes more than \$ 100 in outstanding debt to the District as a result of the items specified in § 47-2862(a)(1) through (9), subject to the exceptions specified in § 47-2862(b).

(c) To determine whether an applicant for a new retailer or wholesaler license meets the criteria of subsection (a)(3) and (4) of this section, the Board may obtain criminal history records of criminal convictions maintained by the Federal Bureau of Investigation and the Metropolitan Police Department. The Board shall:

(1) Inform the applicant that a criminal background check will be conducted;

(2) Obtain written approval from the applicant to conduct a criminal background check;

(3) Coordinate with the Metropolitan Police Department to obtain a set of qualified fingerprints from the applicant; and

(4) Obtain any additional identifying information from the applicant that is required for the Metropolitan Police Department and the Federal Bureau of Investigation to complete a criminal background check.

(d) The Board shall coordinate with the Metropolitan Police Department to adopt procedures necessary to facilitate this objective.

(e) The fingerprint card shall not be maintained by the Board or by the Metropolitan Police Department and shall be returned to the applicant after the completion of the criminal background check.

(f) Once notified, the Board shall seal, set aside, expunge, and otherwise maintain any record received pursuant to this section so that the record is in compliance with any order issued by the Superior Court of the District of Columbia pursuant to a sealing, set aside, or expungement statute, including Chapter 8 of Title 16 and Chapter 9 of Title 24. Once notified, the Board shall also seal, set aside, expunge, and otherwise maintain any record received pursuant to this section so that the record is in compliance with any court order or official government request or statement from the jurisdiction that is the source of that record.

(g) The Board shall maintain the confidentiality of any information returned from the Metropolitan Police Department and the Federal Bureau of Investigation and use such information only for the purpose of determining whether the applicant satisfies the criteria set forth in subsection (a)(3) and (4) of this section.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat.

103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Mar. 2, 2007, D.C. Law 16-192, § 1012(a), 53 DCR 6899; Mar. 25, 2009, D.C. Law 17-353, § 132, 56 DCR 1117; Nov. 6, 2010, D.C. Law 18-259, § 6, 57 DCR 5591.)

Prior Codifications. — 1981 Ed., § 25-301. 1973 Ed., § 25-115.

Effect of amendments. — D.C. Law 16-192 designated subsec. (a); and added subsec. (b).

D.C. Law 17-353 validated a previously made technical correction in subsec. (b).

D.C. Law 18-259 added subsecs. (c), (d), (e), (f), and (g).

Emergency legislation. — For temporary (90 day) amendment of section, see § 1012(a) of Fiscal Year 2007 Budget Support Emergency Act of 2006 (D.C. Act 16-477, August 8, 2006, 53 DCR 7068).

For temporary (90 day) amendment of section, see § 1012(a) of Fiscal Year 2007 Budget Support Congressional Review Emergency Act of 2006 (D.C. Act 16-499, October 23, 2006, 53 DCR 8845).

For temporary (90 day) amendment of section, see § 1012(a) of Fiscal Year 2007 Budget Support Congressional Review Emergency Act of 2007 (D.C. Act 17-1, January 16, 2007, 54 DCR 1165).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 3-146. — Law 3-146, the “Alcoholic Beverage Control Board Rules of Procedure Amendments of 1980,” was introduced in Council and assigned Bill No. 3-165, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first, amended first and second readings on July 29, 1980, September 16, 1980 and September 30, 1980, respectively. Signed by the Mayor on October 21, 1980, it was assigned Act No. 3-267 and transmitted to both Houses of Congress for its review.

Legislative history of Law 4-157. — For legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 5-51. — For legislative history of D.C. Law 5-51, see Historical and Statutory Notes following § 25-206.

Legislative history of Law 5-97. — Law 5-97, the “Prohibition on the Sale of Alcoholic Beverages at Gasoline Stations Act of 1984,” was introduced in Council and assigned Bill

No. 5-70, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on April 10, 1984, and April 30, 1984, respectively. Signed by the Mayor on May 9, 1984, it was assigned Act No. 5-138 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-217. — For legislative history of D.C. Law 6-217, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 7-7. — Law 7-7, the “District of Columbia Alcoholic Beverage Control Act Temporary Amendment Act of 1987,” was introduced in Council and assigned Bill No. 7-142. The Bill was adopted on first and second readings on March 17, 1987, and March 31, 1987, respectively. Signed by the Mayor on April 15, 1987, it was assigned Act No. 7-17 and transmitted to both Houses of Congress for its review.

Legislative history of Law 9-174. — For legislative history of D.C. Law 9-174, see Historical and Statutory Notes following § 25-434.

Legislative history of Law 10-122. — For legislative history of D.C. Law 10-122, see Historical and Statutory Notes following § 25-785.

Legislative history of Law 12-261. — For legislative history of D.C. Law 12-261, see Historical and Statutory Notes following § 25-110.

Legislative history of Law 13-39. — Law 13-39, the “Alcoholic Beverage Control Act Tavern Exception Amendment Act of 1999” was introduced in Council and assigned Bill No. 13-242. The Bill was adopted on first, first amended and second readings on June 8, 1999, and July 6, 1999, respectively. Signed by the Mayor on July 14, 1999, it was assigned Act No. 13-295. D.C. Law 13-39 became effective on October 20, 1999.

Legislative history of Law 16-192. — Law 16-192, the “Fiscal Year Budget Support Act of 2006,” was introduced in Council and assigned Bill No. 16-679, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on May 9, 2006, and June 6, 2006, respectively. Signed by the Mayor on August 8, 2006, it was assigned Act

No. 16-476 and transmitted to both Houses of Congress for its review. D.C. Law 16-192 became effective on March 2, 2007.

Legislative history of Law 17-353. — For Law 17-353, see notes following § 25-113.

Legislative history of Law 18-259. — Law 18-259, the “Community Impact Statement Amendment Act of 2010”, was introduced in Council and assigned Bill No. 18-549, which

was referred to the Committee on Public Safety and the Judiciary. The Bill was adopted on first and second readings on May 4, 2010, and June 1, 2010, respectively. Signed by the Mayor on June 28, 2010, it was assigned Act No. 18-446 and transmitted to both Houses of Congress for its review. D.C. Law 18-259 became effective on November 6, 2010.

CASE NOTES

ANALYSIS

Administrative procedure.

Character and fitness.

Compliance with laws.

Conviction of crimes.

Due process.

In general.

Judicial review.

Renewals generally.

Sufficiency of evidence.

Administrative procedure.

In hearing on application for renewal of liquor license, which alcoholic beverage control board refused to renew on ground that applicant was not generally fit and did not have necessary good moral character, which conclusion was based in part upon alleged conspiracy with bootleggers not to make bookkeeping entries required by Internal Revenue Code, applicant's cross-examination of one of the alleged bootleggers, on question of bias, was not so restricted as to constitute lack of procedural due process. D.C. Code 1951, §§ 25-101 et seq., 25-115(a)(1); 26 U.S.C. § 2857(a). *Minkoff v. Payne*, 210 F.2d 689, 1953 U.S. App. LEXIS 3681 (C.A.D.C. 1953).

Where objectors did not raise as contested issue the question of liquor license applicant's character, thereby placing applicant and Alcoholic Beverage Control Board on notice of such challenge, objectors were not entitled to present evidence on character issue at hearing. D.C. Code 1981, §§ 25-115(b), (g)(1)(A), 25-116(a); D.C.Mun.Reg. title 23, §§ 1510.1. 1510.2. *Craig v. District of Columbia Alcoholic Bev. Control Bd.*, 721 A.2d 584, 1998 D.C. App. LEXIS 227 (1998).

Not only an Alcoholic Beverage Control Board finding of moral character and fitness, but any finding required by licensing statute, must be based only upon evidence in the public record of the proceeding, and participants in the proceeding must have an opportunity to address themselves to that evidence, otherwise fundamentals of due process are denied. D.C. Code §§ 1-1501, 1-1509(c), 25-115. *Citizens Asso. of Georgetown, Inc. v. District of Colum-*

bia Alcoholic Beverage Control Board, 288 A.2d 666, 1972 D.C. App. LEXIS 358 (1972).

Character and fitness.

Alcoholic Beverage Control Board had obligation to determine that liquor license applicant was of good moral character and generally fit for responsibilities of licensure before issuing license, regardless of whether anyone made character challenge. D.C. Code 1981, §§ 25-115(b), (g)(1)(A), 25-116(a); D.C.Mun.Reg. title 23, §§ 1510.1. 1510.2. *Craig v. District of Columbia Alcoholic Bev. Control Bd.*, 721 A.2d 584, 1998 D.C. App. LEXIS 227 (1998).

Alcoholic Beverage Control Board did not abuse its discretion in finding liquor license applicant was more than qualified to receive Class B license, where applicant met fitness requirements set forth in Alcoholic Beverage Control Act, relating to applicant's age, criminal record, moral character, and interest in business seeking license, and where applicant had been Maryland police officer for 11 years and was fully familiar with district's laws relating to sale of alcoholic beverages, hours that they may be sold, and age limitations for purchasers. D.C. Code 1981, § 25-115(a)(1-4). *Gerber v. District of Columbia Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1985 D.C. App. LEXIS 528 (1985).

Under statutory provision that liquor license may be granted only to persons of good moral character or good reputation, an applicant must satisfy the licensing authorities as to his fitness. D.C. Code § 25-115. *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 288 A.2d 666, 1972 D.C. App. LEXIS 358 (1972).

Compliance with laws.

In application for renewal of liquor license, evidence supported alcoholic beverage control board's determination, based upon applicant's having made false recordings of entries in business books and records and having conspired with bootleggers not to make required entries in violation of Internal Revenue Code, that applicant was not of good moral character and was generally unfit for the trust to be reposed in him by renewal. D.C. Code 1951, §§ 25-104, 25-115(a)(1); 26 U.S.C. §§ 5114(a), 5285(b),

5621. *Minkoff v. Payne*, 210 F.2d 689, 1953 U.S. App. LEXIS 3681 (C.A.D.C. 1953).

Conviction of crimes.

Consideration of compromise of criminal charge against applicant for renewal of liquor license that applicant had failed to keep records required by Internal Revenue Code along with ample testimony of alleged bootleggers concerning applicant's agreement not to keep certain records as required did not invalidate alcoholic beverage control board's determination, based in part upon applicant's failure to keep required records, that applicant was not of good moral character and was not generally fit for the trust to be reposed in him by renewal. D.C. Code 1951, §§ 25-104, 25-115(a)(1); 26 U.S.C. §§ 5114(a), 5285(b), 5621. *Minkoff v. Payne*, 210 F.2d 689, 1953 U.S. App. LEXIS 3681 (C.A.D.C. 1953).

Due process.

Night club owner had no due process property interest in liquor license, which was allegedly revoked by District of Columbia Alcoholic Beverage Regulation Administration; District of Columbia law did not vest either an applicant with an entitlement to acquire a license or a licensee with an entitlement to maintain a license. *Jones v. Delaney*, 610 F.Supp.2d 46, 2009 U.S. Dist. LEXIS 33507 (2009).

In general.

Before issuing liquor license to restaurant that was operating in residential area under certificate of occupancy, Alcoholic Beverage Control Board was required to be satisfied that all statutory requirements had been met. D.C. Code 1981, §§ 25-115(b), (g)(1)(A), 25-116(a); D.C.Mun.Reg. title 23, §§ 1510.1, 1510.2. *Craig v. District of Columbia Alcoholic Bev. Control Bd.*, 721 A.2d 584, 1998 D.C. App. LEXIS 227 (1998).

Personal qualifications applicant must meet in order to be issued liquor license under Alcoholic Beverage Control Act, relating to applicant's age, criminal record, moral character, and interest in business, are in nature of minimum requirement for license, and cannot be construed to be exclusive. D.C. Code 1981, § 25-115(a)(1-4). *Gerber v. District of Columbia Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1985 D.C. App. LEXIS 528 (1985).

Alcoholic Beverage Control Board did not abuse discretion by granting liquor license to applicant, even though previous applicant was denied license for same location, where character of applicants and nature of premises differed substantially. D.C. Code 1981, § 25-115(a)(1-4). *Gerber v. District of Columbia Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1985 D.C. App. LEXIS 528 (1985).

Fact that alcoholic beverage control board granted a liquor license to a restaurant adja-

cent to location of much larger proposed restaurant did not render denial of a license to the latter arbitrary where qualifications of applicants and character of restaurants were different. D.C. Code § 25-115(a)(6). *Sophia's Inc. v. Alcoholic Beverage Control Board*, 268 A.2d 799, 1970 D.C. App. LEXIS 333 (App. 1970).

Judicial review.

In suit to enjoin alcoholic beverage control board from putting into effect its decision denying renewal of liquor license, which decision was based upon statutory ground that licensee did not have necessary good moral character and was not generally fit for the trust to be reposed in him by renewal, question before court was whether findings of board were so arbitrary or capricious, or so unsupported by evidence, as to be unwarranted as matter of law. D.C. Code 1951, §§ 25-104, 25-106, 25-115(a) (1). *Minkoff v. Payne*, 210 F.2d 689, 1953 U.S. App. LEXIS 3681 (C.A.D.C. 1953).

Validity of action of District of Columbia Alcoholic Beverage Control Board in issuing liquor license was not mooted as issue by virtue of fact that, after license was initially issued and before court review of Board's action was completed, license was renewed and renewal was not contested. D.C. Code §§ 11-101(2)(A), 11-705(b), 25-111(g), 25-115(b); U.S. Const. art. 1, § 1 et seq.; art. 3, § 1 et seq. *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

Renewals generally.

In determining whether to grant liquor store's application for renewal of retail liquor license, Alcoholic Beverage Control Board was required to consider evidence of liquor store's violation of provision of voluntary agreement between store and community organizations, entered during earlier renewal proceedings, which required store to refrain from selling single-serving containers of alcohol, where agreement was ratified by Board. D.C. Code 1981, §§ 25-115(b)(1)(G), (g)(1)(D); D.C. Mun. Regs. title 23, § 1513.3. *North Lincoln Park Neighborhood Ass'n v. Alcoholic Beverage Control Bd.*, 666 A.2d 63, 1995 D.C. App. LEXIS 209 (1995), remanded by 727 A.2d 872, 1999 D.C. App. LEXIS 80 (D.C. 1999).

In renewing liquor license, Alcoholic Beverage Control Board must consider licensee's record of compliance with terms of license itself, and with all conditions incorporated into license by Board-approved voluntary agreements between licensee and other interested parties. D.C. Code 1981, §§ 25-115(b)(1)(G), (g)(1)(D); D.C. Mun. Regs. title 23, § 1513.3. *North Lincoln Park Neighborhood Ass'n v. Alcoholic Beverage Control Bd.*, 666 A.2d 63, 1995

D.C. App. LEXIS 209 (1995), remanded by 727 A.2d 872, 1999 D.C. App. LEXIS 80 (D.C. 1999).

Sufficiency of evidence.

Substantial evidence supported Alcoholic Beverage Control Board's decision to grant liquor license where there was uncontested evi-

dence of applicant's fitness and of good character of premises, and there was evidence of substantial neighborhood support for license. D.C. Code 1981, § 25-115(a). *Gerber v. District of Columbia Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1985 D.C. App. LEXIS 528 (1985).

§ 25-302. Special qualifications for wholesaler's or retailer's licenses.

In the case of an application for a wholesaler's license or for a retailer's license of any class, except a temporary license, before issuing, transferring to a new owner, or renewing a license, the Board shall further determine that:

(1) No manufacturer, wholesaler, or shareholder holding 25% or more of the common stock of, or equity interest in, a manufacturer or wholesaler, or officer of a manufacturer or wholesaler corporation, or partner or member of a partnership or limited liability company owning 25% or more of its equity interest, has such a substantial interest, direct or indirect, in the applicant's business or establishment that the applicant would be influenced to purchase alcoholic beverages from the manufacturer or wholesaler; and

(2) The business for which the license is sought has not been, and will not be, conducted with money, equipment, furniture, fixtures, or property (A) rented from, (B) loaned from, (C) given by, or (D) sold for less than fair market value, upon a conditional sale agreement, or a chattel trust from, a manufacturer, wholesaler, shareholder holding 25% or more of the common stock of, or equity interest in, a manufacturer or wholesaler, or officer of a manufacturer or wholesaler corporation, or partner or member of a partnership or limited liability company owning 25% or more of its equity interest.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-302.
1973 Ed., § 25-115.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-303. Restrictions on holding a conflicting interest.

(a) Before issuing, transferring to a new owner, or renewing a license, the Board shall determine that the applicant is not disqualified because of a conflicting interest in another license, as follows:

(1) No licensee under a manufacturer's or wholesaler's license shall hold a license of any other class or kind.

(2) No licensee under an on-premises retailer's license, class C or D, shall hold any other license except an on-premises retailer's license, class C or D, or a caterer's license.

(3) No licensee under an off-premises retailer's license, class A or B, shall hold an interest in any other license.

(b) The Board shall not reject, solely on the basis of this section, the application of a franchisee who controls, or will control, the entire interest in the receipts, profits, inventory, purchases, pricing, and sales of beverages under the license, if the franchisee held a license, or had an application for a license pending, on June 22, 1982.

(c) The requirements of this section shall not apply to an applicant for an off-premises retailer's license, class B, for the sale of alcoholic beverages in an establishment if:

(1) The primary business and purpose is the sale of a full range of fresh, canned, and frozen food items, and the sale of alcoholic beverages is incidental to the primary purpose;

(2) The sale of alcoholic beverages constitutes no more than 15% of the total volume of gross receipts on an annual basis;

(3) The establishment is located in a C-1, C-2, C-3, C-4, or C-5 zone or, if located within the Southeast Federal Center, in the SEFC/C-R zone;

(4) The establishment is a full service grocery store which is newly constructed with a certificate of occupancy issued after January 1, 2000, or is an existing store which has undergone renovations in excess of \$500,000 after January 1, 2000;

(5) The opinion of the ANC, if any, has been given great weight; and

(6) The applicant does not hold a manufacturer's or wholesaler's license.

(d)(1) A manufacturer, or its affiliate, licensed under this title, may hold an interest in a limited partnership providing financial assistance to a general partner wholesaler as described in paragraph (2) of this subsection, but shall only exercise such control of the limited partnership business as is permitted by this chapter. The limited partner shall not have or exercise managerial control or decision-making authority with respect to daily operations of the limited partnership. Upon a default by the general partner wholesaler, the limited partner shall not acquire or assume additional control, ownership, or financial interest in the limited partnership. The manufacturer, or its affiliate licensed in the District shall not have a financial or ownership interest in the general partner wholesaler.

(2) The only financial assistance allowed pursuant to paragraph (1) of this subsection shall be the initial financial assistance to the limited partnership to acquire a licensed beer wholesaler. In that arrangement for financial assistance, the wholesaler license issued under this title shall be issued in the name of the general partner wholesaler on behalf of the limited partnership, and shall not be issued in the name of the limited partnership nor in the name of the manufacturer, or its affiliate.

(3) The limited partnership providing the financial assistance described

in this section shall not exist for more than 10 years from the date of its creation, and shall not be recreated, renewed, or extended beyond that date.

(4) This section shall not amend or otherwise alter this title, except for the limited purpose of allowing a manufacturer, or its affiliate, which is licensed in the District, to provide financial assistance to a limited partnership for the exclusive purpose of acquiring a licensed beer wholesaler. A manufacturer or its affiliate shall not require the wholesaler to use the financial assistance as described above.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 12; Sept. 29, 1982, D.C. Law 4-157, § 7, 29 DCR 3617; Mar. 7, 1987, D.C. Law 6-217, § 7, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(c), 38 DCR 4974; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 1, 2002, D.C. Law 14-190, § 1702(e), 49 DCR 6968; Sept. 30, 2004, D.C. Law 15-187, § 101(i), 51 DCR 6525; Mar. 25, 2009, D.C. Law 17-361, § 2(b), 56 DCR 1204; Oct. 20, 2011, D.C. Law 19-23, § 2(b), 58 DCR 6509.)

Prior Codifications. — 1981 Ed., § 25-303. 1973 Ed., § 25-113.

Effect of amendments. — D.C. Law 14-190, in subsec. (c), substituted “during the preceding 12 months” for “in the calendar year” and made a nonsubstantive change in par. (4), made a nonsubstantive change in par. (5), and added par. (6).

D.C. Law 15-187 rewrote par. (5) of subsec. (c); and added subsec. (d). Prior to amendment, par. (5) of subsec. (c) had read as follows: “(5) The opinion of the ANC in which the establishment is located has been given great weight as specified in Chapter 4; and”.

D.C. Law 17-361, in subsec. (c)(4), substituted “after January 1, 2000” for “during the preceding 12 months in which an application is made”.

D.C. Law 19-23, in subsec. (c)(3), substituted “or, if located within the Southeast Federal Center, in the SEFC/C-R zone,” for a semicolon; and, in subsec. (c)(5), substituted “weight; and” for “weight.”

Temporary Amendment of Section. — Section 2 of D.C. Law 13-145 added subsec. (d) to read as follows:

“(d)(1) The requirements of this section shall not apply to an applicant for an off-premises retailer’s license, Class B for the sale of alcoholic beverages in an establishment:

“(A) Where the primary business and purpose is the sale of a full range of fresh, canned, and frozen food items, and where the sale of alcoholic beverages is incidental to the primary purpose;

“(B) Where the sale of alcoholic beverages constitutes no more than 15% of the total volume of gross receipts on an annual basis;

“(C) Where the establishment is located in a C-1, C-2, C-3, C-4, or C-5 zone;

“(D) Where the establishment is a newly constructed, full-service grocery store with a

Certificate of Occupancy issued after January 1, 2000; and

“(E) When the decision of the Advisory Neighborhood Commission in which the establishment is located has been given great weight.

“(2) The exemption in paragraph (1) of this subsection shall not apply to a grocery store which has its structure replaced or has substantially altered its structure as the result of a renovation.”

Section 5(b) of D.C. Law 13-145 provided that the act shall expire after 225 days of its having taken effect.

Section 2(b) of D.C. Law 18-346, in subsec. (c)(3), substituted “or, if located within the Southeast Federal Center, in the SEFC/C-R zone,” for a semicolon; and, in subsec. (c)(5), substituted “; and” for a period at the end.

Section 4(b) of D.C. Law 18-346 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90-day) amendment of section, see § 2 of the Alcoholic Beverage Control New Grocery Store Development Emergency Amendment Act of 2000 (D.C. Act 13-306, April 7, 2000, 47 DCR 2706).

For temporary (90-day) amendment of section, see § 2 of the Alcoholic Beverage Control New Grocery Store Development Congressional Review Emergency Amendment Act of 2000 (D.C. Act 13-369, July 10, 2000, 47 DCR 5834).

For temporary (90 day) amendment of section, see § 1702(e) of Fiscal Year 2003 Budget Support Emergency Act of 2002 (D.C. Act 14-453, July 23, 2002, 49 DCR 8026).

For temporary (90 day) amendment of section, see § 2(b) of Southeast Federal Center/Yards Non-Discriminatory Grocery Store Emergency Act of 2010 (D.C. Act 18-674, December 28, 2010, 58 DCR 130).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-157. — For legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 6-217. — For legislative history of D.C. Law 6-217, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 9-40. — For legislative history of D.C. Law 9-40, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 14-190. — For Law 14-190, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 17-361. — For Law 17-361, see notes following § 25-113.

Legislative history of Law 19-23. — For history of Law 19-23, see notes under § 25-101.

CASE NOTES

ANALYSIS

Interest.

Reconsideration.

Interest.

In proceeding in which Alcoholic Beverage Control Board granted class B beverage license, finding to effect that applicant no longer had any interest in certain retailer so as to be ineligible for “second” retail liquor license was supported by substantial evidence, including copies of income tax returns. D.C. Code § 25-113(b). *Spevak v. District of Columbia Alcoholic Beverage Control Board*, 407 A.2d 549, 1979 D.C. App. LEXIS 449 (1979).

Reconsideration.

In regard to situation in which Alcoholic

Beverage Control Board had reversed itself and denied application for class B beverage license on basis of Board’s determination that evidence in regard to loan payments, which ended the potential for applicant to gain control over a class A retailer and thereby violate statutory ban on dual licensing of class A and class B retailers, was not properly before Board, such loan payment could properly be regarded as “new evidence” within meaning of rule forbidding reconsideration of a denied application for one year except if new pertinent evidence was presented. D.C. Code §§ 25-113, 25-113(b). *Spevak v. District of Columbia Alcoholic Beverage Control Board*, 407 A.2d 549, 1979 D.C. App. LEXIS 449 (1979).

Subchapter II. Qualification of Establishment.

§ 25-311. General provisions — Qualification of establishment.

(a) Unless expressly stated otherwise in this chapter, the applicant shall bear the burden of proving to the satisfaction of the Board that the establishment for which the license is sought is appropriate for the locality, section, or portion of the District where it is to be located; provided, that if proper notice has been given under subchapter II of Chapter 4, and no objection to the appropriateness of the establishment is filed with the Board, the establishment shall be presumed to be appropriate for the locality, section, or portion of the District where it is located.

(b) Before evaluating the appropriateness of the establishment for which the license is sought, the Board shall ensure that the applicant has complied fully with the notification requirements set forth in § 25-422 [repealed].

(c) No license, except a solicitor’s license, shall be issued to an applicant unless the applicant has a valid certificate of occupancy for the premises in which the establishment is located and has all other licenses and permits required by law or regulation for its business.

(d) If a temporary license is sought for an outdoor event or a private residential home used for non-commercial purposes, the applicant shall not be required to provide a valid certificate of occupancy.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch.

766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(j), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-311. 1973 Ed., § 25-115.

Effect of amendments. — D.C. Law 15-187, in subsec. (c), deleted “or a temporary license” following “solicitor’s license”; and added subsec. (d).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

§ 25-312. Defining size of area relevant to determination of appropriateness.

(a) The Board shall determine, on a case-by-case basis, whether the locality, section, or portion proposed by the applicant is a competent measure for determining the appropriateness of the establishment and, if not, shall identify the proper boundaries of the locality, section, or portion for evaluating the application. In making this determination, the Board shall consider the overall characteristics of the area, including population, density, and general commercial and residential activities.

(b) In establishing any geographic boundaries required by this title, the Board shall measure the specified distance in an arc from each corner of the lot or parcel on which the establishment is located, connecting the arcs by tangent lines.

(c) If the Board is required to state the distance between one or more places, (such as the actual distance of one licensed establishment from another or the actual distance of a licensed establishment from a school), the distance shall be measured linearly and shall be the shortest distance between the property lines of the places.

(d) If a boundary line measured by the Board touches upon any portion of a parcel or lot, the parcel or lot shall be within the area being identified by the Board.

(e) In submitting evidence of appropriateness, the applicant shall propose the boundaries of the locality, section, or portion to be considered.

(f) Any person may submit written objections to the boundaries proposed by the applicant or a written proposal listing alternative boundaries for consideration by the Board.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV,

§ 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-312.
1973 Ed., § 25-115.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-313. Appropriateness standard.

(a) To qualify for issuance, renewal of a license, transfer of a license to a new location, or an application for the approval of a substantial change in operation as determined by the Board under § 25-404, an applicant shall demonstrate to the satisfaction of the Board that the establishment is appropriate for the locality, section, or portion of the District where it is to be located.

(b) In determining the appropriateness of an establishment, the Board shall consider all relevant evidence of record, including:

- (1) The effect of the establishment on real property values;
- (2) The effect of the establishment on peace, order, and quiet, including the noise and litter provisions set forth in §§ 25-725 and 25-726;
- (3) The effect of the establishment upon residential parking needs and vehicular and pedestrian safety; and
- (4) In the case of a license renewal, the provisions of this subsection and § 25-315.

(c)(1) The requirements of this section shall not apply to applicants for a solicitor's license or a temporary license.

(2) Applicants for a caterer's license shall apply according to the procedures under Chapter 20 of the District of Columbia Municipal Regulations.

(d) No license shall be issued for an outlet, property, establishment, or business which sells motor vehicle gasoline or which holds a Motor Vehicle Sales, Service, and Repair endorsement under § 47-2851.03(c)(9) [now § 47-2851.03(a)(9)] or an Environmental Materials endorsement under § 47-2851.03(c)(4) [now § 47-2851.03(a)(4)] to its master [basic] business license.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 1, 2002, D.C. Law

14-190, § 1702(f), 49 DCR 6968; Sept. 30, 2004, D.C. Law 15-187, § 201(a), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-313. 1973 Ed., § 25-115.

Effect of amendments. — D.C. Law 14-190, in subsec. (a), substituted “, transfer of a license to a new location,” for “, new owner license renewal.”

D.C. Law 15-187 designated the existing text of subsec. (c) as par. (1); and added par. (2) of subsec. (c).

Emergency legislation. — For temporary

(90 day) amendment of section, see § 1702(f) of Fiscal Year 2003 Budget Support Emergency Act of 2002 (D.C. Act 14-453, July 23, 2002, 49 DCR 8026).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 14-190. — For Law 14-190, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

CASE NOTES

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Administrative procedure.

It is not improper for Alcoholic Beverage Control Board member to become familiar with surroundings in which potential licensee will operate by personally inspecting site, so long as information obtained by inspection is placed on record at hearing, and applicant is given opportunity to controvert it by other evidence or argument. D.C. Code 1981, §§ 1-261(d), 25-111(a)(6). *Park v. District of Columbia Alcoholic Beverage Control Bd.*, 555 A.2d 1029, 1989 D.C. App. LEXIS 49 (1989).

Alcoholic Beverage Control Board's refusal, in liquor license renewal proceeding, to permit restaurant owner to examine for impeachment purposes notes of detective who conducted undercover investigation of drug trafficking activities at restaurant by its employees and patrons under Jencks Act was not reversible error, where testimony by another police officer and several other witnesses corroborated detective's testimony concerning alleged drug activity. D.C. Code 1981, §§ 1-1510(b), 25-115(a); 18 U.S.C. § 3500. *K.G.S., Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 531 A.2d 1001, 1987 D.C. App. LEXIS 454 (1987).

Alcoholic Beverage Control Board erred in allowing one of its members to elicit testimony concerning race and residency of restaurant's patrons at hearing to determine whether to renew restaurant's liquor license, but error was not reversible, where Board did not rely on the

testimony in its findings of fact and conclusions of law. D.C. Code 1981, §§ 25-111(a)(7), 25-115(a)(6). *K.G.S., Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 531 A.2d 1001, 1987 D.C. App. LEXIS 454 (1987).

Alcoholic Beverage Control Board could consider petition in favor of granting applicant Class B liquor license, though only about ten percent of signatures were from persons residing within 600-foot radius of applicant's premises, where approximately 300 signatures were from persons within six blocks of premises. D.C. Code 1981, § 25-115(a)(6). *Gerber v. District of Columbia Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1985 D.C. App. LEXIS 528 (1985).

Erroneous findings of Alcoholic Beverage Control Board regarding the status of public hall license and allegations that patrons left establishment in intoxicated state were not prejudicial, where Board's conclusion that establishment was inappropriate place for reissuance of liquor license was supported by findings concerning noise, litter, public urination and defecation by patrons, illegal parking, inadequate parking facilities, vandalism, and neighborhood opposition. D.C. Code 1981, §§ 25-111(a)(7), 25-115(a)(6). *Gerber v. District of Columbia Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1985 D.C. App. LEXIS 528 (1985).

In granting class C liquor license for hotel restaurant, the Alcoholic Beverage Control Board adequately addressed and made findings on question of whether presence of license would alter character of neighborhood and with respect to issues and concerns raised by advisory neighborhood commission. D.C. Code 1981, §§ 1-261(d), 25-115(a)(6). *Foggy Bottom Asso. v. District of Columbia Alcoholic Beverage Control Bd.*, 445 A.2d 643, 1982 D.C. App. LEXIS 351 (1982).

Appropriateness generally.

Restaurant's use of nude “go-go” dancers did not make restaurant's location inappropriate

and, thus, did not preclude issuance of class C liquor license to restaurant under D.C. Code 1981, § 25-115(a)(6), where such dancing was not illegal under applicable zoning regulations. *Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

Evidence supported finding of alcoholic beverage control board that granting of liquor license to sixty-one seat restaurant which was already in operation, which had lease not contingent upon granting of liquor license, which had provisions for parking and which was operated by owner of another successful restaurant was unlikely to contribute significantly to problems of area. D.C. Code § 25-115(a). *Citizens Asso. of Georgetown, Inc. v. Alcoholic Beverage Control Board*, 268 A.2d 801, 1970 D.C. App. LEXIS 332 (App. 1970).

In view of express wishes of neighborhood residents and property owners against granting of liquor license, evidence supported finding of alcoholic beverage control board that proposed restaurant which could accommodate up to 480 persons, which had indefinite arrangements for off-street parking and which would be located in area containing 6,000 existing liquor service seats was an inappropriate place for issuance of liquor license. D.C. Code § 25-115(a)(6). *Citizens Asso. of Georgetown, Inc. v. Alcoholic Beverage Control Board*, 268 A.2d 801, 1970 D.C. App. LEXIS 332 (App. 1970).

Construction and application.

Nature and identity of the parties, nature of their rights, and nature of impact of the change in law upon those rights weighed in favor of finding that referendum petitioners were unlikely to suffer manifest injustice from application of Omnibus Alcoholic Beverage Amendment Act of 2004, which eliminated referendum process as a means of challenging liquor license applications, even though their petition was already circulated and pending before the Alcoholic Beverage Control Board; statute governing referendum process did not create any unconditional or vested rights for its participants, and Act left petitioners able to voice their objections through protest process. *Holzager v. D.C. Alcoholic Bev. Control Bd.*, 979 A.2d 52, 2009 D.C. App. LEXIS 363 (2009).

In general.

Before issuing liquor license to restaurant that was operating in residential area under certificate of occupancy, Alcoholic Beverage Control Board was required to be satisfied that all statutory requirements were been met. D.C. Code 1981, §§ 25-115(b), (g)(1)(A), 25-116(a); D.C. Mun. Regs. title 23, §§ 1510.1, 1510.2. *Craig v. District of Columbia Alcoholic Bev. Control Bd.*, 721 A.2d 584, 1998 D.C. App. LEXIS 227 (1998).

Alcoholic Beverage Control Board did not abuse discretion by granting liquor license to applicant, even though previous applicant was denied license for same location, where character of applicants and nature of premises differed substantially. D.C. Code 1981, § 25-115(a)(1-4). *Gerber v. District of Columbia Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1985 D.C. App. LEXIS 528 (1985).

Fact that alcoholic beverage control board granted a liquor license to a restaurant adjacent to location of much larger proposed restaurant did not render denial of a license to the latter arbitrary where qualifications of applicants and character of restaurants were different. D.C. Code § 25-115(a)(6). *Sophia's Inc. v. Alcoholic Beverage Control Board*, 268 A.2d 799, 1970 D.C. App. LEXIS 333 (App. 1970).

Judicial review.

Remarks by member of Alcoholic Beverage Control Board, who was also member of Advisory Neighborhood Commission (ANC) which opposed application for liquor license, to effect that conditions in area of license applicant's business were worse than indicated by Board investigator, could not be ground for reversal of Board's denial of application; applicants did not show that positions held by member were so incompatible as to overcome presumption that Board members acted fairly in ruling on application. D.C. Code 1981, § 25-111(a)(6). *Park v. District of Columbia Alcoholic Beverage Control Bd.*, 555 A.2d 1029, 1989 D.C. App. LEXIS 49 (1989).

Advisory neighborhood commission had no capacity to seek court review of action of District of Columbia Alcoholic Beverage Control Board in issuing liquor license; area residents who were commission members, however, had standing to initiate such review and to assert rights of commission itself. D.C. Code §§ 1-171a et seq., 1-171i(g), 1-1502(9), 1-1510, 25-111(g), 25-114, 25-115(b); D.C. Code Court of Appeals Rules, rule 15. *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

Validity of action of District of Columbia Alcoholic Beverage Control Board in issuing liquor license was not mooted as issue by virtue of fact that, after license was initially issued and before court review of Board's action was completed, license was renewed and renewal was not contested. D.C. Code §§ 11-101(2)(A), 11-705(b), 25-111(g), 25-115(b); U.S. Const. art. 1, § 1 et seq.; art. 3, § 1 et seq. *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

Parking needs.

Evidence concerning problems associated with parking was sufficient to support finding

of Alcoholic Beverage Control Board at hearing upon establishment's application for reissuance of liquor license that establishment had not provided adequate parking facilities for its patrons, even though establishment cited implementation of prior agreement with community on parking, absent evidence that parking facilities for patrons had been or could be found in the neighborhood. D.C. Code 1981, §§ 25-111(a)(7), 25-115(a)(6). *LCP, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 499 A.2d 897, 1985 D.C. App. LEXIS 525 (1985).

Record supported finding that issue of parking did not render restaurant's location inappropriate so as to preclude renewal of restaurant's class C liquor license under D.C. Code 1981, § 25-115(a)(6); no evidence demonstrated how many employees worked at same time, whether employees drove their cars to work, or whether restaurant had ever been filled to capacity so as to render restaurant's 30 parking spaces insufficient. *Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

Peace, order, and quiet.

Substantial evidence established that restaurant was inappropriate for its neighborhood and supported Alcoholic Beverage Control Board's decision to deny renewal of restaurant's liquor license; restaurant patrons had engaged in public urination, drinking and discarding trash in adjacent parking lot, and accosting persons in cars that had stopped outside the premises, restaurant had served patrons who were intoxicated, ejected drunk patrons into neighborhood, and had served at least one under-age individual. D.C. Code 1981, §§ 1-1510(a)(3)(E), (b), 25-115(a), 25-121(a). *K.G.S., Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 531 A.2d 1001, 1987 D.C. App. LEXIS 454 (1987).

Disorderly behavior of restaurant patrons, allegedly involving harassment of neighborhood residents and urinating in public, did not render location of restaurant inappropriate so as to preclude renewal of restaurant's class C liquor license under D.C. Code 1981, § 25-115(a)(6), where restaurant owners had sought to alleviate such problems by hiring off-duty police officer to patrol outside of premises, and investigator for Alcoholic Beverage Control Board found no evidence of such activity in his several visits to the restaurant. *Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

Disorderly conduct of patrons proceeding to and departing from establishment was properly considered by Alcoholic Beverage Control Board in determining that establishment was not appropriate place for reissuance of liquor

license. D.C. Code 1981, §§ 25-111(a)(7), 25-115(a)(6). *LCP, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 499 A.2d 897, 1985 D.C. App. LEXIS 525 (1985).

Renewals generally.

Doctrines of *res judicata* and collateral estoppel did not bar alcoholic beverage control board from concluding, on petitioner's liquor license renewal, that petitioner's restaurant adversely affected peace, order, and quiet of neighborhood, despite fact that past boards had concluded that restaurant was appropriate for neighborhood; prior adjudications were subject to modification and reexamination, and before renewing license after two-year period of licensure, board had to make new findings, separate and apart from any prior findings, regarding restaurant's appropriateness for neighborhood. *Gallothom, Inc. v. D.C. Alcoholic Bev. Control Bd.*, 820 A.2d 530, 2003 D.C. App. LEXIS 142 (2003).

In determining whether to grant liquor store's application for renewal of retail liquor license, Alcoholic Beverage Control Board was required to consider evidence of liquor store's violation of provision of voluntary agreement between store and community organizations, entered during earlier renewal proceedings, which required store to refrain from selling single-serving containers of alcohol, where agreement was ratified by Board. D.C. Code 1981, §§ 25-115(b)(1)(G), (g)(1)(D); D.C. Mun. Regs. title 23, § 1513.3. *North Lincoln Park Neighborhood Ass'n v. Alcoholic Beverage Control Bd.*, 666 A.2d 63, 1995 D.C. App. LEXIS 209 (1995), remanded by 727 A.2d 872, 1999 D.C. App. LEXIS 80 (D.C. 1999).

In renewing liquor license, Alcoholic Beverage Control Board must consider licensee's record of compliance with terms of license itself, and with all conditions incorporated into license by Board-approved voluntary agreements between licensee and other interested parties. D.C. Code 1981, §§ 25-115(b)(1)(G), (g)(1)(D); D.C. Mun. Regs. title 23, § 1513.3. *North Lincoln Park Neighborhood Ass'n v. Alcoholic Beverage Control Bd.*, 666 A.2d 63, 1995 D.C. App. LEXIS 209 (1995), remanded by 727 A.2d 872, 1999 D.C. App. LEXIS 80 (D.C. 1999).

Statute permitting denial of liquor license if establishment in question is not appropriate for its neighborhood applied to renewal of liquor license. D.C. Code 1981, §§ 1-1510(b), 25-115(a), 25-121(a). *K.G.S., Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 531 A.2d 1001, 1987 D.C. App. LEXIS 454 (1987).

Under D.C. Code 1981, § 25-115(a)(6), Alcoholic Beverage Control Board, in determining whether to renew restaurant's class C liquor license, could have disregarded entirely the views of neighborhood residents, particularly those who did not live in immediate area of the

restaurant. Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd., 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

Fact that plumbing facilities at establishment were in compliance with applicable zoning regulations did not preclude finding of Alcoholic Beverage Control Board that plumbing facilities were inadequate to render establishment appropriate for reissuance of license. D.C. Code 1981, §§ 25-111(a)(7), 25-115(a)(6). LCP, Inc. v. District of Columbia Alcoholic Beverage Control Bd., 499 A.2d 897, 1985 D.C. App. LEXIS 525 (1985).

Sufficiency of evidence.

Testimony of witness that patrons were responsible for vandalism of car owned by neighborhood resident was sufficient to support finding of Alcoholic Beverage Control Board upon application for reissuance of liquor license that presence of establishment contributed to vandalism. D.C. Code 1981, §§ 25-111(a)(7), 25-115(a)(6). LCP, Inc. v. District of Columbia Alcoholic Beverage Control Bd., 499 A.2d 897, 1985 D.C. App. LEXIS 525 (1985).

Substantial evidence supported Alcoholic Beverage Control Board's decision to grant liquor license where there was uncontested evidence of applicant's fitness and of good character of premises, and there was evidence of substantial neighborhood support for license. D.C. Code 1981, § 25-115(a). LCP, Inc. v. District of Columbia Alcoholic Beverage Control Bd., 499 A.2d 897, 1985 D.C. App. LEXIS 525 (1985).

Substantial evidence regarding nature of neighborhood, number of current liquor outlets, potential effect on children, and existence of neighborhood opposition supported Alcoholic Beverage Control Board's denial of retailer's license to sell beer and light wines at store in mixed residential and commercial area. D.C. Code 1981, § 25-115(a)(1-6). Muir v. District of Columbia Alcoholic Beverage Control Bd., 450 A.2d 412, 1982 D.C. App. LEXIS 430 (1982).

Transfer of license.

Under statute providing that Alcoholic Bev-

erage Control Board may consider character of premises, its surroundings and wishes of persons residing or owning property in neighborhood in reviewing application for transfer of license, Board, if it finds that two liquor stores within 300 feet proximity are inappropriate for particular neighborhood and must necessarily choose between competing applicants, each applicant must be given opportunity to show that his application should be favored so that specific public standards, not unbridled discretion, will control Board's consideration of license application. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. Pollack v. Simonson, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

In license transfer case, question is whether wishes of neighborhood and character of premises warrant granting of liquor license for locality; and previous location and history of store are beside the point. D.C. Code 1951, § 25-115(a)5, (c). Palisades Citizens Ass'n v. Weakly, 166 F.Supp. 591, 1958 U.S. Dist. LEXIS 3580 (D.D.C.1958).

Validity.

Statute [D.C. Code 1981, § 25-115(a)(6)] governing licensure of establishment serving alcohol, providing that license may be issued only where establishment is appropriate, considering character of premises, surroundings, and wishes of persons residing or owning property in the neighborhood, was not unconstitutionally vague as applied in denying application for reissuance of liquor license on grounds of noise, litter, vandalism, public urination and defecation by customers, parking violations, removal of alcoholic beverages, and neighborhood opposition, in view of numerous judicial and administrative interpretations proscribing nearly all conditions cited. D.C. Code 1981, § 25-111(a)(7). LCP, Inc. v. District of Columbia Alcoholic Beverage Control Bd., 499 A.2d 897, 1985 D.C. App. LEXIS 525 (1985).

§ 25-314. Additional considerations for new license application or transfer of license to a new location.

(a) In determining the appropriateness of an establishment for initial issuance of a license or a transfer of a license to a new location, the Board shall also consider the following:

- (1) The proximity of the establishment to schools, recreation centers, day care centers, public libraries, or other similar facilities;
- (2) The effect of the establishment on the operation and clientele of schools, recreation centers, day care centers, public libraries, or other similar facilities; and
- (3) Whether school-age children using facilities in proximity to the

establishment will be unduly attracted to the establishment while present at, or going to or from, the school, recreation center, day care center, public library, or similar facility at issue.

(4) Whether issuance of the license would create or contribute to an overconcentration of licensed establishments which is likely to affect adversely the locality, section, or portion in which the establishment is located.

(b)(1) No license shall be issued for any establishment within 400 feet of a public, private, or parochial primary, elementary, or high school; college or university; or recreation area operated by the District of Columbia Department of Parks and Recreation, except as provided in paragraphs (2) through (5) of this subsection.

(2) The 400-foot restriction shall not apply to a restaurant, hotel, club, caterer's, or temporary license.

(3) The 400-foot restriction shall not apply if there exists within 400 feet a currently-functioning establishment holding a license of the same class at the time that the new application is submitted.

(4) The 400-foot restriction shall not apply if:

(A) The applicant applies for an off-premises retailer's license, Class B;

(B) The primary business and purpose of the establishment is the sale of a full range of fresh, canned, and frozen food items, and the sale of alcoholic beverages is incidental to the primary purpose;

(C) The sale of alcoholic beverages constitutes no more than 15% of the total volume of gross receipts on an annual basis;

(D) The establishment is located in a C-1, C-2, C-3, C-4, or C-5 zone or, if located within the Southeast Federal Center, in the SEFC/C-R zone;

(E) The establishment is a full service grocery store which is newly constructed with a certificate of occupancy issued after January 1, 2000, or is an existing store which has undergone renovations in excess of \$500,000 (i) after January 1, 2000 and prior to [March 8, 2006], or (ii) during the preceding 12 months in which an application is made;

(F) The opinion of the ANC in which the establishment is located has been given great weight as specified in Chapter 4 [of this title]; and

(G) The applicant does not hold a manufacturer's or wholesaler's license.

(5) The 400-foot restriction shall not apply where the main entrance to the college, university, or recreation area, or the nearest property line of the school is actually on or occupies ground zoned commercial or industrial according to the official atlases of the Zoning Commission of the District of Columbia.

(c) In the case of applications for nightclub or tavern licenses, the Board shall consider whether the proximity of the establishment to a residence district, as identified in the zoning regulations of the District and shown in the official atlases of the Zoning Commission for the District, would generate a substantial adverse impact on the residents of the District.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV,

§ 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30 2004, D.C. Law 15-187, § 201(b), 51 DCR 6525; Mar. 8, 2006, D.C. Law 16-53, § 2, 53 DCR 3; Mar. 14, 2007, D.C. Law 16-271, § 2, 54 DCR 854; Oct. 20, 2011, D.C. Law 19-23, § 2(c), 58 DCR 6509.)

Prior Codifications. — 1981 Ed., § 25-314. 1973 Ed., § 25-115.

Effect of amendments. — D.C. Law 15-187 rewrote par. (2) of subsec. (b) which had read as follows: “(2) The 400-foot restriction shall not apply to hotel licenses, club licenses, or temporary licenses.”

D.C. Law 16-53 added subsec. (b)(4).

D.C. Law 16-271, in subsec. (b)(1), substituted “District of Columbia Department of Parks and Recreation, except as provided in paragraphs (2) through (5) of this subsection” for “D.C. Department of Recreation”; rewrote subsec. (b)(2); and added subsec. (b)(5). Prior to amendment, subsec. (b)(2) read as follows: “(2) The 400-foot restriction shall not apply to hotel licenses, club licenses, caterer’s licenses, or temporary licenses.”

D.C. Law 19-23, in subsec. (b)(4)(D), substituted “or, if located within the Southeast Federal Center, in the SEFC/C-R zone,” for a semicolon.

Temporary Amendment of Section. — Section 2 of D.C. Law 16-297, in subsec. (b), in par. (1), substituted “District of Columbia Department of Parks and Recreation; except, that,” for “D.C. Department of Recreation”, and amended par. (2) and added par. (5) to read as follows:

“(2) The 400-foot restriction shall not apply to a restaurant, hotel, club, caterer’s, or temporary license.”

“(5) The 400-foot restriction shall not apply where the main entrance to the college, university, or recreation area, or the nearest property line of the school is actually on or occupies ground zoned commercial or industrial according to the official atlases of the Zoning Commission for the District of Columbia.”

Section 4(b) of D.C. Law 16-297 provided that the act shall expire after 225 days of its having taken effect.

Section 2(c) of D.C. Law 18-346, in subsec. (b)(4)(D), substituted “or, if located within the

Southeast Federal Center, in the SEFC/C-R zone,” for a semicolon at the end.

Section 4(b) of D.C. Law 18-346 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2 of Commercial Exception Clarification Emergency Act of 2006 (D.C. Act 16-525, December 4, 2006, 53 DCR 9820).

For temporary (90 day) amendment of section, see § 2(c) of Southeast Federal Center/Yards Non-Discriminatory Grocery Store Emergency Act of 2010 (D.C. Act 18-674, December 28, 2010, 58 DCR 130).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 16-53. — Law 16-53, the “Full Service Grocery Store Alcohol License Exception Act of 2005”, was introduced in Council and assigned Bill No. 16-160 which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 1, 2005, and December 6, 2005, respectively. Signed by the Mayor on December 22, 2005, it was assigned Act No. 16-215 and transmitted to both Houses of Congress for its review. D.C. Law 16-53 became effective on March 8, 2006.

Legislative history of Law 16-271. — Law 16-271, the “Commercial Exception Clarification Amendment Act of 2006”, was introduced in Council and assigned Bill No. 16-696, which was referred to Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on December 5, 2006, and December 19, 2006, respectively. Signed by the Mayor on December 28, 2006, it was assigned Act No. 16-627 and transmitted to both Houses of Congress for its review. D.C. Law 16-271 became effective on March 14, 2007.

Legislative history of Law 19-23. — For history of Law 19-23, see notes under § 25-101.

CASE NOTES

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Administrative procedure.
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Administrative procedure.

Rejection by the Alcoholic Beverage Control Board, of application for a retailers' Class "C" license on ground that area was adequately serviced, was arbitrary and capricious, in absence of any evidence on the point. D.C. Code 1940, §§ 25-106, 25-115(a). *Clore Restaurant v. Payne*, 72 F.Supp. 677, 1947 U.S. Dist. LEXIS 2366 (D.D.C.1947).

It is not improper for Alcoholic Beverage Control Board member to become familiar with surroundings in which potential licensee will operate by personally inspecting site, so long as information obtained by inspection is placed on record at hearing, and applicant is given opportunity to controvert it by other evidence or argument. D.C. Code 1981, §§ 1-261(d), 25-111(a)(6). *Park v. District of Columbia Alcoholic Beverage Control Bd.*, 555 A.2d 1029, 1989 D.C. App. LEXIS 49 (1989).

Judicial review.

Citizens organization had standing to contest issuance of liquor license and could properly contest Alcoholic Beverage Control Board's actions in matter of meeting its statutory obligations procedurally and substantively, notwithstanding that association's opposition to license was based fundamentally upon its position that area of city was already saturated with establishments having liquor licenses, with attendant problems flowing from that condition. D.C. Code §§ 1-1510, 25-111. *Citizens Assn. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 288 A.2d 666, 1972 D.C. App. LEXIS 358 (1972).

New licenses.

Alcoholic Beverage Control Board is authorized to make finding that two liquor stores within 300 feet proximity are inappropriate for particular neighborhood, notwithstanding absence of any formal regulation promulgated by District Commissioners regarding necessary distances between liquor stores. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. *Pollack v. Simonson*, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

Transfers.

Where it was not suggested at separate hearings on applications to transfer liquor licenses that the two applications were mutually exclusive and no formal regulation required that liquor stores be situated more than 300 feet

apart, denial of plaintiffs' application on sole ground that license of other applicant had been issued for location less than 300 feet from plaintiffs' proposed location was improper for failure of Alcoholic Beverage Control Board to give proper notice to plaintiffs that it considered applications mutually exclusive. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. *Pollack v. Simonson*, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

In license transfer case, question is whether wishes of neighborhood and character of premises warrant granting of liquor license for locality; and previous location and history of store are beside the point. D.C. Code 1951, § 25-115(a)(5), (c). *Palisades Citizens Ass'n v. Weakly*, 166 F.Supp. 591, 1958 U.S. Dist. LEXIS 3580 (D.D.C.1958).

Testimony from several neighborhood residents that the area had enough licensed establishments and another would result in an over-concentration and evidence that the neighborhood was already struggling with loitering, public drinking, and trash problems attributable, at least in part, to other nearby establishments with retail licenses to sell alcoholic beverages supported denial of application to transfer Retailer's Class B license to sell beer and light wine. *Tiger Wyk Ltd. v. D.C. Alcoholic Bev. Control Bd.*, 825 A.2d 303, 2003 D.C. App. LEXIS 292 (2003).

Alcoholic Beverage Control Board's approval of application to transfer Retailer's Class B license to sell beer and light wine did not prevent it from reaching a different conclusion on the same facts on reconsideration. *Tiger Wyk Ltd. v. D.C. Alcoholic Bev. Control Bd.*, 825 A.2d 303, 2003 D.C. App. LEXIS 292 (2003).

The Alcoholic Beverage Control Board ruling on application to transfer Retailer's Class B license to sell beer and light wine could lawfully determine that licensing another store within 600 feet of three other establishments would result in a harmful over-concentration, even though the Board found as a fact that the other three licensed retail establishments were more than 400 feet from the store. *Tiger Wyk Ltd. v. D.C. Alcoholic Bev. Control Bd.*, 825 A.2d 303, 2003 D.C. App. LEXIS 292 (2003).

The Alcoholic Beverage Control Board had the statutory authority, when evaluating an application to transfer Retailer's Class B license, to consider whatever surrounding area would be necessary to decide whether granting another license was appropriate; whether the block on which it based finding of over-concentration was something small, large, or in between, the Board's statutory authority allowed it to establish whatever perimeter it deemed necessary when considering whether the grant

of another license in the neighborhood would result in a harmful over-concentration. *Tiger Wyk Ltd. v. D.C. Alcoholic Bev. Control Bd.*, 825 A.2d 303, 2003 D.C. App. LEXIS 292 (2003).

Licensee applying for transfer of Retailer's

Class B license to sell beer and light wine had the burden of showing that another licensed establishment would be appropriate. *Tiger Wyk Ltd. v. D.C. Alcoholic Bev. Control Bd.*, 825 A.2d 303, 2003 D.C. App. LEXIS 292 (2003).

§ 25-315. Additional considerations for renewal of licenses.

(a) If proper notice has been given, as provided in subchapter II of Chapter 4, and no objection to the appropriateness of the establishment is filed, the establishment shall be presumed to be appropriate for the locality, section, or portion of the District where it is located.

(b)(1) The Board shall consider the licensee's record of compliance with this title and the regulations promulgated under this title and any conditions placed on the license during the period of licensure, including the terms of a voluntary agreement.

(2) The Board shall prepare a check sheet documenting the licensee's compliance. This check sheet shall be available to the public for review.

(c) If an application for license renewal is made the subject of contested proceedings and the license expires before the Board's decision on the renewal application, the Board may extend the expiration date during the pendency of the decision on the renewal application.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-315.
1973 Ed., § 25-115.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

CASE NOTES

ANALYSIS

Actions and proceedings.
Compliance record.
In general.

Actions and proceedings.

Consideration of compromise of criminal charge against applicant for renewal of liquor license that applicant had failed to keep records required by Internal Revenue Code along with ample testimony of alleged bootleggers concerning applicant's agreement not to keep cer-

tain records as required did not invalidate alcoholic beverage control board's determination, based in part upon applicant's failure to keep required records, that applicant was not of good moral character and was not generally fit for the trust to be reposed in him by renewal. D.C. Code 1951, §§ 25-104, 25-115(a)(1); 26 U.S.C. §§ 5114(a), 5285(b), 5621. *Minkoff v. Payne*, 210 F.2d 689, 1953 U.S. App. LEXIS 3681 (C.A.D.C. 1953).

Validity of action of District of Columbia Alcoholic Beverage Control Board in issuing

liquor license was not mooted as issue by virtue of fact that, after license was initially issued and before court review of Board's action was completed, license was renewed and renewal was not contested. D.C. Code §§ 11-101(2)(A), 11-705(b), 25-111(g), 25-115(b); U.S. Const. art. 1, § 1 et seq.; art. 3, § 1 et seq. *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

Compliance record.

In determining whether to grant liquor store's application for renewal of retail liquor license, Alcoholic Beverage Control Board was required to consider evidence of liquor store's violation of provision of voluntary agreement between store and community organizations, entered during earlier renewal proceedings, which required store to refrain from selling single-serving containers of alcohol, where agreement was ratified by Board. D.C. Code 1981, §§ 25-115(b)(1)(G), (g)(1)(D); D.C. Mun. Regs. title 23, § 1513.3. *North Lincoln Park*

Neighborhood Ass'n v. Alcoholic Beverage Control Bd., 666 A.2d 63, 1995 D.C. App. LEXIS 209 (1995), remanded by 727 A.2d 872, 1999 D.C. App. LEXIS 80 (D.C. 1999).

In renewing liquor license, Alcoholic Beverage Control Board must consider licensee's record of compliance with terms of license itself, and with all conditions incorporated into license by Board-approved voluntary agreements between licensee and other interested parties. D.C. Code 1981, §§ 25-115(b)(1)(G), (g)(1)(D); D.C. Mun. Regs. title 23, § 1513.3. *North Lincoln Park Neighborhood Ass'n v. Alcoholic Beverage Control Bd.*, 666 A.2d 63, 1995 D.C. App. LEXIS 209 (1995), remanded by 727 A.2d 872, 1999 D.C. App. LEXIS 80 (D.C. 1999).

In general.

Statute permitting denial of liquor license if establishment in question is not appropriate for its neighborhood applied to renewal of liquor license. D.C. Code 1981, §§ 1-1510(b), 25-115(a), 25-121(a). *K.G.S., Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 531 A.2d 1001, 1987 D.C. App. LEXIS 454 (1987).

§ 25-316. Additional considerations for transfer of licensed establishment to new owner.

(a) In determining the appropriateness of the transfer of a licensed establishment to a new owner, the Board shall consider only the applicant's qualifications as set forth in § 25-301.

(b) The Board shall not allow the transfer of the license of an establishment to a person against whom there is pending in the courts or before the Board a charge of keeping a disorderly house or of violating this title or the laws against gambling in the District.

(c) When the transferred license comes due for renewal, the Board shall evaluate the appropriateness of the application for renewal according to the standards set forth in §§ 25-313 and 25-315.

(d) If the transfer of ownership, as defined in § 25-405, includes a proposed substantial change in the operation of the establishment, the Board shall evaluate this transfer of ownership in accordance with § 25-404.

(Jan. 24, 1934, 48 Stat. 330, ch. 4, § 16; May 27, 1949, 63 Stat. 135, ch. 146, title V, § 503; Mar. 5, 1981, D.C. Law 3-157, § 2(d), 27 DCR 5117; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-316. 1973 Ed., § 25-117.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 3-157. — For legislative history of D.C. Law 3-157, see Historical and Statutory Notes following § 25-211.

CASE NOTES

ANALYSIS

Due process.
Hearing.
Pending charges.
Presumptions and burden of proof.
Purpose.
Reconsideration.
Review.

Due process.

There was no denial of due process in Alcoholic Beverage Control Board's scheduling of hearing on protest of transfer of liquor license ten days prior to the resignation of one of its members, even if members knew that said member would be resigning. *Palisades Citizens Asso. v. District of Columbia Alcoholic Beverage Control Board*, 324 A.2d 692, 1974 D.C. App. LEXIS 266 (1974).

Due process requires information in Alcoholic Beverage Control Board's confidential file concerning an applicant's moral fitness and good character to be made available to parties as part of the record. *Northeast Liquors, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 302 A.2d 222, 1973 D.C. App. LEXIS 252 (1973).

Hearing.

Where Alcoholic Beverage Control Board personally inspected premises and, subsequent to hearing on application for transfer of license and not in presence of parties, measured area to see if proposed liquor store violated regulation prohibiting liquor store within 400 feet of recreational area entrance then requested remand to remedy procedural defects but limited remand to question of measurements without setting forth facts revealed by personal inspection and giving parties opportunity to address themselves to those facts when decision as to main entrance was based on both testimony and personal inspection, Board's refusal to admit further testimony at remand hearing on question of main entrance was error. *Northeast Liquors, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 302 A.2d 222, 1973 D.C. App. LEXIS 252 (1973).

Pending charges.

In enacting statute providing that Board of Alcoholic Beverage Control "... shall not allow the transfer of the license of any person against whom there is pending in the courts or before the Board any charge of keeping a disorderly house, or of violating this chapter or the laws against gambling in the District of Columbia," Congress sought to prevent transfer "by the licensee" when said licensee has charges pending against him, and said proviso does not apply to cases where transfer is sought by

someone other than the present license holder. D.C. Code §§ 25-117, 25-118. *Hornstein v. District of Columbia Alcoholic Beverage Control Board*, 321 A.2d 567, 1974 D.C. App. LEXIS 232 (1974).

Where mortgage holders of liquor business purchased business at foreclosure sale when the licensee ceased to do business on the premises as a result of charges against its officers of permitting illegal activity on the premises, and sought transfer of licensee's liquor license, statute providing that Board of Alcoholic Beverage Control "... shall not allow the transfer of the license of any person against whom charges are pending," did not prevent requested transfer of liquor license to mortgage holders. D.C. Code §§ 25-117, 25-118. *Hornstein v. District of Columbia Alcoholic Beverage Control Board*, 321 A.2d 567, 1974 D.C. App. LEXIS 232 (1974).

Presumptions and burden of proof.

On petition to review order granting application to transfer alcoholic beverage retailer's license, petitioner, an attorney, was presumed to have been familiar with provisions of Act, which he admitted he had read. D.C. Code § 25-115(a), par. 6(b, c). *Schiffmann v. District of Columbia Alcoholic Beverage Control Board*, 302 A.2d 235, 1973 D.C. App. LEXIS 249 (1973).

Ordinarily, party opposing transfer of liquor license has burden of showing change in circumstances relating to the applicant's moral character. *Schiffmann v. District of Columbia Alcoholic Beverage Control Board*, 302 A.2d 235, 1973 D.C. App. LEXIS 249 (1973).

Where case concerns application for transfer of liquor license rather than initial granting of license, appellate court must presume that matter of applicant's moral character was determined by the Alcoholic Beverage Control Board when original license was issued. *Schiffmann v. District of Columbia Alcoholic Beverage Control Board*, 302 A.2d 235, 1973 D.C. App. LEXIS 249 (1973).

Purpose.

Evil sought to be prevented by statute providing that Board of Alcoholic Beverage Control "... shall not allow the transfer of the license of any person against whom" charges are pending, was transfer by licensee who is the putative subject of revocation or suspension as provided in same statute. D.C. Code § 25-117. *Hornstein v. District of Columbia Alcoholic Beverage Control Board*, 321 A.2d 567, 1974 D.C. App. LEXIS 232 (1974).

Reconsideration.

No written findings were required for disposition of petition for reconsideration of transfer

order entered by Alcoholic Beverage Control Board. D.C. Code § 1-1501 et seq. Palisades Citizens Asso. v. District of Columbia Alcoholic Beverage Control Board, 324 A.2d 692, 1974 D.C. App. LEXIS 266 (1974).

Review.

Where Court of Appeals could not determine from the record whether Alcoholic Beverage Control Board's decision denying petition for reconsideration of transfer order had been issued while there was a quorum on the Board, case was remanded to the Board to determine whether such quorum existed. Organization Action Commissioners Order No. 72-206, D.C. Code 1973, Tit. I Appendix. Palisades Citizens Asso. v. District of Columbia Alcoholic Beverage Control Board, 324 A.2d 692, 1974 D.C. App. LEXIS 266 (1974).

On petition for review of order of Alcoholic Beverage Control Board granting application for transfer of alcoholic beverage retailer's license, Court of Appeals may not disturb any action of Board in exercise of its statutory powers unless such action is plainly wrong or without support in substantial evidence in ad-

ministrative record. D.C. Code § 1-1510(3)(E). Schiffmann v. District of Columbia Alcoholic Beverage Control Board, 302 A.2d 235, 1973 D.C. App. LEXIS 249 (1973).

Where, on petition for review of order of Alcoholic Beverage Control Board granting application to transfer alcoholic beverage retailer's license, petitioners were present and accorded fair opportunity to be heard, they could not complain that statutory requirements were not satisfied because there was no indication in Board's decision that required notice of hearing was ever published. D.C. Code § 25-115(a), par. 6(b, c). Schiffmann v. District of Columbia Alcoholic Beverage Control Board, 302 A.2d 235, 1973 D.C. App. LEXIS 249 (1973).

In absence of any evidence in record as to whether confidential information concerning applicant's moral character was made available to party opposing transfer of applicant's liquor license at hearing, decision of Alcoholic Beverage Control Board allowing transfer of license would be remanded. Schiffmann v. District of Columbia Alcoholic Beverage Control Board, 302 A.2d 235, 1973 D.C. App. LEXIS 249 (1973).

§ 25-317. Transfer of licensed establishment to new location.

The Board shall consider an application to transfer a license to a new location according to the same standards and procedures as an application for an initial license and shall not presume appropriateness if a protest to the application is filed as set forth in Chapter 6.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Subchapter III. Denial of License.

§ 25-331. Quotas — Off-premises retail licenses.

(a) The number of off-premises retailer's licenses, class A, shall be no more than 250.

(b) The number of off-premises retailer's licenses, class B, shall be no more than 300.

(c) The quotas set forth in this section shall have a prospective effect.

(d) The quotas set forth in subsection (b) of this section shall not prohibit the issuance of a license for an off-premises retailer's license, Class B, for the sale of alcoholic beverages in an establishment if:

(1) The primary business and purpose is the sale of a full range of fresh, canned, and frozen food items, and the sale of alcoholic beverages is incidental to the primary purpose;

(2) The sale of alcoholic beverages constitutes no more than 15% of the total volume of gross receipts on an annual basis;

(3) The establishment is located in a C-1, C-2, C-3, C-4, or C-5 zone or, if located within the Southeast Federal Center, in the SEFC/C-R zone;

(4) The establishment is a full service grocery store which is newly constructed with a certificate of occupancy issued after January 1, 2000, or is an existing store which has undergone renovations in excess of \$500,000 in the calendar year in which an application is made; and

(5) The opinion of the ANC, if any, has been given great weight.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(k), 51 DCR 6525; Oct. 20, 2011, D.C. Law 19-23, § 2(d), 58 DCR 6509.)

Effect of amendments. — D.C. Law 15-187 rewrote par. (5) of subsec. (d) which had read as follows: “(5) The opinion of the ANC in which the establishment is located has been given great weight as specified in Chapter 4.”

D.C. Law 19-23, in subsec. (d)(3), substituted “or, if located within the Southeast Federal Center, in the SEFC/C-R zone;” for a semicolon.

Temporary Amendment of Section. — Section 2(d) of D.C. Law 18-346, in subsec. (d)(3), substituted “or, if located within the Southeast Federal Center, in the SEFC/C-R zone;” for a semicolon at the end.

Section 4(b) of D.C. Law 18-346 provided that

the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(d) of Southeast Federal Center/Yards Non-Discriminatory Grocery Store Emergency Act of 2010 (D.C. Act 18-674, December 28, 2010, 58 DCR 130).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 19-23. — For history of Law 19-23, see notes under § 25-101.

§ 25-332. Moratorium on class B licenses.

(a) No new off-premises retailer’s license, class B, shall be issued.

(b) The moratorium shall have a prospective effect.

(c) This moratorium shall not apply to an applicant for an off-premises retailer’s license, class B, for the sale of alcoholic beverages in an establishment if:

(1) The primary business and purpose is the sale of a full range of fresh, canned, and frozen food items, and the sale of alcoholic beverages is incidental to the primary purpose;

(2) The sale of alcoholic beverages constitutes no more than 15% of the total volume of gross receipts on an annual basis;

(3) The establishment is located in a C-1, C-2, C-3, C-4, or C-5 zone or, if located within the Southeast Federal Center, in the SEFC/C-R zone;

(4) The establishment is a full service grocery store which is newly constructed with a certificate of occupancy issued after January 1, 2000, or is an existing store which has undergone renovations in excess of \$500,000 during the preceding 12 months in which an application is made; and

(5) The opinion of the ANC, if any, has been given great weight.

(d) An exception to the moratorium shall be granted for 4 new class B licenses on Connecticut Avenue, N.W., between N Street and Florida Avenue, N.W., after October 22, 1999; provided, that no licensee shall devote more than 3,000 square feet to the sale of alcoholic beverages.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 1, 2002, D.C. Law 14-190, § 1702(g), 49 DCR 6968; Sept. 30, 2004, D.C. Law 15-187, § 101(l), 51 DCR 6525; Oct. 20, 2011, D.C. Law 19-23, § 2(e), 58 DCR 6509.)

Effect of amendments. — D.C. Law 14-190, in subsec. (c)(4), substituted “during the preceding 12 months” for “in the calendar year”.

D.C. Law 15-187 rewrote par. (5) of subsec. (c) which had read as follows: “(5) The opinion of the ANC in which the establishment is located has been given great weight as specified in Chapter 4.”

D.C. Law 19-23, in subsec. (c)(3), substituted “or, if located within the Southeast Federal Center, in the SEFC/C-R zone;” for a semicolon.

Temporary Amendment of Section. — Section 2(e) of D.C. Law 18-346, in subsec. (c)(3), substituted “or, if located within the Southeast Federal Center, in the SEFC/C-R zone;” for a semicolon at the end.

Section 4(b) of D.C. Law 18-346 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 1702(g) of Fiscal Year 2003 Budget Support Emergency Act of 2002 (D.C. Act 14-453, July 23, 2002, 49 DCR 8026).

For temporary (90 day) amendment of section, see § 2(e) of Southeast Federal Center/Yards Non-Discriminatory Grocery Store Emergency Act of 2010 (D.C. Act 18-674, December 28, 2010, 58 DCR 130).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 14-190. — For Law 14-190, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 19-23. — For history of Law 19-23, see notes under § 25-101.

§ 25-333. Limitation on the distance between off-premises retailer’s licenses.

(a) No new off-premises retailers license, class A, shall be issued for an establishment which is located within 400 feet from another establishment operating under an off-premises retailer’s license, class A.

(b) No new off-premises retailers license, class B, shall be issued for an establishment which is located within 400 feet from another establishment operating under an off-premises retailer’s license, class B.

(c) This section shall not prohibit the issuance of a license for an off-premises retailer’s license, Class B, for the sale of alcoholic beverages in an establishment if:

(1) The primary business and purpose is the sale of a full range of fresh, canned, and frozen food items, and the sale of alcoholic beverages is incidental to the primary purpose;

(2) The sale of alcoholic beverages constitutes no more than 15% of the total volume of gross receipts on an annual basis;

(3) The establishment is located in a C-1, C-2, C-3, C-4, or C-5 zone or, if located within the Southeast Federal Center, in the SEFC/C-R zone;

(4) The establishment is a full service grocery store which is newly constructed with a certificate of occupancy issued after January 1, 2000, or is an existing store which has undergone renovations in excess of \$500,000 in the calendar year in which an application is made;

(5) The opinion of the ANC, if any, has been given great weight.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(m), 51 DCR 6525; Oct. 20, 2011, D.C. Law 19-23, § 2(f), 58 DCR 6509.)

Effect of amendments. — D.C. Law 15-187 rewrote par. (5) of subsec. (c) which had read as follows: “(5) The opinion of the ANC in which the establishment is located has been given great weight as specified in Chapter 4.”

D.C. Law 19-23, in subsec. (c)(3), substituted “or, if located within the Southeast Federal Center, in the SEFC/C-R zone;” for a semicolon.

Temporary Amendment of Section. — Section 2(f) of D.C. Law 18-346, in subsec. (c)(3), substituted “or, if located within the Southeast Federal Center, in the SEFC/C-R zone;” for a semicolon at the end.

Section 4(b) of D.C. Law 18-346 provided that

the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(f) of Southeast Federal Center/Yards Non-Discriminatory Grocery Store Emergency Act of 2010 (D.C. Act 18-674, December 28, 2010, 58 DCR 130).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 19-23. — For history of Law 19-23, see notes under § 25-101.

CASE NOTES

In general.

Alcoholic Beverage Control Board is authorized to make finding that two liquor stores within 300 feet proximity are inappropriate for particular neighborhood, notwithstanding absence of any formal regulation promulgated by District Commissioners regarding necessary distances between liquor stores. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. Pollack v. Simonson, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

Where it was not suggested at separate hearings on applications to transfer liquor licenses

that the two applications were mutually exclusive and no formal regulation required that liquor stores be situated more than 300 feet apart, denial of plaintiffs’ application on sole ground that license of other applicant had been issued for location less than 300 feet from plaintiffs’ proposed location was improper for failure of Alcoholic Beverage Control Board to give proper notice to plaintiffs that it considered applications mutually exclusive. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. Pollack v. Simonson, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

§ 25-334. Denial — Board-certified referendum. [Repealed].

Repealed.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(n), 51 DCR 6525.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

§ 25-335. Denial — Public health and safety restrictions.

Notwithstanding any other provision of this title, the Board shall deny a license if the evidence reasonably shows that:

(1) The establishment for which the license is sought is in violation of one or more of the Construction Codes for the District contained in Title 12 of the District of Columbia Municipal Regulations, or any other law or rule of the District intended to protect public safety; or

(2) The applicant has knowingly permitted, at the place for which the license is sought, the illegal sale, or negotiations for sale, or the use, of any controlled substance in violation of the CSA, or the possession or sale, or negotiations for sale, of drug paraphernalia in violation of the CSA, or Chapter 11 of Title 48. Successive sales, or negotiations for sale, over a continuous

period of time constituting a recognizable pattern of activity shall be deemed evidence of knowing permission.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-335.
1973 Ed., § 25-115.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

CASE NOTES

In general.

Certificates of occupancy duly—issued by the zoning division for an area comprised of two combined lots at the time applicant sought retailer's license for the sale of alcohol brought applicant in compliance with statutory requirement that an applicant not be in violation of any other law or rule intended to protect public safety. *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic Bev. Control Bd.*, 766 A.2d 59, 2001 D.C. App. LEXIS 18 (2001).

Board adequately considered applicant's record of compliance with the Alcohol Beverage Control (ABC) laws, including lack of citations, in reviewing its application for retailer's license to allow it to serve alcohol. *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic Bev. Control Bd.*, 766 A.2d 59, 2001 D.C. App. LEXIS 18 (2001).

Past compliance with the Alcohol Beverage Control (ABC) laws is one of several appropri-

ateness qualifications an applicant must demonstrate to the satisfaction of Alcohol Beverage Control Board. *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic Bev. Control Bd.*, 766 A.2d 59, 2001 D.C. App. LEXIS 18 (2001).

Once the Alcohol Beverage Control Board is satisfied that an applicant has satisfied the statutory "appropriateness" qualifications, the Court of Appeals' review of that decision is deferential. *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic Bev. Control Bd.*, 766 A.2d 59, 2001 D.C. App. LEXIS 18 (2001).

Whether an agency tribunal such as the Alcohol Beverage Control Board commits the disqualification decision entirely to the individual member, or asserts the authority to itself disqualify a member, is a matter over which the court has almost no review authority. *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic Bev. Control Bd.*, 766 A.2d 59, 2001 D.C. App. LEXIS 18 (2001).

§ 25-336. Retail license prohibited in residential-use district.

(a) No retailer's license shall be issued for, or transferred to, a business operated in a residential-use district as defined in the zoning regulations and shown in the official atlases of the Zoning Commission for the District, except for a restaurant or tavern operated in a hotel or apartment house, if the entrance to the restaurant or tavern is entirely inside the hotel or apartment house and no sign or display is visible from the outside of the building.

(b) A nightclub license may be issued on the premises of a hotel that was legally located in a residential-use district and was operating a nightclub on the licensed premises on September 30, 1986.

(c) Subsection (a) of this section shall not apply if, at the time the application for a new license is submitted to the Board, a license of the same type and class is operating an establishment within 400 feet of the applicant.

(d) The provisions of this section shall not apply to:

(1) A restaurant which has received a valid certificate of occupancy as of January 1, 2000 for a restaurant operation in a residential-use district; or

(2) A club which is operated under a license issued by the Board as of January 1, 2000 for operation in a residential-use district.

(e)(1) For the purposes of this subsection, the term “ANC 3/4G” means the single member district area partly in Ward 3 and partly in Ward 4, established under § 1-309.03.

(2) Notwithstanding the restriction in subsection (a) of this section, a full service grocery store in a residential-use district in ANC 3/4G with a certificate of occupancy issued prior to [March 21, 2009], may apply for a retailer Class B license.

(3) The Mayor, pursuant to [subchapter I of Chapter 5 of Title 2], may issue rules to implement the provisions of this subsection. The proposed rules shall be submitted to the Council for a 30-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution, within this 30-day review period, the proposed rules shall be deemed approved.

(Jan. 24, 1934, 48 Stat. 328, ch. 4, § 15; June 16, 1934, 48 Stat. 974, ch. 552; May 22, 1958, 72 Stat. 132, Pub. L. 85-423, § 1; Mar. 7, 1987, D.C. Law 6-217, § 10, 34 DCR 907; May 24, 1994, D.C. Law 10-122, § 2(g), 41 DCR 1658; Apr. 12, 1997, D.C. Law 11-258, § 2(b), 44 DCR 1421; Mar. 24, 1998, D.C. Law 12-81, § 15, 45 DCR 745; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Mar. 21, 2009, D.C. Law 17-324, § 2(b), 56 DCR 239.)

Prior Codifications. — 1981 Ed., § 25-336. 1973 Ed., § 25-116.

Effect of amendments. — D.C. Law 17-324 added subsec. (e).

Temporary Amendment of Section. — Section 2 of D.C. Law 17-32 amended subsec. (c) by striking “type and”.

Section 4(b) of D.C. Law 17-32 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2 of Retail Class Exemption Clarification Emergency Act of 2007 (D.C. Act 17-67, July 9, 2007, 54 DCR 6822).

For temporary (90 day) amendment of section, see § 2 of Retail Class Exemption Clarification Congressional Review Emergency Act of 2007 (D.C. Act 17-144, October 17, 2007, 54 DCR 10747).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 6-217. — For

legislative history of D.C. Law 6-217, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 10-122. — For legislative history of D.C. Law 10-122, see Historical and Statutory Notes following § 25-785.

Legislative history of Law 11-258. — For legislative history of D.C. Law 11-258, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 12-81. — Law 12-81, the “Technical Amendments Act of 1998,” was introduced in Council and assigned Bill No. 12-408, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 4, 1997, and December 4, 1997, respectively. Signed by the Mayor on December 22, 1997, it was assigned Act No. 12-246 and transmitted to both Houses of Congress for its review. D.C. Law 12-81 became effective on March 24, 1998.

Legislative history of Law 17-324. — Law 17-324, the “Targeted Ward 4 Single Sales Moratorium and Neighborhood Grocery Retailer Act of 2008,” was introduced in Council and assigned Bill No. 17-941 which was re-

ferred to the Committee on Public Works and the Environment. The Bill was adopted on first and second readings on November 18, 2008, and December 2, 2008, respectively. Signed by

the Mayor on December 22, 2008, it was assigned Act No. 17-629 and transmitted to both Houses of Congress for its review. D.C. Law 17-324 became effective on March 21, 2009.

CASE NOTES

ANALYSIS

Eligibility requirements.
In general.
Review.

Eligibility requirements.

Applicant that was registered for tax purposes as a nonprofit organization satisfied requirements of Club Exception Act, which provided a six-month "window" for pre-existing private clubs located within residentially-zoned districts to apply for licensure, despite any moratorium on issuance of new licenses; Act did not require assessment of whether applicant currently operated as a nonprofit organization. *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic Bev. Control Bd.*, 766 A.2d 59, 2001 D.C. App. LEXIS 18 (2001).

Applicant's cigarette license satisfied Club Exception Act's requirement that applicant seeking a retailer's club license to sell alcohol, during moratorium period, hold a valid business license, as well as Act's evident purpose to limit the class of applicants to established clubs already regulated by some form of licensure. *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic Bev. Control Bd.*, 766 A.2d 59, 2001 D.C. App. LEXIS 18 (2001).

Undisputed testimony regarding applicant's combining parts of two adjoining contiguous townhouses was sufficient evidence that applicant seeking retailer's club license had been "established" at its location for at least three-years, as was required by Club Exception Act, which provided a six-month "window" for pre-existing private clubs located within residentially-zoned districts to apply for licensure, despite any moratorium on issuance of new licenses. *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic Bev. Control Bd.*, 766 A.2d 59, 2001 D.C. App. LEXIS 18 (2001).

Before issuing liquor license to restaurant that was operating in residential area under certificate of occupancy, Alcoholic Beverage Control Board was required to be satisfied that all statutory requirements were been met. D.C. Code 1981, §§ 25-115(b), (g)(1)(A), 25-116(a); D.C.Mun.Reg. title 23, §§ 1510.1. 1510.2. *Craig v. District of Columbia Alcoholic Bev. Control Bd.*, 721 A.2d 584, 1998 D.C. App. LEXIS 227 (1998).

In general.

To determine whether restaurant that was operating in residential area under certificate of occupancy issued by Zoning Board qualified for issuance of liquor license, Alcoholic Beverage Control Board was required to decide whether statute governing licenses in residential use districts could be interpreted to authorize issuance of liquor license to restaurant; ABC Board was not required, or authorized, to review or overturn decision of Zoning Board to issue certificate of occupancy. D.C. Code 1981, § 25-116(a). *Craig v. District of Columbia Alcoholic Bev. Control Bd.*, 721 A.2d 584, 1998 D.C. App. LEXIS 227 (1998).

Review.

Where Alcoholic Beverage Control Board neither provided legal interpretation nor resolved factual issues pertinent to application of statute governing liquor licenses in residential use districts, Court of Appeals could not accept Board's decision granting liquor license to restaurant that was operating in residential area under certificate of occupancy as a reasonable interpretation of statute to which Court could defer. D.C. Code 1981, § 25-116(a). *Craig v. District of Columbia Alcoholic Bev. Control Bd.*, 721 A.2d 584, 1998 D.C. App. LEXIS 227 (1998).

§ 25-337. Wholesaler's license prohibited in residential-use district.

No wholesaler's license shall be issued for an establishment in a residential-use district as defined in the zoning regulations and shown in the official atlases of the Zoning Commission for the District.

(Jan. 24, 1934, 48 Stat. 328, ch. 4, § 15; June 16, 1934, 48 Stat. 974, ch. 552; May 22, 1958, 72 Stat. 132, Pub. L. 85-423, § 1; Mar. 7, 1987, D.C. Law 6-217, § 10, 34 DCR 907; May 24, 1994, D.C. Law 10-122, § 2(g), 41 DCR 1658; Apr.

12, 1997, D.C. Law 11-258, § 2(b), 44 DCR 1421; Mar. 24, 1998, D.C. Law 12-81, § 15, 45 DCR 745; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-337.
1973 Ed., § 25-116.

Legislative history of Law 13-298. — For
D.C. Law 13-298, see notes following § 25-101.

§ 25-338. Limitation on successive applications after denial.

(a) A second and each subsequent application for the same class of license for the same person or persons shall not be considered within 5 years of a denial.

(b) If an application is withdrawn for good cause, as determined by the Board, before the timely filing of a protest, or if the first application was denied for purely technical or procedural reasons, as determined by the Board, another application by the same applicant for a license of the same class at the same premises may be made at any time.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For
D.C. Law 13-298, see notes following § 25-101.

§ 25-339. Special restrictions for the Georgetown historic district.

(a) The number of nightclub or tavern license holders, class C or D, within the Georgetown historic district shall not exceed 6. No new nightclub or tavern license shall be issued, and no existing nightclub or tavern license shall be transferred, to any other person or to any other location within the Georgetown historic district, except when the number of such licensed establishments in the Georgetown historic district is less than 6.

(b) A licensee of a nightclub license, or a tavern license, class C, within the Georgetown historic district as of May 24, 1994, may apply for a conversion to a restaurant license, class C or D, for its present location, present owner, and for the duration of its present license. The application shall not require a public hearing or the assessment of fees.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-339. 1973 Ed., § 25-115.

Effect of amendments. — D.C. Law 13-39, in former § 25-115(k), deleted the period at the end of the first sentence and added “; provided, that with regard to the establishment located at 3148-3150 M Street, N.W., known as Moustache, Inc. t/a Nathans, the Class CT license may be transferred once by the Board, after

determining that the requirements of section 16 have been met, to an entity controlled by the individual who controls Moustache, Inc. on the effective date of the Alcoholic Beverage Control Act Tavern Exception Amendment Act of 1999.”.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-340. Special restrictions for Ward 4.

No class A or B license shall be issued in or transferred into Ward 4; provided, that this section shall not prohibit the transfer of a class A or B license within Ward 4. For the purposes of this section, “Ward 4” means the area defined as Ward 4 in § 1-1041.03 on [September 30, 2004]. This section shall not apply to any application for a new or transferred license pending on [September 30, 2004].

(Sept. 30, 2004, D.C. Law 15-187, § 101(o), 51 DCR 6525.)

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

References in text. — The effective date of the Omnibus Alcoholic Beverage Amendment

Act of 2004, passed on 2nd reading on May 18, 2004 (Enrolled version of Bill 15-516), referred to this section, is September 30, 2004.

CASE NOTES

Pending applications.

Grocery store’s application for liquor license was pending as of effective date of statute banning issuance of new liquor licenses to establishments located in ward and, thus, was

exempt from ban, where board had not granted or denied store’s license application, but instead had taken matter under advisement. *Holzsgager v. D.C. Alcoholic Bev. Control Bd.*, 979 A.2d 52, 2009 D.C. App. LEXIS 363 (2009).

§ 25-340.01. Special restrictions for Ward 4.

(a) For the purposes of this section, the term:

(1) “ANC 4C07” means the single member district area in Ward 4, established under § 1-309.03.

(2) “Ward 4” means the area defined as Ward 4 in § 1-1041.03 on September 30, 2004.

(b) Except as provided in subsections (c) and (d) of this section, no class A or B license shall be issued in or transferred into Ward 4; provided, that this section shall not prohibit the transfer of a class A or B license within Ward 4.

(c) This section shall not apply to any application for a new or transferred license pending on September 30, 2004.

(d) An exception to the moratorium imposed by subsection (b) of this section on the application of a Class B license shall be granted for a full service grocery store or substantially renovated full service grocery store located within the boundaries of ANC 4C07, with a certificate of occupancy issued after [March 21, 2009]; provided, that no licensee shall devote more than 3,000 square feet to the sale of alcoholic beverages.

(e) The Mayor, pursuant to [subchapter I of Chapter 5 of Title 2], may issue rules to implement the provisions of this section. The proposed rules shall be

submitted to the Council for a 30-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution, within this 30-day review period, the proposed rules shall be deemed approved.

(Mar. 21, 2009, D.C. Law 17-324, § 2(c), 56 DCR 239.)

Temporary Addition of Section. — Section 2 of D.C. Law 17-288 added a section to read as follows: “§ 25-340.01. Special restrictions for Ward 4. “No class A or B license shall be issued in or transferred into Ward 4; provided, that this section shall not prohibit the transfer of a class A or B license within Ward 4. For the purposes of this section, the term ‘Ward 4’ means the area defined as Ward 4 in § 1-1041.03 on September 30, 2004. This section shall not apply to any application for a new or transferred license pending on September 30, 2004.”

Section 5(b) of D.C. Law 17-288 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) addition, see § 2(a) of Targeted Ward 4 Single Sales Moratorium Emergency Act of 2008 (D.C. Act 17-509, September 25, 2008, 55 DCR 10878).

Legislative history of Law 17-324. — For Law 17-324, see notes following § 25-336.

§ 25-341. Targeted Ward 4 Moratorium Zone.

(a) For the purposes of this section, the term “Targeted Ward 4 Moratorium Zone” means the area bounded by the line starting at 13th Street, N.W., and Eastern Avenue, N.W.; thence in a southerly direction along 13th Street, N.W., to Fern Street, N.W.; thence in an easterly direction along Fern Street, N.W., to Georgia Avenue, N.W.; thence in a southerly direction along Georgia Avenue, N.W., to Aspen Street, N.W.; thence in a westerly direction along Aspen Street, N.W., to 13th Street, N.W.; thence in a southerly direction along 13th Street, N.W., to Piney Branch Road, N.W.; thence in a southerly direction along Piney Branch Road, N.W., to 13th Street, N.W.; thence in a southerly direction along 13th Street, N.W., to Colorado Avenue, N.W.; thence in a southwesterly direction along Colorado Avenue, N.W., to Madison Street, N.W.; thence in a westerly direction along Madison Street, N.W., to 16th Street, N.W.; thence in a southerly direction along 16th Street, N.W., to Spring Road, N.W.; thence in an easterly direction along Spring Road, N.W. to 13th Street, N.W.; thence in a northerly direction along 13th Street, N.W., to Randolph Street, N.W.; thence in an easterly direction along Randolph Street, N.W. to 10th Street, N.W.; thence in a southerly direction along 10th Street, N.W., to Spring Road, N.W.; thence in an easterly direction along Spring Road, N.W., to Rock Creek Church Road, N.W.; thence in an easterly direction along Rock Creek Church Road, N.W., to 7th Street, N.W., thence in a northerly direction along 7th Street, N.W., to Randolph Street, N.W., thence in an easterly direction along Randolph Street, N.W., to Rock Creek Church Road, N.W.; thence in a northeasterly direction along Rock Creek Church Road, N.W., to Varnum Street, N.W.; thence in a westerly direction along Varnum Street, N.W., to Grant Circle, N.W.; thence in a westerly direction along the southern circumference of Grant Circle, N.W., to Varnum Street, N.W.; thence in a westerly direction along Varnum Street, N.W., to 8th Street, N.W.; thence in a northerly direction along 8th Street, N.W., to Ingraham Street, N.W.; thence in an easterly direction

along Ingraham Street, N.W., to 2nd Street, N.W.; thence in a southerly direction along 2nd Street, N.W., to Farragut Street, N.W.; thence in a southeasterly direction along Farragut Street, N.W., to 1st Street, N.W.; thence in a northeasterly direction along 1st Street, N.W., to Gallatin Street, N.W.; thence in an easterly direction along Gallatin Street, N.W., to North Capitol Street; thence in a northerly direction along North Capitol Street to Riggs Road, N.E.; thence in an easterly direction along Riggs Road, N.E., to South Dakota Avenue, N.E.; thence in a southeasterly direction along South Dakota Avenue, N.E., to Kennedy Street, N.E.; thence in a northeasterly direction along Kennedy Street, N.E., to Madison Street, N.E.; thence in a northwesterly direction along Madison Street, N.E., to 6th Street, N.E.; thence in a north-easterly direction along 6th Street, N.E., to Nicholson Street, N.E.; thence in a northwesterly direction along Nicholson Street, N.E., to 6th Street, N.E.; thence in a northerly direction along 6th Street, N.E., to Eastern Avenue, N.E.; thence in a northwesterly direction along Eastern Avenue, N.E., to New Hampshire Avenue, N.E.; thence in a southwesterly direction along New Hampshire Avenue, N.E. to Blair Road, N.E.; thence in a northwesterly direction along Blair Road, N.E., to North Capitol Street; thence in a northwesterly direction along Blair Road, N.W., to Aspen Street, N.W.; thence in an easterly direction along Aspen Street, N.W., to Willow Street, N.W.; thence in a northeasterly direction along Willow Street, N.W., to Eastern Avenue, N.W.; thence in a northwesterly direction along Eastern Avenue, N.W., to the point of beginning at the intersection of 13th Street, N.W., and Eastern Avenue, N.W.; provided, that the Targeted Ward 4 Moratorium Zone shall not include the area bounded by the line starting at the intersection of 8th Street, N.W., and Dahlia Street, N.W.; thence in a southerly direction along 8th Street, N.W., to Aspen Street, N.W.; thence easterly along Aspen Street, N.W., to Piney Branch Road, N.W.; thence southwesterly along Piney Branch Road, N.W., to 8th Street, N.W.; thence in a southerly direction along 8th Street, N.W., to Madison Street, N.W.; thence in an easterly direction along Madison Street, N.W., to 3rd Street, N.W.; thence in a northerly direction along 3rd Street, N.W., to Whittier Street, N.W.; thence in a westerly direction along Whittier Street, N.W., to 5th Street, N.W.; thence in a northerly direction along 5th Street, N.W., to Dahlia Street, N.W.; thence in a westerly direction along Dahlia Street, N.W., to the point of beginning at the intersection of 13th Street, N.W., and Dahlia Street, N.W.

(b) Within the Targeted Ward 4 Moratorium Zone, a licensee under an off-premises retailer's license, class A or B, shall not divide a manufacturer's package of more than one container of beer, malt liquor, or ale, to sell an individual container of the package if the capacity of the individual container is 70 ounces or less.

(c) Within the Targeted Ward 4 Moratorium Zone, a licensee under an off-premises retailer's license, class A or B, shall not sell, give, offer, expose for sale, or deliver an individual container of beer, malt liquor, or ale with a capacity of 70 ounces or less.

(d) [Repealed].

(Sept. 30, 2004, D.C. Law 15-187, § 101(o), 51 DCR 6525; Aug. 15, 2008, D.C. Law 17-211, § 2(c), 55 DCR 6984.)

Effect of amendments. — D.C. Law 17-211 repealed subsec. (d) which had read as follows: “(d) This section shall expire 4 years after September 30, 2004. No later than 60 days before the expiration of this section, the Council Committee having jurisdiction over the Alcoholic Beverage Control Board shall hold a public hearing on the present need and appropriateness of the Targeted Ward 4 Moratorium Zone.”

Emergency legislation. — For temporary (90 day) additions, see § 2(b) to (d) of Mt.

Pleasant, Targeted Ward 2, and Ward 6 Single Sales Moratorium Emergency Act of 2008 (D.C. Act 17-471, July 28, 2008, 55 DCR 9004).

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 17-211. — For Law 17-211, see notes following § 25-342.

References in text. — The effective date of the Omnibus Alcoholic Beverage Amendment Act of 2004, passed on 2nd reading on May 18, 2004 (Enrolled version of Bill 15-516), referred to subsec. (d), is September 30, 2004.

§ 25-341.01. Targeted Ward 4 Moratorium Zone.

(a) For the purposes of this section, the term “Targeted Ward 4 Moratorium Zone” means the area bounded by the line starting at 13th Street, N.W., and Eastern Avenue, N.W.; thence in a southerly direction along 13th Street, N.W., to Fern Street, N.W.; thence in an easterly direction along Fern Street, N.W., to Georgia Avenue, N.W.; thence in a southerly direction along Georgia Avenue, N.W., to Aspen Street, N.W.; thence in a westerly direction along Aspen Street, N.W., to 13th Street, N.W.; thence in a southerly direction along 13th Street, N.W., to Piney Branch Road, N.W.; thence in a southerly direction along Piney Branch Road, N.W., to 13th Street, N.W.; thence in a southerly direction along 13th Street, N.W., to Colorado Avenue, N.W.; thence in a southwesterly direction along Colorado Avenue, N.W., to Madison Street, N.W.; thence in a westerly direction along Madison Street, N.W., to 16th Street, N.W.; thence in a southerly direction along 16th Street, N.W., to Spring Road, N.W.; thence in an easterly direction along Spring Road, N.W. to 13th Street, N.W.; thence in a northerly direction along 13th Street, N.W., to Randolph Street, N.W.; thence in an easterly direction along Randolph Street, N.W. to 10th Street, N.W.; thence in a southerly direction along 10th Street, N.W., to Spring Road, N.W.; thence in an easterly direction along Spring Road, N.W., to Rock Creek Church Road, N.W.; thence in an easterly direction along Rock Creek Church Road, N.W., to 7th Street, N.W.; thence in a northerly direction along 7th Street, N.W., to Randolph Street, N.W.; thence in an easterly direction along Randolph Street, N.W., to Rock Creek Church Road, N.W.; thence in a northeasterly direction along Rock Creek Church Road, N.W., to Varnum Street, N.W.; thence in a westerly direction along Varnum Street, N.W., to Grant Circle, N.W.; thence in a westerly direction along the southern circumference of Grant Circle, N.W., to Varnum Street, N.W.; thence in a westerly direction along Varnum Street, N.W., to 8th Street, N.W.; thence in a northerly direction along 8th Street, N.W., to Ingraham Street, N.W.; thence in an easterly direction along Ingraham Street, N.W., to 2nd Street, N.W.; thence in a southerly direction along 2nd Street, N.W., to Farragut Street, N.W.; thence in a southeasterly direction along Farragut Street, N.W., to 1st Street, N.W.; thence in a northeasterly direction along 1st Street, N.W., to Gallatin Street, N.W.; thence in an easterly direction along Gallatin Street, N.W., to North Capitol

Street; thence in a northerly direction along North Capitol Street to Riggs Road, N.E.; thence in an easterly direction along Riggs Road, N.E., to South Dakota Avenue, N.E.; thence in a southeasterly direction along South Dakota Avenue, N.E., to Kennedy Street, N.E.; thence in a northeasterly direction along Kennedy Street, N.E., to Madison Street, N.E.; thence in a northwesterly direction along Madison Street, N.E., to 6th Street, N.E.; thence in a north-easterly direction along 6th Street, N.E., to Nicholson Street, N.E.; thence in a northwesterly direction along Nicholson Street, N.E., to 6th Street, N.E.; thence in a northerly direction along 6th Street, N.E., to Eastern Avenue, N.E.; thence in a northwesterly direction along Eastern Avenue, N.E., to New Hampshire Avenue, N.E.; thence in a southwesterly direction along New Hampshire Avenue, N.E. to Blair Road, N.E.; thence in a northwesterly direction along Blair Road, N.E., to North Capitol Street; thence in a northwesterly direction along Blair Road, N.W., to Aspen Street, N.W.; thence in an easterly direction along Aspen Street, N.W., to Willow Street, N.W.; thence in a northeasterly direction along Willow Street, N.W., to Eastern Avenue, N.W.; thence in a northwesterly direction along Eastern Avenue, N.W., to the point of beginning at the intersection of 13th Street, N.W., and Eastern Avenue, N.W.; provided, that the Targeted Ward 4 Moratorium Zone shall not include the area bounded by the line starting at the intersection of 8th Street, N.W., and Dahlia Street, N.W.; thence in a southerly direction along 8th Street, N.W., to Aspen Street, N.W.; thence easterly along Aspen Street, N.W., to Piney Branch Road, N.W.; thence southwesterly along Piney Branch Road, N.W., to 8th Street, N.W.; thence in a southerly direction along 8th Street, N.W., to Madison Street, N.W.; thence in an easterly direction along Madison Street, N.W., to 3rd Street, N.W.; thence in a northerly direction along 3rd Street, N.W., to Whittier Street, N.W.; thence in a westerly direction along Whittier Street, N.W., to 5th Street, N.W.; thence in a northerly direction along 5th Street, N.W., to Dahlia Street, N.W.; thence in a westerly direction along Dahlia Street, N.W., to the point of beginning at the intersection of 13th Street, N.W., and Dahlia Street, N.W.

(b) Within the Targeted Ward 4 Moratorium Zone, a licensee under an off-premises retailer's license, class A or B, shall not:

(1) Divide a manufacturer's package of more than one container of beer, malt liquor, or ale, to sell an individual container of the package if the capacity of the individual container is 70 ounces or less; or

(2) Sell, give, offer, expose for sale, or deliver an individual container of beer, malt liquor, or ale with a capacity of 70 ounces or less.

(c) The Mayor, pursuant to [subchapter I of Chapter 5 of Title 2], may issue rules to implement the provisions of this section. The proposed rules shall be submitted to the Council for a 30-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution, within this 30-day review period, the proposed rules shall be deemed approved.

(Mar. 21, 2009, D.C. Law 17-324, § 2(c), 56 DCR 239.)

Temporary Addition of Section. — Section 2 of D.C. Law 17-288 added a section to read as follows:

“§ 25-341.01. Targeted Ward 4 Moratorium Zone.

“(a) For the purposes of this section, the term ‘Targeted Ward 4 Moratorium Zone’ means the area bounded by the line starting at 13th Street, N.W., and Eastern Avenue, N.W.; thence in a southerly direction along 13th Street, N.W., to Fern Street, N.W.; thence in an easterly direction along Fern Street, N.W., to Georgia Avenue, N.W.; thence in a southerly direction along Georgia Avenue, N.W., to Aspen Street, N.W.; thence in a westerly direction along Aspen Street, N.W., to 13th Street, N.W.; thence in a southerly direction along 13th Street, N.W., to Piney Branch Road, N.W.; thence in a southerly direction along Piney Branch Road, N.W., to 13th Street, N.W.; thence in a southerly direction along 13th Street, N.W., to Colorado Avenue, N.W.; thence in a southwesterly direction along Colorado Avenue, N.W., to Madison Street, N.W.; thence in a westerly direction along Madison Street, N.W., to 16th Street, N.W.; thence in a southerly direction along 16th Street, N.W., to Spring Road, N.W.; thence in an easterly direction along Spring Road, N.W. to 13th Street, N.W.; thence in a northerly direction along 13th Street, N.W., to Randolph Street, N.W.; thence in an easterly direction along Randolph Street, N.W. to 10th Street, N.W.; thence in a southerly direction along 10th Street, N.W., to Spring Road, N.W.; thence in an easterly direction along Spring Road, N.W., to Rock Creek Church Road, N.W.; thence in an easterly direction along Rock Creek Church Road, N.W., to 7th Street, N.W., thence in a northerly direction along 7th Street, N.W., to Randolph Street, N.W., thence in an easterly direction along Randolph Street, N.W., to Rock Creek Church Road, N.W.; thence in a northeasterly direction along Rock Creek Church Road, N.W., to Varnum Street, N.W.; thence in a westerly direction along Varnum Street, N.W., to Grant Circle, N.W.; thence in a westerly direction along the southern circumference of Grant Circle, N.W., to Varnum Street, N.W.; thence in a westerly direction along Varnum Street, N.W., to 8th Street, N.W.; thence in a northerly direction along 8th Street, N.W., to Ingraham Street, N.W.; thence in an easterly direction along Ingraham Street, N.W., to 2nd Street, N.W.; thence in a southerly direction along 2nd Street, N.W., to Farragut Street, N.W.; thence in a southeasterly direction along Farragut Street, N.W., to 1st Street, N.W.; thence in a northeasterly direction along 1st Street, N.W., to Gallatin Street, N.W.; thence in an easterly direction along Gallatin Street, N.W., to North Capitol Street; thence in a northerly direction along North Capitol Street to Riggs Road, N.E.;

thence in an easterly direction along Riggs Road, N.E., to South Dakota Avenue, N.E.; thence in a southeasterly direction along South Dakota Avenue, N.E., to Kennedy Street, N.E.; thence in a northeasterly direction along Kennedy Street, N.E., to Madison Street, N.E.; thence in a northwesterly direction along Madison Street, N.E., to 6th Street, N.E.; thence in a northeasterly direction along 6th Street, N.E., to Nicholson Street, N.E.; thence in a northwesterly direction along Nicholson Street, N.E., to 6th Street, N.E.; thence in a northerly direction along 6th Street, N.E., to Eastern Avenue, N.E.; thence in a northwesterly direction along Eastern Avenue, N.E., to New Hampshire Avenue, N.E.; thence in a southwesterly direction along New Hampshire Avenue, N.E. to Blair Road, N.E.; thence in a northwesterly direction along Blair Road, N.E., to North Capitol Street; thence in a northwesterly direction along Blair Road, N.W., to Aspen Street, N.W.; thence in an easterly direction along Aspen Street, N.W., to Willow Street, N.W.; thence in a northeasterly direction along Willow Street, N.W., to Eastern Avenue, N.W.; thence in a northwesterly direction along Eastern Avenue, N.W., to the point of beginning at the intersection of 13th Street, N.W., and Eastern Avenue, N.W.; provided, that the Targeted Ward 4 Moratorium Zone shall not include the area bounded by the line starting at the intersection of 8th Street, N.W., and Dahlia Street, N.W.; thence in a southerly direction along 8th Street, N.W., to Aspen Street, N.W.; thence easterly along Aspen Street, N.W., to Piney Branch Road, N.W.; thence southwesterly along Piney Branch Road, N.W., to 8th Street, N.W.; thence in a southerly direction along 8th Street, N.W., to Madison Street, N.W.; thence in an easterly direction along Madison Street, N.W., to 3rd Street, N.W.; thence in a northerly direction along 3rd Street, N.W., to Whittier Street, N.W.; thence in a westerly direction along Whittier Street, N.W., to 5th Street, N.W.; thence in a northerly direction along 5th Street, N.W., to Dahlia Street, N.W.; thence in a westerly direction along Dahlia Street, N.W., to the point of beginning at the intersection of 13th Street, N.W., and Dahlia Street, N.W.

“(b) Within the Targeted Ward 4 Moratorium Zone, a licensee under an off-premises retailer’s license, class A or B, shall not:

“(1) Divide a manufacturer’s package of more than one container of beer, malt liquor, or ale, to sell an individual container of the package if the capacity of the individual container is 70 ounces or less; or

“(2) Sell, give, offer, expose for sale, or deliver an individual container of beer, malt liquor, or ale with a capacity of 70 ounces or less.”

Section 5(b) of D.C. Law 17-288 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) addition, see § 2(a) of Targeted Ward 4 Single Sales Moratorium Emergency Act of 2008 (D.C. Act 17-509, September 25, 2008, 55 DCR 10878).

Legislative history of Law 17-324. — For Law 17-324, see notes following § 25-336.

§ 25-342. Special restrictions for off-premises retailer's license in Ward 7.

(a) For the purposes of this section, the term “Ward 7” means the area defined as Ward VII in § 1-1041.03(a) on [August 15, 2008].

(b) A licensee under an off-premises retailer's license in Ward 7, class A or B, shall not divide a manufacturer's package of more than one container of beer, malt liquor, or ale, to sell an individual container of the package if the capacity of the individual container is 70 ounces or less.

(c) A licensee under an off-premises retailer's license in Ward 7, class A or B, shall not sell, give, offer, expose for sale, or deliver an individual container of beer, malt liquor, or ale with a capacity of 70 ounces or less.

(Aug. 15, 2008, D.C. Law 17-211, § 2(b), 55 DCR 6984.)

Legislative history of Law 17-211. — Law 17-211, the “Wards 4, 7, and 8 Anti-Sale Containers of Alcoholic Beverages Act of 2008”, was introduced in Council and assigned Bill No. 17-532 which was referred to Public Works and the Environment. The Bill was adopted on first

and second readings on May 6, 2008, and June 3, 2008, respectively. Signed by the Mayor on June 18, 2008, it was assigned Act No. 17-407 and transmitted to both Houses of Congress for its review. D.C. Law 17-211 became effective on August 15, 2008.

§ 25-343. Special restrictions for off-premises retailer's license in Ward 8.

(a) For the purposes of this section, the term “Ward 8” means the area defined as Ward VIII in § 1-1041.03(a) on [August 15, 2008].

(b) A licensee under an off-premises retailer's license in Ward 8, class A or B, shall not divide a manufacturer's package of more than one container of beer, malt liquor, or ale, to sell an individual container of the package if the capacity of the individual container is 70 ounces or less.

(c) A licensee under an off-premises retailer's license in Ward 8, class A or B, shall not sell, give, offer, expose for sale, or deliver an individual container of beer, malt liquor, or ale with a capacity of 70 ounces or less.

(Aug. 15, 2008, D.C. Law 17-211, § 2(b), 55 DCR 6984.)

Emergency legislation. — For temporary (90 day) additions, see § 2(b) of Mt. Pleasant, Targeted Ward 2, and Targeted Ward 6 Single Sales Moratorium Congressional Review Emer-

gency Act of 2008 (D.C. Act 17-564, October 27, 2008, 55 DCR 12024).

Legislative history of Law 17-211. — For Law 17-211, see notes following § 25-342.

§ 25-344. Special restrictions for off-premises retailer's license in Mt. Pleasant.

(a) For the purposes of this section, the term “Mt. Pleasant” means the area defined as ANC-1D, delimited by Piney Branch Parkway to the north, 16th

Street to the east, Harvard Street to the south, and Adams Mill and Klinge Roads to the west, on [December 24, 2008].

(b) A licensee under an off-premises retailer's license in Mt. Pleasant, class A or B, shall not:

(1) Divide a manufacturer's package of more than one container of beer, malt liquor, or ale, to sell an individual container of the package if the capacity of the individual container is 70 ounces or less; or

(2) Sell, give, offer, expose for sale, or deliver an individual container of beer, malt liquor, or ale with a capacity of 70 ounces or less.

(Dec. 24, 2008, D.C. Law 17-287, § 2(b), 55 DCR 11993.)

Legislative history of Law 17-287. — Law 17-287, the "Consolidated Mt. Pleasant, Ward 2, and Ward 6, Single Sales Moratorium Act of 2008", was introduced in Council and assigned Bill No. 17-846 which was referred to the Committee on Public Works and the Environment. The Bill was adopted on first and second readings on July 15, 2008, and October 7, 2008, respectively. Signed by the Mayor on October 27, 2008, it was assigned Act No. 17-553 and transmitted to both Houses of Congress for its review. D.C. Law 17-287 became effective on December 24, 2008.

Editor's notes. — Section 4 of D.C. Law

17-287 provided: "Sec. 4. Rules. "The Mayor, pursuant to Title I of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 et seq.), may issue rules to implement the provisions of this act. The proposed rules shall be submitted to the Council for a 30-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution, within this 30-day review period, the proposed rules shall be deemed approved."

§ 25-345. Ward 2 restrictions for off-premises retailer's license.

(a) For the purposes of this section, the term "Ward 2" means the area defined as Ward II in § 1-1041.03 on [December 24, 2008].

(b) A licensee under an off-premises retailer's license, class A or B, located in Ward 2, shall not:

(1) Divide a manufacturer's package of more than one container of beer, malt liquor, or ale, to sell an individual container of the package if the capacity of the individual container is 70 ounces or less; or

(2) Sell, give, offer, expose for sale, or deliver an individual container of beer, malt liquor, or ale with a capacity of 70 ounces or less, as well as spirits (liquor) sold in half-pints or smaller volumes.

(c)(1) An existing licensee may apply to the Alcoholic Beverage Control Board for an exception to the restrictions in subsection (b) of this section. The Board shall notify the Advisory Neighborhood Commission in which the licensee is located when a licensee applies for an exception and provide a copy of the application. The copy of the application shall be provided at the address of the ANC's office of record. The Board shall make its determination on the licensee application within 60 calendar days of receipt of the application.

(2) In making a determination on the licensee application under this subsection, the Board shall consider the following factors:

(A) The input, if any, of the ANC in which the licensee is located, as evidenced by a vote of the ANC, which shall be given great weight;

(B) Whether the exception will negatively impact the enforceability and effectiveness of the ban;

(C) The absence or presence of any primary or secondary tier violations within the 12 months immediately preceding the date of application, including sales to minors, use of premises for unlawful purposes, or sale to persons without a valid identification;

(D) Evidence of licensee participation in the community, such as attendance at ANC and Police Service Area community meetings; and

(E) Clear and convincing evidence that there have been no significant adverse community impacts, such as loitering, littering, or other anti-social behavior in the vicinity of the licensee establishment.

(3) A new licensee under an off-premises retailer's license, class A or B, may not apply for an exception under this subsection within the first 12 months of having obtained a license under this title.

(d) The restrictions in subsection (b) of this section shall not apply to a licensee located in a federal building, or to a licensee that is a full-service grocery store, as described in this title.

(Dec. 24, 2008, D.C. Law 17-287, § 2(c), 55 DCR 11993.)

Legislative history of Law 17-287. — For Law 17-287, see notes following § 25-344.

§ 25-346. Ward 6 restrictions for off-premises retailer's license.

(a) For the purposes of this section, the term "Ward 6" means the area defined as Ward VI in § 1-1041.03 on [December 24, 2008].

(b) A licensee under an off-premises retailer's license, class A or B, located in Ward 6 shall not:

(1) Divide a manufacturer's package of more than one container of beer, malt liquor, or ale, to sell an individual container of the package if the capacity of the individual container is 70 ounces or less; or

(2) Sell, give, offer, expose for sale, or deliver an individual container of beer, malt liquor, or ale with a capacity of 70 ounces or less, as well as spirits (liquor) sold in half-pints or smaller volumes.

(c)(1) An existing licensee may apply to the Alcoholic Beverage Control Board for an exception to the restrictions in subsection (b) of this section. The Board shall notify the Advisory Neighborhood Commission in which the licensee is located when a licensee applies for an exception and provide a copy of the application. The copy of the application shall be provided at the address of the ANC's office of record. The Board shall make its determination on the licensee application within 60 calendar days of receipt of the application.

(2) In making a determination on the licensee application under this subsection, the Board shall consider the following factors:

(A) The input, if any, of the ANC in which the licensee is located, as evidenced by a vote of the ANC, which shall be given great weight;

(B) Whether the exception will negatively impact the enforceability and effectiveness of the ban;

(C) The absence or presence of any primary or secondary tier violations within the 12 months immediately preceding the date of application, including sales to minors, use of premises for unlawful purposes, or sale to persons without a valid identification;

(D) Evidence of licensee participation in the community, such as attendance at ANC and Police Service Area community meetings; and

(E) Clear and convincing evidence that there have been no significant adverse community impacts, such as loitering, littering, or other anti-social behavior in the vicinity of the licensee establishment.

(3) A new licensee under an off-premises retailer's license, class A or B, may not apply for an exception under this subsection within the first 12 months of having obtained a license under this title.

(d) The restrictions in subsection (b) of this section shall not apply to a licensee located in a federal building, or to a licensee that is a full-service grocery store, as described in this title.

(Dec. 24, 2008, D.C. Law 17-287, § 2(d), 55 DCR 11993.)

Legislative history of Law 17-287. — For Law 17-287, see notes following § 25-344.

Subchapter IV. Board-Created Moratoria.

§ 25-351. Board-created moratoria.

(a) If the Board reasonably determines that it is in the public interest to do so based on the appropriateness standard set forth in subchapter II of this chapter, the Board may, by rule:

(1) Limit the number of licenses of any class to be issued;

(2) Declare a moratorium on the issuance of licenses of any class, or the issuance of amended licenses that constitute a substantial change, in any locality, section, or portion of the District; or

(3) Declare a moratorium in any locality, section, or portion of the District to limit the sale of products by licensees under an off-premises retailer license, class A and B.

(b) Any group with standing under § 25-601 may request the Board to issue regulations establishing the limit or declaring the moratorium. A moratorium issued by the Board under subsection (a)(1) or (a)(2) of this section shall have a prospective effect and shall not apply to existing licenses.

(c) A moratorium on the issuance of an amended license that constitutes a substantial change, in accordance with § 25-762, shall only be allowed in those geographical areas for which a limit or moratorium on the number of licenses in any class is in effect and shall apply to any application filed after May 3, 2001, for an amended license that would constitute a substantial change.

(d) No licensee or agent of any licensee shall be entitled to make a request under subsection (b) of this section.

(e) A moratorium shall be effective for 5 years from the date of final rulemaking, or for a lesser period as determined by the Board.

(f) If the Board acts on a moratorium request, a moratorium request for the

same area, or an area covering substantially the same area, shall not be considered for 2 years from the date of the Board's action.

(g) The requirements of this section shall not apply to solicitor's licenses, manager's licenses, caterer's licenses, or to temporary licenses.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 201(c), 51 DCR 6525.)

Effect of amendments. — D.C. Law 15-187 added subsec. (g).

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-352. Procedures to request a moratorium.

(a) The moratorium request shall be made to the Board in writing, stating:

- (1) The name and address of the individual, group, or business entity seeking the moratorium;
- (2) The area of the District to be covered by the moratorium;
- (3) The class or classes of licenses to be covered by the moratorium; and
- (4) A detailed statement of the reasons that the moratorium is appropriate under at least 2 of the appropriateness standards set forth in subchapter II of this chapter.

(b) For the purposes of subsection (a)(2) of this section, the individual, group, or business entity seeking the moratorium shall identify one licensed establishment. The area to be covered by the moratorium shall be measured from the property lines of that establishment. The entire area to be covered under a moratorium shall be either a locality, section, or portion.

(c) For the purposes of subsection (a)(3) of this section, a moratorium may be sought for a single class of license or for any combination of the classes of licenses.

(d) No moratorium request to limit the number of licenses to be issued, the number of licenses issued for any single class, or the issuance of amended licenses for any single class that constitute a substantial change shall be considered by the Board unless all the requirements of subsection (a) of this section have been met and the following conditions are satisfied:

(1) If the requested moratorium area is a locality, there shall exist in the area at least 3 licensed establishments of the same class or 6 licensed establishments of any class or combination of classes;

(2) If the requested moratorium area is a section, there shall exist in the area at least 6 establishments of the same class or 12 establishments of any class or combination of classes; or

(3) If the requested moratorium area is a portion, there shall exist in the area at least 9 establishments of the same class or 18 establishments of any class or combination of classes.

(e) A moratorium request to limit the sale of products by licensees under an off-premises retailer's license, class A and class B, shall not be considered by the Board unless all the requirements of subsection (a) of this section have been met and the following conditions are satisfied:

(1) If the requested moratorium area is a locality, there shall exist in the locality at least 3 class A, 3 class B, or any combination of 3 class A or class B licensed establishments;

(2) If the requested moratorium area is a section, there shall exist in the section at least 5 class A, 5 class B, or any combination of 5 class A or class B licensed establishments; or

(3) If the requested moratorium area is a portion, there shall exist in the portion at least 7 class A, 7 class B, or any combination of 7 class A or class B licensed establishments.

(f) The requirements of this section shall not apply to solicitor's licenses, manager's licenses, caterer's licenses, or to temporary licenses.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 1, 2002, D.C. Law 14-190, § 1702(h), 49 DCR 6968; Sept. 30, 2004, D.C. Law 15-187, § 201(d), 51 DCR 6525.)

Effect of amendments. — D.C. Law 14-190 rewrote subsec. (d), and added subsec. (e).

D.C. Law 15-187 added subsec. (f).

Emergency legislation. — For temporary (90 day) amendment of section, see § 1702(h) of Fiscal Year 2003 Budget Support Emergency Act of 2002 (D.C. Act 14-453, July 23, 2002, 49 DCR 8026).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 14-190. — For Law 14-190, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

§ 25-353. Notice requirements for moratorium proceedings.

If a moratorium request meets all of the requirements set forth in § 25-352, the Board shall provide notice to the public according to the same procedures as required by § 25-421.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(p), 51 DCR 6525.)

Effect of amendments. — D.C. Law 15-187 substituted “§ 25-421” for “§§ 25-421 and 25-422; provided, that, for purposes of this section, the responsibilities of the applicant prescribed in § 25-422 shall be assumed by the Board”.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

§ 25-354. Board review of moratorium request.

(a) The Board shall hold a public hearing to review a proposed moratorium. The public hearing shall be in the nature of a rulemaking hearing under § 2-505 and not in the nature of a contested case under § 2-509.

(b) At the public hearing, any interested person may appear to give oral or written testimony in support of, or in opposition to, the moratorium request.

(c) In addition to receiving testimony from the public, the Board shall request formal comments from the following persons or agencies:

(1) The Councilmembers within whose wards the requested moratorium area is located;

(2) The ANCs within whose areas the requested moratorium area is located and any other ANC abutting the proposed moratorium area;

(3) The Assistant City Administrator for Economic Development, or his or her designee;

(4) The Office of Planning, or its successor agency; and

(5) The District Commander of the Metropolitan Police Department in which the requested moratorium zone is located.

(d) In deciding on a moratorium request, the Board shall consider the extent to which the testimony and comments show that the requested moratorium is appropriate under at least 2 of the appropriateness standards set forth in subchapter II of this chapter.

(e) The Board may grant the moratorium request in one or more of the following ways:

(1) In whole or in part;

(2) By enlarging or decreasing the moratorium area; or

(3) By limiting the moratorium to no more than one class of license.

(f) The Board may deny the moratorium request in its entirety.

(g) The decision of the Board shall be final and shall be issued in writing, including each member's vote.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(q), 51 DCR 6525.)

Effect of amendments. — D.C. Law 15-187, in par. (2) of subsec. (c), substituted “is located and any other ANC abutting the proposed moratorium area” for “is located”.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Subchapter V. Involuntary Transfer.

§ 25-361. Involuntary transfer.

(a) The Board may transfer a license upon the request of a bona fide purchaser of the license who made the purchase at any of the following:

(1) A marshal's sale;

(2) A trustee's sale under foreclosure of a chattel deed of trust;

(3) A trustee's or receiver's sale in bankruptcy proceedings;

(4) Any other sale conducted upon the order of a court of competent jurisdiction;

(5) A sale under Article 9 of the Uniform Commercial Code;

(6) Upon the death of an individual who is a licensee or who has a stock ownership or partnership interest of 50% or more in the licensed business; or

(7) A tax sale under Chapter 13 or 13A of Title 47.

(b) Except as provided in this section, transfers made under this section may, because of their involuntary nature, be approved by the Board without an initial inquiry, as required by §§ 25-311 through 25-314, as to the appropriateness of the establishment, and without the notice provisions contained in subchapter II of Chapter 4.

(c) Bona fide purchasers whose transfers are approved under this section

shall, at the time for renewal of the license, meet all of the requirements of § 25-313 regarding the appropriateness of the establishment and shall at that time have notice of their renewal application given under subchapter II of Chapter 4.

(d) Bona fide purchasers shall, before an approval of the transfer, submit to the Board an affidavit stating that no change which could be considered a substantial change to the business under § 25-762 will occur before the expiration of the license period during which the transfer takes place.

(e) If a change which could be considered a substantial change will occur before the expiration of the license period, the transfer application shall be considered under §§ 25-404 and 25-762.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Subchapter VI. Moratorium on Establishments Which Permit Nude Dancing.

§ 25-371. Moratorium on establishments which permit nude dancing.

(a) Except as provided in subsection (b) of this section, no licensee under this title shall permit nude dancers.

(b) A licensee who regularly provided entertainment by nude dancers before December 15, 1993, may continue to do so at its establishment.

(Jan. 24, 1934, 48 Stat. 319, ch. 4, § 3; Aug. 27, 1935, 49 Stat. 897, ch. 756, § 1; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 1; Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Sept. 29, 1982, D.C. Law 4-157, §§ 2, 15, 29 DCR 3617; Mar. 10, 1983, D.C. Law 4-204, § 2, 30 DCR 185; Aug. 2, 1983, D.C. Law 5-16, § 2, 30 DCR 3193; May 23, 1986, D.C. Law 6-119, § 2, 33 DCR 2447; Mar. 7, 1987, D.C. Law 6-217, § 2, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(a), 38 DCR 4974; Oct. 3, 1992, D.C. Law 9-174, § 2(a), 39 DCR 5859; Sept. 11, 1993, D.C. Law 10-12, § 2(a), 40 DCR 4020; May 24, 1994, D.C. Law 10-122, § 2(a), 41 DCR 1658; Apr. 12, 1997, D.C. Law 11-258, § 2(a), 44 DCR 1421; Mar. 26, 1999, D.C. Law 12-202, § 2(a), 45 DCR 8412; Mar. 26, 1999, D.C. Law 12-206, § 2(a), 45 DCR 8430; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 26, 2001, D.C. Law 14-42, § 6(c), 48 DCR 7612.)

Prior Codifications. — 1981 Ed., § 25-103. 1973 Ed., § 25-103.

Effect of amendments. — D.C. Law 14-42, in subsec. (a), substituted “shall” for “may”; and validated the previously made technical corrections in the section designation of § 25-371.

Emergency legislation. — For temporary (90 day) amendment of section, see § 6(c) of

Technical Amendments Emergency Act of 2001 (D.C. Act 14-108, August 3, 2001, 48 DCR 7622).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 14-42. — For Law 14-42, see notes following § 25-120.

CASE NOTES

In general.

Restaurant's use of nude "go-go" dancers did not make restaurant's location inappropriate and, thus, did not preclude issuance of class C liquor license to restaurant under D.C. Code

1981, § 25-115(a)(6), where such dancing was not illegal under applicable zoning regulations. *Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

§ 25-372. Nude dancing performances.

Nude dancers in an establishment licensed under § 25-371(b) shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least 3 feet from the nearest customer. The licensee under an on-premises retailer's license for a multipurpose facility for a legitimate theater may permit nudity by performers in dramatic productions.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-373. Transfer of ownership of establishments which permit nude dancing.

A licensee under § 25-371(b) may transfer ownership in accordance with the provisions of this chapter.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-374. Transfer of location of establishments which permit nude dancing.

(a) A license under § 25-371(b) may only be transferred to a location in the Central Business District or, if the licensee is currently located in a CM or M-zoned district, transferred within the same CM or M-zoned district, as identified in the zoning regulations of the District of Columbia and shown in the official atlases of the Zoning Commission of the District of Columbia; provided, that no license shall be transferred to any premises which is located:

(1) Six hundred feet or less from another licensee operating under § 25-371(b); and

(2) Six hundred feet from a building with a certificate of occupancy for residential use or a lot or building with a permit from the Department of Consumer and Regulatory Affairs for residential construction at the premises.

(b)(1) Notwithstanding the restrictions of subsection (a) and (a)(1) of this section, but subject to the provisions in subsection (a)(2) of this section, if a licensee was located in a CM or M-zoned district, in or within 2000 feet of the footprint of the Ballpark, as of January 1, 2006, or was located within the Skyland Development Project site as described in § 2-1219.19(c)(1) [repealed],

as of January 1, 2007, then within one year of [October 18, 2007] a license may be transferred to:

(A) A location in any CM or M-zoned district, if the licensee was located in a CM or M-zoned district, respectively, as identified in the zoning regulations of the District of Columbia and shown in the official atlases of the Zoning Commission of the District of Columbia;

(B) A location in any CM-zoned district, if the licensee was located within the Skyland Development Project site; or

(C) In any C-3, C-4, or C-5 zone within 5000 feet from the Ballpark footprint.

(2) For the purposes of this subsection, the term “Ballpark” shall have the same meaning as provided in § 47-2002.05(a)(1)(A).

(c)(1) No more than 2 licensees may be transferred to any one ward pursuant to subsection (b) of this section.

(2) Licensees transferring to a C-4 zone shall not count against the ward limitations set forth in paragraph (1) of this subsection.

(d) Notwithstanding any other provision, licensees relocating pursuant to subsection (b) of this section shall not locate within 1,200 feet from each other.

(e) No portion of any establishment granted a license pursuant to subsection (b) of this section shall be located within 600 feet of a church, school, library, playground, or the area under the jurisdiction of the Commission of Fine Arts pursuant to §§ 6-611.01 — 6-611.02.

(f) All licensees shall consult the Advisory Neighborhood Commission in the area where the license is transferred pursuant to subsection (b) of this section regarding entering a voluntary agreement with the community.

(g) Notwithstanding any other provision of this section, a license under subsection (b) of this section shall not be transferred prior to November 1, 2007, or to a location that has been rezoned by that date to a residential, C-1, or C-2 zoning district classification as identified in the Zoning Regulations of the District of Columbia.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 18, 2007, D.C. Law 17-24, § 2, 54 DCR 8011.)

Effect of amendments. — D.C. Law 17-24 designated the existing text as subsec. (a); and added subsecs. (b) to (g).

Temporary Amendment of Section. — Section 2 of D.C. Law 19-129 added subsec. (a-1) to read as follows:

“(a-1) Notwithstanding subsection (a) of this section, no class CN license with nude dancing shall be issued in or transferred into Ward 5, as defined by § 1-1041.03; provided, that this section shall not prohibit the transfer of an existing CN license with nude dancing within Ward 5.”.

Section 4(b) of D.C. Law 19-129 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2 of

Moratorium on Establishments Which Permit Nude Dancing Emergency Act of 2012 (D.C. Act 19-302, February 21, 2012, 59 DCR 1671).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 17-24. — Law 17-24, the “The One-Time Relocation of Licensees Displaced by the Ballpark and Skyland Development Project Act of 2007”, was introduced in Council and assigned Bill No. 17-109 which was referred to the Committee on Public Works and Environment. The Bill was adopted on first and second readings on June 5, 2007, and July 10, 2007, respectively. Signed by the Mayor on July 26, 2007, it was assigned Act No. 17-86 and transmitted to both Houses of Congress for its review. D.C. Law 17-24 became effective on October 18, 2007.

CHAPTER 4. APPLICATION AND REVIEW PROCESSES.

Subchapter I. Application Requirements

Sec.

- 25-401. Form of application.
- 25-402. New license application for manufacturer, wholesaler, or retailer.
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- 25-421. Notice by Board.
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Sec.

- 25-423. Posted notice required after submission of application and for the duration of the protest period.

Subchapter III. Review of License Applications

- 25-431. Review procedures — General provisions.
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Subchapter IV. Review and Resolution Procedures

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- 25-447. Show cause hearing.

*Subchapter I. Application Requirements.***§ 25-401. Form of application.**

(a) A person applying for issuance, transfer to a new owner, or renewal of a license, or for approval of substantial changes in operation or change in license class, shall file with the Board an application in the form prescribed by the Board. The application shall contain the information set forth in this chapter and any additional information that the Board may require.

(b) A separate application shall be filed for each establishment for which a license is sought; provided, that a railroad company may file one application for all of its dining cars and club cars and a passenger-carrying marine vessel line may file one application for all of its passenger-carrying marine vessels and dockside waiting areas.

(c) An individual applicant, all of the general partners of an applicant partnership, all of the members of a limited liability company, or the president or vice-president of an applicant corporation shall sign a notarized statement certifying that the application is complete and accurate. Any person who knowingly makes a false statement on an application, or in any accompanying statement under oath that the Mayor or the Board may require, shall be guilty of the offense of making false statements. The making of a false statement, whether made with or without the knowledge or consent of the applicant, shall, in the discretion of the Board, constitute sufficient cause for denial of the application or revocation of the license.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat.

103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-401.
1973 Ed., § 25-115.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-402. New license application for manufacturer, wholesaler, or retailer.

(a) The application of a person applying for a manufacturer's, wholesaler's, or retailer's license shall include:

(1) In the case of an individual applicant, the trade name of the business, if applicable, and the name and address of the individual; in the case of a partnership or limited liability company applicant, the trade name of the business, if applicable, and the names and addresses of each member of the partnership or limited liability company; and in the case of a corporate applicant, the legal name, trade name, place of incorporation, principal place of business, and the names and addresses of each of the corporation's principal officers, directors, and shareholders holding, directly or beneficially, 10% or more of its common stock;

(2) The name and address of the owner of the establishment for which the license is sought and the premises where it is located; provided, that this requirement shall not apply to applicants for a solicitor's license;

(3) The class of license sought;

(4) The proximity of the establishment to the nearest public or private, elementary, middle, charter, junior high, or high school, and the name of the school;

(5) The size and design of the establishment, which shall include both the number of seats (occupants) and the number of patrons permitted to be standing, both inside and on any sidewalk café or summer garden.

(6) A detailed description of the nature of the proposed operation, including the following:

(A) The type of food to be offered, if any;

(B) The type of entertainment to be offered, if any;

(C) The goods and services to be offered for sale, in addition to alcoholic beverages, if any;

(D) The hours during which the establishment plans to sell alcoholic beverages;

(E) If different from those stated in subparagraph (D) of this paragraph, the hours during which the establishment plans to remain open for the sale of goods or services other than alcoholic beverages and a description of the

provisions planned for the storage of the alcoholic beverages, as required under § 25-754, during hours when the sale of alcoholic beverages is prohibited;

(7) An affidavit that complies with § 47-2863(b);

(8) Documents or other written statements or evidence establishing to the satisfaction of the Board that the person applying for the license meets all of the qualifications set forth in § 25-301; and

(9) Written statements or evidence establishing to the satisfaction of the Board that the applicant has complied with the requirements of § 25-423.

(b) The applicant for a restaurant or hotel license shall attest that it will receive at least 45% of its gross annual receipts from the sale of food during each year of the license period.

(c) The Board shall establish application procedures for the issuance of a caterer's license under § 25-211(b).

(d) The applicant for a nightclub license shall file a written security plan with the Board.

(e) The Board may require, in its sound discretion, the applicant for a restaurant, tavern, or multipurpose facility license to file a written security plan with the Board.

(f) A written security plan shall include at least the following elements:

(1) A statement on the type of security training provided for, and completed by, establishment personnel, including:

(A) Conflict resolution training;

(B) Procedures for handling violent incidents, other emergencies, and calling the Metropolitan Police Department; and

(C) Procedures for crowd control and preventing overcrowding;

(2) The establishment's procedures for permitting patrons to enter;

(3) How security personnel are stationed inside and in front of the establishment and the number and location of cameras used by the establishment;

(4) Procedures in place to prevent patrons from becoming intoxicated and ensuring that only persons 21 years or older are served alcohol; and

(5) How the establishment maintains an incident log.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Mar. 2, 2007, D.C. Law 16-192, § 1012(b), 53 DCR 6899; July 18, 2008, D.C. Law 17-201, § 4(b), 55 DCR 6289; Mar. 25, 2009, D.C. Law 17-353, § 242, 56 DCR 1117.)

Prior Codifications. — 1981 Ed., § 25-402. 1973 Ed., § 25-115.

Effect of amendments. — D.C. Law 16-192, in subsec. (a)(1), substituted “shareholders holding, directly or beneficially, 10% or more of its common stock” for “shareholders holding 25% or more of its common stock”.

D.C. Law 17-201 rewrote subsec. (a)(6); and added subsecs. (d), (e), and (f). Prior to repeal, subsec. (a)(6) read as follows: “(6) The size and design of the establishment for which the license is sought;”

D.C. Law 17-353, in subsec. (a), redesignated former pars. (6) to (10) as pars. (5) to (9), respectively.

Emergency legislation. — For temporary (90 day) amendment of section, see § 1012(b) of Fiscal Year 2007 Budget Support Emergency Act of 2006 (D.C. Act 16-477, August 8, 2006, 53 DCR 7068).

For temporary (90 day) amendment of section, see § 1012(b) of Fiscal Year 2007 Budget Support Congressional Review Emergency Act of 2006 (D.C. Act 16-499, October 23, 2006, 53 DCR 8845).

For temporary (90 day) amendment of section, see § 1012(b) of Fiscal Year 2007 Budget Support Congressional Review Emergency Act of 2007 (D.C. Act 17-1, January 16, 2007, 54 DCR 1165).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 16-192. — For Law 16-192, see notes following § 25-301.

Legislative history of Law 17-201. — For Law 17-201, see notes following § 25-101.

Legislative history of Law 17-353. — For Law 17-353, see notes following § 25-113.

§ 25-403. License renewal application for manufacturer, wholesaler, or retailer.

(a) An applicant for license renewal shall verify, by affidavit, the accuracy of its application, including all documents and submissions constituting a part of the application for its initial license or, if appropriate, at the time of a Board-approved substantial change in operation.

(b) In the case of an application for renewal of a restaurant or hotel license, the applicant shall present evidence establishing that the sale of food accounted for at least 45% of gross annual receipts from the operation of the restaurant or of the dining room of the hotel during the current license period.

(c) The applicant shall submit documents or other written evidence establishing to the satisfaction of the Board that the applicant has complied with the requirements of § 25-423.

(d) The Board shall establish application procedures for the renewal of a caterer’s license under § 25-211(b).

(e) In the case of an application for renewal of a nightclub license, the applicant shall submit a written security plan.

(f) In the case of an application for renewal for a restaurant, tavern, or multipurpose facility license, the Board may, in its sound discretion, require that the applicant submit a written security plan.

(g) A written security plan shall include at least the following elements:

(1) A statement on the type of security training provided for, and completed by, establishment personnel, including:

(A) Conflict resolution training;

(B) Procedures for handling violent incidents, other emergencies, and calling the Metropolitan Police Department; and

(C) Procedures for crowd control and preventing overcrowding;

(2) The establishment’s procedures for permitting patrons to enter;

(3) How security personnel are stationed inside and in front of the establishment and the number and location of cameras used by the establishment;

(4) Procedures in place to prevent patrons from becoming intoxicated and ensuring that only persons 21 years or older are served alcohol; and

(5) How the establishment maintains an incident log.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; July 18, 2008, D.C. Law 17-201, § 4(c), 55 DCR 6289.)

Prior Codifications. — 1981 Ed., § 25-403.
1973 Ed., § 25-115.

Effect of amendments. — D.C. Law 17-201
added subsecs. (e), (f), and (g).

Legislative history of Law 13-298. — For
D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 17-201. — For
Law 17-201, see notes following § 25-101.

§ 25-404. Application for approval of substantial change in operation.

(a) Before making a substantial change in the nature of the operation of the licensed establishment, an applicant shall file with the Board an amendment to its application or last application, providing the information required on an application under § 25-402(a).

(b)(1) If the Board determines that the proposed change to the nature of the operation is substantial:

(A) It shall provide notice of the licensee's amended filing to the same persons and in the same manner required for license renewal applications in subchapter II of this chapter; and

(B) The applicant requesting approval of a substantial change shall demonstrate appropriateness as set forth in §§ 25-313 and 25-314.

(2) There shall be no presumption of appropriateness with respect to substantial change applications. If the applicant fails to demonstrate that the proposed change in the nature of operation is appropriate for the locality, section, or portion of the District where the establishment is located, the Board shall disapprove the proposed change.

(3) In determining whether the proposed changes are substantial, the Board shall consider whether they are potentially of concern to the residents or businesses surrounding the establishment.

(c) If proper notice has been given as provided under subchapter II of this chapter, and no objection to the appropriateness of the proposed substantial change in the nature of the operation of the establishment is filed with the Board during the protest period, the proposed change shall be presumed

appropriate for the locality, section, or portion of the District where it is located.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-404.
1973 Ed., § 25-115.

Legislative history of Law 13-298. — For
D.C. Law 13-298, see notes following § 25-101.

§ 25-405. Application for transfer to new owner.

(a) A voluntary transaction which results in (1) the transfer to an individual of 50% or more of the legal or beneficial ownership of (A) the licensed establishment, or (B) the entity owning or controlling the licensed establishment, or (2) a change in stock ownership or partnership interest of 50% or more, within any 12 month period, shall require application for transfer of the license to new owners from the Board.

(b) An application to transfer a license to a new owner shall be filed by the transferee and approved by the Board before the consummation of the transfer.

(c) An applicant requesting the transfer of a license to a new owner shall submit documents and other written statements and evidence requesting written approval of the transfer and establishing to the satisfaction of the Board that the new owner meets all of the qualifications set forth in § 25-301.

(d) The current licensee shall submit an affidavit which complies with § 47-2863(b).

(e) If the Board finds that the licensee is in violation of this title or regulations promulgated under this title, the Board shall deny the application for transfer.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For
D.C. Law 13-298, see notes following § 25-101.

§ 25-406. Application for a solicitor's license.

The application for the issuance or renewal of a solicitor's license shall include:

- (1) The full name and home address of the applicant, if an individual;
- (2) The business name and address of the applicant;

(3) The name, business address, and business telephone number for the vendor that the applicant represents; and

(4) Written statements and evidence establishing to the satisfaction of the Board that the applicant meets all of the qualifications set forth in § 25-301.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-407. Application for a brew pub permit.

The application for issuance or renewal of a brew pub permit shall include:

(1) A copy of the applicant's restaurant or tavern license, or a copy of the pending application for a license; and

(2) A map showing the relation of the restaurant or tavern to the premises to be used to brew malt beverages.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-408. Application for a tasting permit for a class A licensee.

The application for issuance or renewal of a tasting permit for off-premises retailer's license, class A, shall include:

(1) A copy of the applicant's off-premises's retailers license, class A;

(2) Drawings of the premises indicating the areas where sampling is to occur; and

(3) The hours and days during which the tasting is to occur.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-409. Application for importation permit.

The application for issuance or renewal of a importation permit shall include:

(1) The quantity, character, and brand or trade name of the alcoholic beverage to be transported; and

(2) The name and address of the retailer.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-410. Application for manager's license.

The application for a manager's license shall include:

- (1) Certification that he or she has obtained [and] read a copy of this title;
 - (2) Written statements or evidence establishing to the satisfaction of the Board that the applicant meets all of the qualifications set forth in § 25-301; and
 - (3) A copy of the applicant's alcohol training and education certificate.
- (May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(r), 51 DCR 6525.)

Prior Codifications. — For D.C. Law 13-298, see notes following § 25-101.

Effect of amendments. — D.C. Law 15-187, in pars. (1) and (2), made nonsubstantive changes; and added par. (3).

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

§ 25-411. Application and responsibilities of pool buying retail agent.

- (a) The application for a pool buying group retail agent permit shall include:
 - (1) The name of the pool buying group;
 - (2) The appointed license retail agent for the pool buying group; and
 - (3) A statement that the agent will fully comply with Chapter 9 and other regulations regarding recordkeeping.
- (b) All taxes due on alcoholic beverages imported by an agent who has been issued an importation license shall be paid as prescribed in Chapter 9.
- (c) Pool buying agents shall maintain the records of each pool order placed for 3 years. The records shall include:
 - (1) The date the pool order was placed and each date it was revised;
 - (2) The distributor who was given the order;
 - (3) The names and license numbers of each pool member participating in the pool order;
 - (4) The price, discounts, and net price of all alcoholic beverages ordered by each member in the pool order; and
 - (5) The date when deliveries of pool orders are made to the pool buying agent's premises, which is a permitted off-premises storage area.
- (d) The pool buying agent shall place the order under the name of the pool buying group and provide instructions for delivery as well as each licensed retailer's part of the pool order.
- (e) Upon written request, a pool buying agent shall make available for inspection all papers and reports related to pool orders, purchases, and payments within 10 days to any ABRA employee.
- (f)(1) Individual members of a pool buying group shall place their orders and remit their payment to the pool buying agent.
 - (2) Payments shall be made payable to the pool buying agent or the distributor.
 - (3) Distributors of alcoholic beverages may accept pool orders and payment only from the designated pool buying agent of a pool buying group.

(Sept. 30, 2004, D.C. Law 15-187, § 401(h), 51 DCR 6525.)

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

References in text. — “Chapter 9”, referred to in par. (3) of subsec. (a) and in subsec. (b), is Chapter 9 of this title.

Editor’s notes. — Sections 402 and 403 of D.C. Law 15-187 provided:

“Sec. 402. Rules and regulations.

“The Mayor shall promulgate proposed rules and regulations to administer this title within 180 days of its effective date. The proposed rules and regulations, as well as any subsequent rules and regulations amending this ti-

tle, shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the rules and regulations, in whole or in part, by resolution with the 45-day review period, the proposed rules and regulations shall be deemed approved.

“Sec. 403. Applicability.

“Section 401 shall apply upon the effective date of the regulations promulgated under section 402.”

Subchapter II. Notice of Application Proceedings.

§ 25-421. Notice by Board.

(a) Upon the receipt of an application for the issuance or renewal, for a substantial change in operation as determined by the Board under 25-404, or for the transfer of a license to a new location, of a retailer’s license, the Board shall give notice of the application to the following parties:

(1) The Council;

(2) Repealed.

(3) Repealed.

(4) Any ANC within 600 feet of where the establishment is or will be located.

(b) The notice shall contain the legal name and trade name of the applicant, the street address of the establishment for which the license is sought, the class of license sought, and a description of the nature of the operation the applicant has proposed or the proposed change in operation. The description shall include the hours of sales or service of alcoholic beverages.

(c) The notice to the Board of Education shall state the proximity of the establishment to the nearest public school of the District and the name of the nearest public school.

(d) The notice shall state that persons objecting to approval of the application are entitled to be heard before the granting of the license, and shall inform the recipient of the final day of the protest period and the date, time, and place of the administrative review in accordance with subchapter III of this chapter.

(e) The Board shall give notice to the ANC by first-class mail, postmarked not more than 7 days after the date of submission, and addressed to the following persons:

(1) The ANC office, with a copy for each ANC member;

(2) The ANC chairperson, at his or her home address of record; and

(3) The ANC member in whose single-member district the establishment is or will be located, at his or her home address of record.

(f) The Board shall publish the notices required under this section in the District of Columbia Register.

(g) Within 180 days after May 3, 2001, the Board shall implement a

procedure by which it will provide additional notification, via electronic media, to the public and ANCs, of these notification requirements, and the publication of proposed and adopted regulations.

(h) The requirements of this section shall not apply to applicants for a caterer's license.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, §§ 101(s), 201(e), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-421. 1973 Ed., § 25-115.

Effect of amendments. — D.C. Law 15-187, in subsec. (a), repealed pars. (2) and (3) and rewrote par. (4); and added subsec. (h).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

CASE NOTES

ANALYSIS

In general.
Parties.

In general.

Where it was not suggested at separate hearings on applications to transfer liquor licenses that the two applications were mutually exclusive and no formal regulation required that liquor stores be situated more than 300 feet apart, denial of plaintiffs' application on sole ground that license of other applicant had been issued for location less than 300 feet from plaintiffs' proposed location was improper for failure of Alcoholic Beverage Control Board to give proper notice to plaintiffs that it considered applications mutually exclusive. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. *Pollack v. Simonson*, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

Under statute providing that Alcoholic Beverage Control Board may consider character of premises, its surroundings and wishes of persons residing or owning property in neighborhood in reviewing application for transfer of licensee, Board, if it finds that two liquor stores within 300 feet proximity are inappropriate for particular neighborhood and must necessarily choose between competing applicants, each ap-

plicant must be given opportunity to show that his application should be favored so that specific public standards, not unbridled discretion, will control Board's consideration of license application. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. *Pollack v. Simonson*, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

Parties.

Remand for new liquor licensing hearing made appropriate notice requirements of new hearing, rather than notice requirements of continuation of existing hearing; therefore, Alcoholic Beverage Control Board did not err in failing to notify 44 known remonstrants who had expressed interest in earlier liquor licensing hearing. D.C. Code §§ 1-171i(b), 25-115(b). *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 413 A.2d 152, 1980 D.C. App. LEXIS 258 (1980).

Requirement that notice of hearing on application for liquor license be given to known remonstrants applied to reschedulings of such hearings. D.C. Code § 25-115(b). *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

In proceedings on application for liquor license, District of Columbia Alcoholic Beverage

Control Board committed reversible error in failing to comply with applicable statute by giving notice of rescheduled hearing on license application to known remonstrants and by failing to post such notice on applicant's premises.

D.C. Code §§ 1-1509(a), 25-115(b). *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

§ 25-422. Notice by applicant. [Repealed].

Repealed.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; July 18, 2008, D.C. Law 17-201, § 4(d), 55 DCR 6289.)

Prior Codifications. — 1981 Ed., § 25-422. 1973 Ed., § 25-115.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 17-201. — For Law 17-201, see notes following § 25-101.

§ 25-423. Posted notice required after submission of application and for the duration of the protest period.

(a) The applicant shall post 2 notices, furnished by ABRA, of the application in conspicuous places on the outside of the establishment for the duration of the protest period.

(b) The notices shall state:

- (1) The information required by § 25-421(b);
- (2) The final day of the protest period;
- (3) The date, time, and place of the administrative review; and
- (4) The telephone number and mailing address of ABRA.

(c) Any person wilfully removing, obliterating, or defacing the notices shall be guilty of a violation of this chapter.

(d) An applicant who fails to maintain the posted notices continuously during the protest period shall be guilty of a violation of this chapter.

(e) If the Board determines that the notices posted at an applicant's establishment have not remained visible to the public for a full 45 days, the Board shall require the reposting of the notices and shall reschedule the administrative review for a date at least 45 days after the originally scheduled review, unless the applicant has fully performed all other notice requirements and the Board determines that it is in the best interests, of the parties to proceed at an earlier date.

(f) The requirements of this section shall not apply to applicants for a solicitor's license, manager's license, caterer's license, or a temporary license.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 201(f), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-423. 1973 Ed., § 25-115.

Effect of amendments. — D.C. Law 15-187 added subsec. (f).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

CASE NOTES

In general.

In proceedings on application for liquor license, District of Columbia Alcoholic Beverage Control Board committed reversible error in failing to comply with applicable statute by giving notice of rescheduled hearing on license

application to known remonstrants and by failing to post such notice on applicant's premises. D.C. Code §§ 1-1509(a), 25-115(b). *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

Subchapter III. Review of License Applications.

§ 25-431. Review procedures — General provisions.

(a) Except as otherwise provided herein, Board actions and procedures shall be governed by Chapter 5 of Title 2.

(b) Except as provided in subsection (c) of this section, the Board may meet in panels of at least 3 members for the purpose of conducting hearings and taking official actions. Three members shall constitute a quorum.

(c) The Board may establish alternate procedures for uncontested, interim administrative proceedings or issuing stipulated licenses. Such procedures shall be submitted to the Council for approval as provided under § 25-211(b).

(d) The Chair of the Board may appoint a Vice-Chair for the purposes of leading panels as provided for in this section.

(e) For the purposes of this chapter, the Board may permit the Board of Directors of a licensee under a club license to designate a representative to represent it during proceedings before the Board.

(f) Upon receipt of a complete application, the Board shall schedule an administrative review on the application. The administrative review shall not take place until after the close of the 45-day protest period. This administrative review may be conducted by a panel of 3 Board members.

(g) Before any license is issued or renewed, and before any substantial change in the operation of a licensed establishment as determined by the Board under § 25-404, the Board shall ensure that proper notice has been provided to the public and that the public has been given at least 45 days in which to protest the license and that an administrative review has been conducted.

(h) The administrative review shall be a non-adversarial proceeding held by the Board, at which hearing a list of applications for a new or renewed license or approval of substantial change in operation as under § 25-404, and the protestants thereto, shall be read to the public.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

CASE NOTES

ANALYSIS

Hearings.
In general.

Hearings.

Alcoholic Beverage Control Act does not explicitly require hearing before denial of application for transfer of license. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. *Pollack v. Simonson*, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

Alcohol Beverage Control Board had no reason to disqualify member who had been replaced as chair of the Board, but continued to hold position on Board, from proceeding on application for retailer's license. *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic Bev. Control Bd.*, 766 A.2d 59, 2001 D.C. App. LEXIS 18 (2001).

Not only an Alcoholic Beverage Control Board finding of moral character and fitness, but any finding required by licensing statute, must be based only upon evidence in the public record of the proceeding, and participants in the proceeding must have an opportunity to address themselves to that evidence, otherwise fundamentals of due process are denied. D.C. Code §§ 1-1501, 1-1509(c), 25-115. *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 288 A.2d 666, 1972 D.C. App. LEXIS 358 (1972).

Alcoholic Beverage Control Board may, in its discretion, hold formal comparative hearing, or follow some other procedure to inform itself in choosing between mutually exclusive applicants. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. *Pollack v. Simonson*, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

In general.

In application for renewal of liquor license,

board properly followed procedure applicable to application for license in first instance, rather than that prescribed for revocation or suspension of license already issued. D.C. Code 1951, §§ 25-106, 25-114, 25-115(b, c), 25-118. *Minkoff v. Payne*, 210 F.2d 689, 1953 U.S. App. LEXIS 3681 (C.A.D.C. 1953).

Three members of Alcoholic Beverage Control Board constituted a quorum for purpose of revoking alcoholic beverage license of operator of nightclub, and thus, Board's order revoking operator's license to serve alcoholic beverages, signed by only three members of Board, was valid; provision of statute specifically defined quorum as three members of seven-member Board, order issued by three members of Board showed on its face that it was action of quorum, and even without vote of member who was not present at all three hearings, two Board members who did attend hearings constituted majority of that quorum. *Aziken v. D.C. Alcoholic Bev. Control Bd.*, 29 A.3d 965, 2011 D.C. App. LEXIS 604 (2011).

It is not improper for Alcoholic Beverage Control Board member to become familiar with surroundings in which potential licensee will operate by personally inspecting site, so long as information obtained by inspection is placed on record at hearing, and applicant is given opportunity to controvert it by other evidence or argument. D.C. Code 1981, §§ 1-261(d), 25-111(a)(6). *Park v. District of Columbia Alcoholic Beverage Control Bd.*, 555 A.2d 1029, 1989 D.C. App. LEXIS 49 (1989).

Issuance of class "F" liquor licenses by the Alcoholic Beverage Control Board did not pre-judge issues in class "D" proceeding, where Board had already received all evidence in class "D" application at time it issued its order in class "F" proceeding and applications raised completely different issues. D.C. Code 1973,

§§ 25-111(j), 25-115. *Haight v. District of Columbia Alcoholic Beverage Control Bd.*, 439 A.2d 487, 1981 D.C. App. LEXIS 410 (1981).

§ 25-432. Standard review procedures.

(a) If no protest has been received by the Board during the protest period, the Board shall schedule an administrative review to consider the application within 10 days after the end of the protest period.

(b) If a protest has been received by the Board during the protest period, the Board shall take the following actions:

(1) The Board shall schedule a protest hearing to receive testimony and other evidence regarding the application in accordance with §§ 25-442 and 25-444.

(2)(A) The parties shall be informed of their obligation to attend a settlement conference under § 25-445 for the purpose of discussing and resolving, if possible, the objections raised by the protestants.

(B) The parties shall be informed of their rights and responsibilities with respect to reaching a settlement under §§ 25-445 and 25-446.

(C) At the request of all parties, and if a settlement conference would be unlikely to succeed, the Board may waive the parties' obligation to attend a settlement conference.

(3) The Board shall issue a decision in accordance with § 25-433.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

CASE NOTES

In general.

Where it was not suggested at separate hearings on applications to transfer liquor licenses that the two applications were mutually exclusive and no formal regulation required that liquor stores be situated more than 300 feet apart, denial of plaintiffs' application on sole ground that license of other applicant had been issued for location less than 300 feet from plaintiffs' proposed location was improper for failure of Alcoholic Beverage Control Board to give proper notice to plaintiffs that it considered applications mutually exclusive. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. *Pollack v. Simonson*, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

Under statute providing that Alcoholic Bev-

erage Control Board may consider character of premises, its surroundings and wishes of persons residing or owning property in neighborhood in reviewing application for transfer of license, Board, if it finds that two liquor stores within 300 feet proximity are inappropriate for particular neighborhood and must necessarily choose between competing applicants, each applicant must be given opportunity to show that his application should be favored so that specific public standards, not unbridled discretion, will control Board's consideration of license application. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. *Pollack v. Simonson*, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

§ 25-433. Decisions of the board; petition for reconsideration.

(a) No application shall be approved until the Board has determined that the applicant has complied with § 25-402(a)(8) through (10) [now (7) through

(9)] (and § 25-402(b) if the applicant is a restaurant or hotel) or, in the case of a renewal, has fulfilled the license requirements of this title. The Board shall make findings of fact with respect to each requirement, including the appropriateness standards set forth in §§ 25-313, 25-314, and 25-315, and the food sales requirements for restaurants and hotels.

(b) For the purposes of this section, the record shall close when a hearing is concluded. Parties shall have 30 days after the conclusion of the hearing to submit proposed findings of fact and conclusions of law to the Board.

(c) Within 90 days after the close of the record, the Board shall issue its written decision accompanied by findings of fact and conclusions of law. The Board shall publish and maintain a compilation of its decisions and orders.

(d)(1) A petition for reconsideration, rehearing, reargument, or stay of a decision or order of the Board may be filed by a party within 10 days after the date of receipt of the Board's final order.

(2) The filing or the granting of a petition filed under paragraph (1) of this subsection shall not stay the final order unless the stay is specifically ordered by the Board.

(3) A stay shall be granted only upon good cause, which shall consist of unusual or exceptional circumstances.

(e) The Board may establish procedures under § 25-211(b) to consider an application which is not protested during the protest period.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 1, 2002, D.C. Law 14-190, § 1702(i), 49 DCR 6968.)

Prior Codifications. — 1981 Ed., § 25-433. 1973 Ed., § 25-115.

Effect of amendments. — D.C. Law 14-190, in subsec. (b), substituted "30" for "10".

Emergency legislation. — For temporary (90 day) amendment of section, see § 1702(i) of Fiscal Year 2003 Budget Support Emergency

Act of 2002 (D.C. Act 14-453, July 23, 2002, 49 DCR 8026).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 14-190. — For Law 14-190, see notes following § 25-101.

CASE NOTES

ANALYSIS

Findings.

In general.

Injunctions.

Investigative reports.

Judicial review.

Record.

Findings.

Alcoholic Beverage Control Board is authorized to make finding that two liquor stores within 300 feet proximity are inappropriate for particular neighborhood, notwithstanding ab-

sence of any formal regulation promulgated by District Commissioners regarding necessary distances between liquor stores. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. Pollack v. Simonson, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

Alcoholic Beverage Control Board's approval of application to transfer Retailer's Class B license to sell beer and light wine did not prevent it from reaching a different conclusion on the same facts on reconsideration. Tiger Wyk Ltd. v. D.C. Alcoholic Bev. Control Bd., 825 A.2d 303, 2003 D.C. App. LEXIS 292 (2003).

Alcoholic Beverage Control Board was required to articulate legal basis of its authority to disapprove or dismiss petition proposal in opposition to liquor license application for objector's false representations; although it was possible that purging misrepresentations would not undo damage caused by falsehoods in petition, Board did not explain why it took more drastic action, not explicitly authorized under governing statute, of dismissing petition. D.C. Code 1981, § 25-115(e)(3). Coumaris v. District of Columbia Alcoholic Beverage Control Bd., 660 A.2d 896, 1995 D.C. App. LEXIS 127 (1995).

Under D.C. Code 1981, § 25-115(a)(6), Alcoholic Beverage Control Board, in determining whether to renew restaurant's class C liquor license, could have disregarded entirely the views of neighborhood residents, particularly those who did not live in immediate area of the restaurant. Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd., 500 A.2d 987, 1985 D.C. App. LEXIS 562 (1985).

Erroneous findings of Alcoholic Beverage Control Board regarding the status of public hall license and allegations that patrons left establishment in intoxicated state were not prejudicial, where Board's conclusion that establishment was inappropriate place for reissuance of liquor license was supported by findings concerning noise, litter, public urination and defecation by patrons, illegal parking, inadequate parking facilities, vandalism, and neighborhood opposition. D.C. Code 1981, §§ 25-111(a)(7), 25-115(a)(6). LCP, Inc. v. District of Columbia Alcoholic Beverage Control Bd., 499 A.2d 897, 1985 D.C. App. LEXIS 525 (1985).

In granting class C liquor license for hotel restaurant, the Alcoholic Beverage Control Board adequately addressed and made findings on question of whether presence of license would alter character of neighborhood and with respect to issues and concerns raised by advisory neighborhood commission. D.C. Code 1981, §§ 1-261(d), 25-115(a)(6). Foggy Bottom Asso. v. District of Columbia Alcoholic Beverage Control Bd., 445 A.2d 643, 1982 D.C. App. LEXIS 351 (1982).

In proceeding on application for issuance of liquor license, District of Columbia Alcoholic Beverage Control Board entered findings which were adequate to address each contested issue, including saturation of liquor licenses, parking in traffic, refuse storage, character of neighborhood, and neighborhood wishes and desires. D.C. Code §§ 1-1509(e), 1-1510, 25-107, 25-115. Kopff v. District of Columbia Alcoholic Beverage Control Board, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

Reference in licensing authority's findings to "token" opposition did not constitute substantial error where citizens association petitioning for review of grant of license offered no evidence and individual objectors did nothing more than note their objections. D.C. Code § 25-115. Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board, 287 A.2d 87, 1972 D.C. App. LEXIS 330 (1972).

In general.

Alcoholic Beverage Control Act does not explicitly require hearing before denial of application for transfer of license. D.C. Code 1961, §§ 25-106, 25-107, 25-115(a), subd. 5. Pollack v. Simonson, 350 F.2d 740, 1965 U.S. App. LEXIS 4742 (C.A.D.C. 1965).

The Alcoholic Beverage Control Board, like any court, has the power to reconsider any decision it makes, unless there is some statute or regulation that affirmatively forbids such action. Tiger Wyk Ltd. v. D.C. Alcoholic Bev. Control Bd., 825 A.2d 303, 2003 D.C. App. LEXIS 292 (2003).

In proceedings on application for liquor license, District of Columbia Alcoholic Beverage Control Board did not abuse its discretion in refusing to consider hearsay summaries of residents' views about proposed license and information concerning potential congestive impact of metro station under construction nearby. D.C. Code § 25-111(g). Kopff v. District of Columbia Alcoholic Beverage Control Board, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

Not only an Alcoholic Beverage Control Board finding of moral character and fitness, but any finding required by licensing statute, must be based only upon evidence in the public record of the proceeding, and participants in the proceeding must have an opportunity to address themselves to that evidence, otherwise fundamentals of due process are denied. D.C. Code §§ 1-1501, 1-1509(c), 25-115. Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board, 288 A.2d 666, 1972 D.C. App. LEXIS 358 (1972).

Injunctions.

In suit to enjoin alcoholic beverage control board from putting into effect its decision denying renewal of liquor license, which decision was based upon statutory ground that licensee

did not have necessary good moral character and was not generally fit for the trust to be reposed in him by renewal, question before court was whether findings of board were so arbitrary or capricious, or so unsupported by evidence, as to be unwarranted as matter of law. D.C. Code 1951, §§ 25-104, 25-106, 25-115(a) (1). *Minkoff v. Payne*, 210 F.2d 689, 1953 U.S. App. LEXIS 3681 (C.A.D.C. 1953).

Where there was no genuine issue of material fact as to whether alcoholic beverage control board had discriminated against liquor licensee in deciding not to renew his license, suit to enjoin board from putting such decision into effect was properly resolved by summary judgment procedure. D.C. Code 1951, §§ 25-104, 25-115 (a)(1); Fed.Rules Civ.Proc. rule 56(c), 18 U.S.C. *Minkoff v. Payne*, 210 F.2d 689, 1953 U.S. App. LEXIS 3681 (C.A.D.C. 1953).

Under circumstances disclosed, including showing that net effect of board's failure to prescribe adequate rules and regulations had been to by-pass wishes of community, plaintiffs were entitled to preliminary injunction against operation of liquor store pending review of board's grant of application for transfer of liquor license. D.C. Code 1951, §§ 25-106, 25-115(a) 5. *Palisades Citizens Ass'n v. Weakly*, 166 F.Supp. 591, 1958 U.S. Dist. LEXIS 3580 (D.D.C.1958).

Investigative reports.

Procedure for entry into record by Alcoholic Beverage Control Board of information in investigative reports which is relevant and material to statutory criteria for issuance or denial of license and which will be relied upon in any degree by Board should be fashioned in recognition of requirement that participants must have an opportunity to rebut and of relative procedural informality of administrative proceeding as contrasted with technical rules of evidence in civil litigation. D.C. Code § 25-115. *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 288 A.2d 666, 1972 D.C. App. LEXIS 358 (1972).

Where there was no indication of reliance by licensing authority on any investigative report, there was statement by one of the members of the authority that it would rely only on the public record, and in summary statement of facts accompanying decision to grant license, authority made reference only to the evidence produced at the hearing, it could not be assumed that authority improperly considered matters not of record. D.C. Code §§ 1-1510, 11-721(e), 25-115. *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 287 A.2d 87, 1972 D.C. App. LEXIS 330 (1972).

If investigative reports are officially noticed by licensing authority or relied on in consider-

ation of application, such reports should be placed in the record and made available to all parties. D.C. Code § 25-115. *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 287 A.2d 87, 1972 D.C. App. LEXIS 330 (1972).

Judicial review.

Decision of alcoholic beverage control board rejecting application for renewal of liquor license was not reviewable by commissioners of the District of Columbia. D.C. Code 1951, §§ 25-106, 25-114, 25-115(b, c), 25-118. *Minkoff v. Payne*, 210 F.2d 689, 1953 U.S. App. LEXIS 3681 (C.A.D.C. 1953).

Court of Appeals determination that agency regulating issuance of liquor licenses incorrectly granted license to applicant applied retroactively so as to revoke applicant's previously issued license; retroactive application of determination did not result in substantial disruption of settled transactions since grant of license was not based on long-standing legal doctrine which was suddenly or surprisingly abandoned by court, but rather was only based on erroneous ruling by agency that had been secured by applicant itself. *Chase v. District of Columbia Alcoholic Beverage Control Bd.*, 669 A.2d 1264, 1995 D.C. App. LEXIS 232 (1995).

Remarks by member of Alcoholic Beverage Control Board, who was also member of Advisory Neighborhood Commission (ANC) which opposed application for liquor license, to effect that conditions in area of license applicant's business were worse than indicated by Board investigator, could not be ground for reversal of Board's denial of application; applicants did not show that positions held by member were so incompatible as to overcome presumption that Board members acted fairly in ruling on application. D.C. Code 1981, § 25-111 (a)(6). *Park v. District of Columbia Alcoholic Beverage Control Bd.*, 555 A.2d 1029, 1989 D.C. App. LEXIS 49 (1989).

Alcoholic Beverage Control Board's refusal, in liquor license renewal proceeding, to permit restaurant owner to examine for impeachment purposes notes of detective who conducted undercover investigation of drug trafficking activities at restaurant by its employees and patrons under Jencks Act was not reversible error, where testimony by another police officer and several other witnesses corroborated detective's testimony concerning alleged drug activity. D.C. Code 1981, §§ 1-1510(b), 25-115(a); 18 U.S.C. § 3500. *K.G.S., Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 531 A.2d 1001, 1987 D.C. App. LEXIS 454 (1987).

Alcoholic Beverage Control Board erred in allowing one of its members to elicit testimony concerning race and residency of restaurant's patrons at hearing to determine whether to renew restaurant's liquor license, but error was

not reversible, where Board did not rely on the testimony in its findings of fact and conclusions of law. D.C. Code 1981, §§ 25-111(a)(7), 25-115(a)(6). *K.G.S., Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 531 A.2d 1001, 1987 D.C. App. LEXIS 454 (1987).

Advisory neighborhood commission had no capacity to seek court review of action of District of Columbia Alcoholic Beverage Control Board in issuing liquor license; area residents who were commission members, however, had standing to initiate such review and to assert rights of commission itself. D.C. Code §§ 1-171a et seq., 1-171i(g), 1-1502(9), 1-1510, 25-111(g), 25-114, 25-115(b); D.C. Code Court of Appeals Rules, rule 15. *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

Validity of action of District of Columbia Alcoholic Beverage Control Board in issuing liquor license was not mooted as issue by virtue of fact that, after license was initially issued and before court review of Board's action was completed, license was renewed and renewal was not contested. D.C. Code §§ 11-101(2)(A), 11-705(b), 25-111(g), 25-115(b); U.S. Const. art. 1, § 1 et seq.; art. 3, § 1 et seq. *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

Record on review established no prejudicial error in Alcoholic Beverage Control Board's compliance with court's prior decision, amount-

ing to substantial compliance with order that Board take further proceedings and enter into record all information which would be relevant and material to statutory criteria for issuance or denial of license and which would be relied upon in any degree by the Board. D.C. Code §§ 1-1510, 25-115(a). *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 305 A.2d 861, 1973 D.C. App. LEXIS 310 (1973).

Citizens organization had standing to contest issuance of liquor license and could properly contest Alcoholic Beverage Control Board's actions in matter of meeting its statutory obligations procedurally and substantively, notwithstanding that association's opposition to license was based fundamentally upon its position that area of city was already saturated with establishments having liquor licenses, with attendant problems flowing from that condition. D.C. Code §§ 1-1510, 25-111. *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 288 A.2d 666, 1972 D.C. App. LEXIS 358 (1972).

Record.

In case of hearing on application to transfer alcoholic beverage retailer's license, better practice would have been for Alcoholic Beverage Control Board to have included in record copies of notice of publication required by statute. D.C. Code § 25-115(a), par. 6(b, c). *Schiffmann v. District of Columbia Alcoholic Beverage Control Board*, 302 A.2d 235, 1973 D.C. App. LEXIS 249 (1973).

§ 25-434. Influencing the application process.

(a) A person shall not provide, offer to provide, request, or receive anything of value for the personal use, enjoyment, or profit of an individual in exchange for the individual's promise not to exercise his or her rights provided under this title to object to, or petition against, a license application.

(b) Any person who violates subsection (a) of this section shall be guilty of a criminal misdemeanor, and, upon conviction, shall be imprisoned for not more than 90 days, or fined not more than \$300, or both.

(Jan. 24, 1934, ch. 4, § 14a, as added Oct. 3, 1992, D.C. Law 9-174, § 2(d), 39 DCR 5859; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-434.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 9-174. — Law 9-174, the "Alcoholic Beverage Control Amendment Act of 1992," was introduced in Council and assigned Bill No. 9-125, which was referred to the Committee on Consumer and Regulatory

Affairs. The Bill was adopted on first and second readings on June 2, 1992, and July 7, 1992, respectively. Signed by the Mayor on July 27, 1992, it was assigned Act No. 9-280 and transmitted to both Houses of Congress for its review. D.C. Law 9-174 became effective on October 3, 1992.

*Subchapter IV. Review and Resolution Procedures.***§ 25-441. Hearings — Continuances.**

(a) A hearing may be continued for good cause. A written motion for a continuance shall be filed with the Board at least 6 days before the scheduled hearing date and served upon all parties at least 6 calendar days before the hearing. To be granted, the motion shall, in the opinion of the Board, set forth good and sufficient cause for continuance or demonstrate that an extreme emergency exists.

(b) A continuance shall not waive the requirements of this chapter governing the time in which to file objections, petitions, or other pleadings.

(c) The Board may, on motion of any party or on its own motion, continue a hearing to permit an ANC to vote on a material issue in the hearing or upon a determination that the interests of justice will be served by the granting of the continuance to any party.

(d) The Board may waive the provisions of this section if all parties agree to a continuance.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 1, 2002, D.C. Law 14-190, § 1702(j), 49 DCR 6968.)

Effect of amendments. — D.C. Law 14-190 rewrote subsec. (c) which had read as follows: “(c) The Board may, on motion of any party or on its own motion, continue a hearing in order to permit an ANC to vote on a material issue in the hearing.”

Emergency legislation. — For temporary (90 day) amendment of section, see § 1702(j) of

Fiscal Year 2003 Budget Support Emergency Act of 2002 (D.C. Act 14-453, July 23, 2002, 49 DCR 8026).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 14-190. — For Law 14-190, see notes following § 25-101.

§ 25-442. Hearings — Witnesses.

(a) A party shall have the right to call and examine witnesses.

(b) Except as provided in subsection (c) of this section, at any proceeding before the Board in a contested case, the Board shall hear as witnesses all persons residing within and outside the neighborhood who desire to be heard.

(c) The Board may exclude any irrelevant or unduly repetitious evidence or testimony.

(d) A witness who shall willfully give false testimony in a proceeding or hearing before the Board shall be guilty of perjury.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

CASE NOTES**In general.**

In hearing on application for renewal of liquor license, which alcoholic beverage control board refused to renew on ground that appli-

cant was not generally fit and did not have necessary good moral character, which conclusion was based in part upon alleged conspiracy with bootleggers not to make bookkeeping en-

tries required by Internal Revenue Code, applicant's cross-examination of one of the alleged bootleggers, on question of bias, was not so restricted as to constitute lack of procedural due process. D.C. Code 1951, §§ 25-101 et seq., 25-115(a)(1); 26 U.S.C. § 2857(a). *Minkoff v. Payne*, 210 F.2d 689, 1953 U.S. App. LEXIS 3681 (C.A.D.C. 1953).

In proceedings on application for liquor license, District of Columbia Alcoholic Beverage Control Board did not abuse its discretion in refusing to consider hearsay summaries of residents' views about proposed license and information concerning potential congestive impact of metro station under construction nearby.

D.C. Code § 25-111(g). *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

Not only an Alcoholic Beverage Control Board finding of moral character and fitness, but any finding required by licensing statute, must be based only upon evidence in the public record of the proceeding, and participants in the proceeding must have an opportunity to address themselves to that evidence, otherwise fundamentals of due process are denied. D.C. Code §§ 1-1501, 1-1509(c), 25-115. *Citizens Asso. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 288 A.2d 666, 1972 D.C. App. LEXIS 358 (1972).

§ 25-443. Subpoena of witnesses.

(a) Subpoenas issued by the Board shall be served:

(1) By an officer of the Metropolitan Police Department;

(2) By a special process server, at least 18 years of age, designated by the Board from among the staff appointed by the Board who are not directly involved in the investigation; or

(3) By a special process server, at least 18 years of age, engaged by the Board for this purpose.

(b) Witnesses, other than those employed by the District or by the United States, shall be entitled to the same fees as are paid witnesses for attendance before the Superior Court of the District of Columbia.

(c) In the case of contumacy or refusal to obey a subpoena, the Superior Court of the District of Columbia, upon written request by the Board, shall issue an order requiring the contumacious person to appear and testify before the Board or to produce evidence if so ordered.

(Jan. 24, 1934, 48 Stat. 322, ch. 4, § 6; Aug. 27, 1935, 49 Stat. 897, ch. 756, § 2; Sept. 29, 1982, D.C. Law 4-157, §§ 3, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(2), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 3, 34 DCR 907; May 24, 1994, D.C. Law 10-122, § 2(c), 41 DCR 1658, 48 DCR 2959; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-443.
1973 Ed., § 25-106.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-444. Protest hearings; parties identified.

(a) If a protest is filed in a contested case, the Board shall hold a protest hearing for the purpose of receiving evidence and testimony regarding the appropriateness of the licensing action.

(b) The parties to the protest hearing shall be the applicant and the protestants as identified at the administrative review.

(c) If there is more than one protestant, the Board, in its discretion, may require the protestants to confer among themselves and designate one person to conduct the protestants' case.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-445. Settlement conference.

(a) A settlement conference among the parties shall be held to discuss and resolve, if possible, the objections raised by the protestants.

(b) If the date of the settlement conference is not arranged on or before the date of the administrative review, the applicant shall contact the protestants to arrange the conference.

(c) If the applicant fails to make a good faith effort to contact the protestants timely, the Board shall deny the license application unless, in the judgment of the Board, the applicant shows good cause for his or her failure to act.

(d) No protestant shall unreasonably refuse to make himself or herself available to attend a settlement conference.

(e) If the protestant unreasonably refuses to make himself or herself available to attend a settlement conference, the Board shall consider the protest withdrawn unless, in the judgment of the Board, the protestant shows good cause for refusing to be available.

(f) At the request of any party, the Board may designate a member of its staff to attend the settlement conference.

(g) If the parties fail to reach an agreement on one or more of the protest issues they shall so state at the scheduled protest hearing.

(h) A party may be represented at a settlement conference by an attorney or a designated representative who has been authorized to act on the party's behalf.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-446. Voluntary agreements; approval process, show cause hearing for violation.

(a) The applicant and any protestant may, at any time, negotiate a settlement and enter into a written voluntary agreement setting forth the terms of the settlement.

(b) The signatories to the agreement shall submit the agreement to the Board for approval.

(c) If it determines that the voluntary agreement complies with all applicable laws and regulations and the applicant otherwise qualifies for licensure, the Board shall approve the license application, conditioned upon the licensee's compliance with the terms of the voluntary agreement. The Board shall incorporate the text of the voluntary agreement in its order and the voluntary agreement shall be enforceable by the Board.

(d)(1) Unless a shorter term is agreed upon by the parties, a voluntary agreement shall run for the term of a license, including renewal periods, unless

it is terminated or amended in writing by the parties and the termination or amendment is approved by the Board.

(2) The Board may accept an application to amend or terminate a voluntary agreement by fewer than all parties in the following circumstances:

(A) During the license's renewal period; and

(B) After 4 years from the date of the Board's decision initially approving the voluntary agreement.

(3) Notice of an application to amend or terminate a voluntary agreement shall be given both to the parties of the agreement and to the public at the time of the applicant's renewal application according to the renewal procedures required under §§ 25-421 through 25-423.

(4) The Board may approve a request by fewer than all parties to amend or terminate a voluntary agreement for good cause shown if it makes each of the following findings based upon sworn evidence:

(A)(i) The applicant seeking the amendment has made a diligent effort to locate all other parties to the voluntary agreement; or

(ii) If non-applicant parties are located, the applicant has made a good-faith attempt to negotiate a mutually acceptable amendment to the voluntary agreement;

(B) The need for an amendment is either caused by circumstances beyond the control of the applicant or is due to a change in the neighborhood where the applicant's establishment is located; and

(C) The amendment or termination will not have an adverse impact on the neighborhood where the establishment is located as determined under § 25-313 or § 25-314, if applicable.

(5) To fulfill the good faith attempt criteria of paragraph (4)(A)(ii) of this subsection, a sworn affidavit from the applicant shall be filed with the Board at the time that an application to amend a voluntary agreement by fewer than all parties is filed stating that either:

(A) A meeting occurred between the parties which did not result in agreement; or

(B) The non-applicant parties refused to meet with the applicant.

(e) The Board shall initiate a show cause hearing upon evidence that a licensee has violated a voluntary agreement. Upon a determination that the licensee has violated the voluntary agreement, the Board shall penalize the licensee according to the provisions set forth for violations of a license in Chapter 8.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(t), 51 DCR 6525.)

Effect of amendments. — D.C. Law 15-187 rewrote subsec. (d) which had read as follows: "(d) A voluntary agreement shall run for the term of a license, including renewal periods, unless it is terminated or amended in writing by the parties and the termination or amendment is approved by the Board."

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

§ 25-447. Show cause hearing.

(a) The Board shall receive, at any time during the license period, complaints from any person, or an affected ANC, alleging a violation by a licensee of the terms of its license. Complaints shall be in writing and set forth enough information to allow the Board or its staff to investigate the matter.

(b) In addition to written complaints identifying the complainant, any person may make an anonymous complaint in writing to the Board or orally to any ABRA investigator. Anonymous complaints shall be investigated to the best of the Board's ability, but may result in no action being taken if the anonymous complainant fails to provide the Board or the investigator with adequate information.

(c) Within 30 days of receiving evidence supporting a reasonable belief that any licensee or permittee is in violation of the provision of this title or the regulations issued under it, the Board shall order the licensee or permittee, by personal service or certified mail, to appear before the Board not less than 30 days thereafter to show cause why the license or permit should not be revoked or suspended, or the licensee or permittee penalized, as provided by subchapter II of Chapter 8. The notice shall state the time and place set by the Board for the hearing.

(d) The licensee or permittee (or in the case of an entity, all members, partners, or officers) shall appear in person, may be represented by counsel, and shall be entitled to offer evidence in his, her, or its defense.

(e) If the licensee or permittee waives the hearing or fails to appear, the Board shall proceed *ex parte*, unless the Board extends the time for the hearing for good and sufficient cause.

(f) If the Board holds a show cause hearing on a complaint made under subsection (a) of this section, the Board, in issuing its order, may place certain conditions on the license if it determines that the inclusion of the conditions would be in the best interests of the locality, section, or portion of the District in which the establishment is licensed. The Board, in placing the conditions, shall state, in writing, the rationale for its decision.

(g) All written complaints as set forth under subsection (a) of this section, which identify the complainant by name and address, shall be responded to by the Board or its staff within 90 days of receipt of the complaint, and shall advise the complainant of the action that the Board or its staff has taken on the matter.

(h) The Board shall maintain records documenting complaints received and the action taken in response to the complaint.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(u), 51 DCR 6525.)

Effect of amendments. — D.C. Law 15-187, in subsec. (a), substituted “an affected ANC” for “the ANC representing the area in which the licensee exists”.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

CHAPTER 5. ANNUAL FEES.

Sec.	Sec.
25-501. Annual fees.	25-507. Minimum annual fee for solicitor's licenses.
25-502. Mayor may propose alteration in license fees.	25-508. Minimum fee for permits and manager's license.
25-503. Minimum annual fees for manufacturer's, wholesaler's, and off-premises retailer's licenses.	25-509. Minimum fee for transfer of a license to new owner.
25-504. Minimum annual fees for on-premises retail licenses, class C and D.	25-510. Minimum fee for amendment to license.
25-505. Fees for Arena C/X by Mayor.	25-511. Minimum fee for pool buying group retail importation permit.
25-506. Minimum fees for temporary licenses.	

§ 25-501. Annual fees.

(a) License fees shall be paid annually. The fee for the first year shall be paid at the time of application and the renewal fee shall be paid on or before the anniversary date of issuance of the license.

(b) The applicant shall pay the initial license fee to the D.C. Treasurer. The applicant's duplicate receipt shall accompany the application for license. If the application for the license is denied, the fee shall be returned. This subsection shall not apply to an application for a temporary license.

(c) A licensee's failure to timely remit the annual fee shall be cause for the Board to suspend the license until the licensee pays the fee and any fines imposed by the Board for late payment. If a licensee is 90 days delinquent on payment of the renewal fee, the Board shall give notice to the licensee of its intent to revoke the license. The licensee shall have 14 days to respond to the notice. If the Board thereafter determines that the failure to pay the fees and fines is not for good cause, the Board shall revoke the license.

(d) The Board may establish license periods at intervals necessary to facilitate efficient processing of applications. If the Board changes a license period, the licensee shall pay the proportionate amount of the annual license fee. If the Board issues a license for less than one year, the licensee shall pay a fee reduced by the proportionate amount of the annual fee.

(e) The fee for a temporary license shall be assessed according to the number of days for which the license is issued and shall be paid at the time of the application.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-502. Mayor may propose alteration in license fees.

The Mayor may propose regulations, subject to approval in accordance with § 25-211(b), to alter the license fees established by this chapter or to create additional license categories.

(Jan. 24, 1934, 48 Stat. 324, ch. 4, § 11; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 1; June 18, 1934, 48 Stat. 997, ch. 588; July 2, 1935, 49 Stat. 444, ch. 359; Aug. 27, 1935, 49 Stat. 898, 899, ch. 756, §§ 3-7; June 15, 1938, 52 Stat. 691,

ch. 396, §§ 1, 2; May 27, 1949, 63 Stat. 133, ch. 146, title V, § 501; June 29, 1953, 67 Stat. 103, ch. 159, § 404(d); May 31, 1962, 76 Stat. 89, Pub. L. 87-470, § 1; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 2; Apr. 6, 1977, D.C. Law 1-102, § 2(a), (b), 23 DCR 8732; Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Mar. 5, 1981, D.C. Law 3-157, § 2(b), 27 DCR 5117; Sept. 29, 1982, D.C. Law 4-157, §§ 6, 15, 29 DCR 3617; Mar. 10, 1983, D.C. Law 4-204, § 2, 30 DCR 185; Aug. 2, 1983, D.C. Law, 5-16, § 3, 30 DCR 3193; Mar. 8, 1984, D.C. Law 5-51, § 2(a), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 5, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(b), 38 DCR 4974; May 24, 1994, D.C. Law 10-122, § 2(e), 41 DCR 1658; Mar. 26, 1999, D.C. Law 12-202, § 2(b), 45 DCR 8412; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(1), 46 DCR 3142; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-502. 1973 Ed., § 25-111.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Delegation of Authority. — Delegation of

Authority Pursuant to D.C. Law 13-298, the Title 25, D.C. Code Enactment and Related Amendments Act of 2001, see Mayor's Order 2001-96, June 28, 2001 (48 DCR 6277).

§ 25-503. Minimum annual fees for manufacturer's, wholesaler's, and off-premises retailer's licenses.

The minimum annual fees for a manufacturer's, wholesaler's, and off-premises retailer's licenses shall be as set forth on the following:

License Class	Cost/year
MANUFACTURERS	
Manufacturer's license, class A. (rectifying plant)	\$6,000
Manufacturer's license, class A. (distillery)	\$6,000
Manufacturer's license, class A. (winery)	\$1,500
Manufacturer's license, class A. (distillery producing more than 50% nonbeverage alcohol)	\$3,000
Manufacturer's license, class B. (brewery)	\$5,000
WHOLESALEERS	
Wholesaler's license, class A. (beer, wine, and spirits)	\$4,000
Wholesaler's license, class B. (beer and wine)	\$2,000
OFF-PREMISES RETAILERS	
Retailer's license (off-premises), class A. (beer, wine, and spirits)	\$2,000
Retailer's license (off-premises), class B. (beer and wine)	\$1,000

(Jan. 24, 1934, 48 Stat. 324, ch. 4, § 11; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 1; June 18, 1934, 48 Stat. 997, ch. 588; July 2, 1935, 49 Stat. 444, ch. 359; Aug. 27, 1935, 49 Stat. 898, 899, ch. 756, §§ 3-7; June 15, 1938, 52 Stat. 691, ch. 396, §§ 1, 2; May 27, 1949, 63 Stat. 133, ch. 146, title V, § 501; June 29, 1953, 67 Stat. 103, ch. 159, § 404(d); May 31, 1962, 76 Stat. 89, Pub. L. 87-470,

§ 1; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 2; Apr. 6, 1977, D.C. Law 1-102, § 2(a), (b), 23 DCR 8732; Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Mar. 5, 1981, D.C. Law 3-157, § 2(b), 27 DCR 5117; Sept. 29, 1982, D.C. Law 4-157, §§ 6, 15, 29 DCR 3617; Mar. 10, 1983, D.C. Law 4-204, § 2, 30 DCR 185; Aug. 2, 1983, D.C. Law 5-16, § 3, 30 DCR 3193; Mar. 8, 1984, D.C. Law 5-51, § 2(a), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 5, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(b), 38 DCR 4974; May 24, 1994, D.C. Law 10-122, § 2(e), 41 DCR 1658; Mar. 26, 1999, D.C. Law 12-202, § 2(b), 45 DCR 8412; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(1), 46 DCR 3142; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-503.
1973 Ed., § 25-111.

Legislative history of Law 13-298. — For
D.C. Law 13-298, see notes following § 25-101.

§ 25-504. Minimum annual fees for on-premises retail licenses, class C and D.

The minimum annual fees for an on-premises retailer's licenses, class C and D, shall be as set forth on the following schedule. Capacity shall be the posted level of occupancy approved under the Construction Codes, as defined under § 6-1401 and as set forth in Title 12 of the District of Columbia Municipal Regulations.

Type	Capacity	Class C (beer, wine, spirits)	Class D (beer & wine)
Restaurant	99 or fewer.	\$500	\$300
	100 to 199.	\$1,000	\$600
	200 to 499.	\$1,500	\$900
	500 or more.	\$2,000	\$1,200
Tavern	99 or fewer.	\$800	\$500
	100 to 199.	\$1,600	\$1,000
	200 or more.	\$2,400	\$1,500
Nightclub	99 or fewer.	\$1,500	\$1,000
	100 to 199.	\$2,000	\$1,250
	200 to 499.	\$2,500	\$1,500
	500 to 999.	\$3,500	\$2,000
	1,000 or more.	\$4,500	\$3,500
Hotel	99 or fewer guest rooms	\$2,000	\$1,000
	100 or more guest rooms	\$4,000	\$2,000
Club		\$1,500	\$500
Multipurpose facility		\$1,500	\$500
Marine vessel	Single vessel.	\$1,500	\$750
Marine vessel line	3 or fewer vessels and dockside waiting areas	\$2,500	\$1,000

Type	Capacity	Class C (beer, wine, spirits)	Class D (beer & wine)
	Each additional vessel or dockside waiting area.	\$1,500	\$500
Railroad dining or club car	Single car.	\$500	\$250
Railroad company	All dining or club cars	\$1,500	\$750
Caterer	More than \$1,000,000 per year gross annual receipts	\$5,000	—
Caterer	\$1,000,000 or less per year gross annual receipts	\$4,000	—
Caterer	\$500,000 or less per year gross annual receipts	\$3,000	—
Caterer	\$300,000 or less per year gross annual receipts	\$2,000	—
Caterer	\$200,000 or less per year gross annual receipts	\$1,000	—
Caterer	\$100,000 or less per year gross annual receipts	\$750	—
Caterer	\$50,000 or less per year gross annual receipts	\$500	—
Caterer	\$25,000 or less per year gross annual receipts	\$300	—

(Jan. 24, 1934, 48 Stat. 324, ch. 4, § 11; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 1; June 18, 1934, 48 Stat. 997, ch. 588; July 2, 1935, 49 Stat. 444, ch. 359; Aug. 27, 1935, 49 Stat. 898, 899, ch. 756, §§ 3-7; June 15, 1938, 52 Stat. 691, ch. 396, §§ 1, 2; May 27, 1949, 63 Stat. 133, ch. 146, title V, § 501; June 29, 1953, 67 Stat. 103, ch. 159, § 404(d); May 31, 1962, 76 Stat. 89, Pub. L. 87-470, § 1; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 2; Apr. 6, 1977, D.C. Law 1-102, § 2(a), (b), 23 DCR 8732; Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Mar. 5, 1981, D.C. Law 3-157, § 2(b), 27 DCR 5117; Sept. 29, 1982, D.C. Law 4-157, §§ 6, 15, 29 DCR 3617; Mar. 10, 1983, D.C. Law 4-204, § 2, 30 DCR 185; Aug. 2, 1983, D.C. Law 5-16, § 3, 30 DCR 3193; Mar. 8, 1984, D.C. Law 5-51, § 2(a), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 5, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(b), 38 DCR 4974; May 24, 1994, D.C. Law 10-122, § 2(e), 41 DCR 1658; Mar. 26, 1999, D.C. Law 12-202, § 2(b), 45 DCR 8412; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(1), 46 DCR 3142; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(v), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-504.
1973 Ed., § 25-111.

Effect of amendments. — D.C. Law 15-187

added a new row after the row designated "Nightclub"; deleted the five rows designated as "Caterer" which pertained to capacity in terms

of annual revenue and also set forth the license fees; and added eight new rows designated as "Caterer".

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

§ 25-505. Fees for Arena C/X by Mayor.

The annual license fee for the retailer's licenses, class Arena C/X, for the DC Arena shall be established by the Mayor.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Mar. 3, 2010, D.C. Law 18-111, § 2082(n)(3), 57 DCR 181.)

Effect of amendments. — D.C. Law 18-111, in the section heading, deleted "and Washington Convention Center" following "C/X"; and deleted "and for the Washington Convention Center" following "DC Arena".

Emergency legislation. — For temporary (90 day) amendment of section, see § 2082(n)(3) of Fiscal Year 2010 Budget Support Second Emergency Act of 2009 (D.C. Act 18-207, October 15, 2009, 56 DCR 8234).

For temporary (90 day) amendment of section, see § 2082(n)(3) of Fiscal Year Budget Support Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-260, January 4, 2010, 57 DCR 345).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 18-111. — For Law 18-111, see notes following § 25-101.

§ 25-506. Minimum fees for temporary licenses.

(a) The minimum fee for the issuance of a temporary license shall be the following:

Temporary license (class F) (beer and wine)	\$100/day
Temporary license (class G) (spirits, beer, and wine)	\$300/day

(b) Upon request, the Board has the authority to reduce the fee to \$150 per day, for a temporary license, class G, or to \$50 per day, for a temporary license, class F, for nonprofit organizations. This reduction shall only be available once each calendar year to any single organization.

(c) The Board may create regulations and fees, in accordance with §§ 25-211(b) and 25-502, to permit an on-premises retailer under a restaurant license to apply for a one-day substantial change to the size of their licensed premises to expand the establishment's interior or exterior space in order to facilitate participation in community or street festivals. The Board shall not grant permission for this change more than twice in any calendar year for any establishment.

(Jan. 24, 1934, 48 Stat. 324, ch. 4, § 11; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 1; June 18, 1934, 48 Stat. 997, ch. 588; July 2, 1935, 49 Stat. 444, ch. 359; Aug. 27, 1935, 49 Stat. 898, 899, ch. 756, §§ 3-7; June 15, 1938, 52 Stat. 691, ch. 396, §§ 1, 2; May 27, 1949, 63 Stat. 133, ch. 146, title V, § 501; June 29, 1953, 67 Stat. 103, ch. 159, § 404(d); May 31, 1962, 76 Stat. 89, Pub. L. 87-470, § 1; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 2; Apr. 6, 1977, D.C. Law 1-102, § 2(a), (b), 23 DCR 8732; Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Mar. 5, 1981, D.C. Law 3-157, § 2(b), 27 DCR 5117; Sept. 29, 1982, D.C. Law 4-157, §§ 6, 15, 29 DCR 3617; Mar. 10, 1983, D.C. Law 4-204, § 2, 30 DCR

185; Aug. 2, 1983, D.C. Law 5-16, § 3, 30 DCR 3193; Mar. 8, 1984, D.C. Law 5-51, § 2(a), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 5, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(b), 38 DCR 4974; May 24, 1994, D.C. Law 10-122, § 2(e), 41 DCR 1658; Mar. 26, 1999, D.C. Law 12-202, § 2(b), 45 DCR 8412; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(1), 46 DCR 3142; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-506.
1973 Ed., § 25-111.

Legislative history of Law 13-298. — For
D.C. Law 13-298, see notes following § 25-101.

§ 25-507. Minimum annual fee for solicitor's licenses.

The minimum annual fee for a solicitor's license shall be \$250.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For
D.C. Law 13-298, see notes following § 25-101.

§ 25-508. Minimum fee for permits and manager's license.

The minimum fees for permits and manager's license shall be as follows:

Brew pub permit	\$3,000/year
Tasting permit for class A licensees	\$100/year
Importation permit	\$5
Manager's license	\$100/year

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For
D.C. Law 13-298, see notes following § 25-101.

§ 25-509. Minimum fee for transfer of a license to new owner.

The minimum fee for transfer of a license to a new owner shall be \$150.

(Jan. 24, 1934, 48 Stat. 330, ch. 4, § 16; May 27, 1949, 63 Stat. 135, ch. 146, title V, § 503; Mar. 5, 1981, D.C. Law 3-157, § 2(d), 27 DCR 5117; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-509.
1973 Ed., § 25-117.

Legislative history of Law 13-298. — For
D.C. Law 13-298, see notes following § 25-101.

§ 25-510. Minimum fee for amendment to license.

The minimum fee for an amendment to a license which results in an inspection of the licensed premises shall be \$25.

(Jan. 24, 1934, 48 Stat. 324, ch. 4, § 11; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 1; June 18, 1934, 48 Stat. 997, ch. 588; July 2, 1935, 49 Stat. 444, ch. 359; Aug. 27, 1935, 49 Stat. 898, 899, ch. 756, §§ 3-7; June 15, 1938, 52 Stat. 691,

ch. 396, §§ 1, 2; May 27, 1949, 63 Stat. 133, ch. 146, title V, § 501; June 29, 1953, 67 Stat. 103, ch. 159, § 404(d); May 31, 1962, 76 Stat. 89, Pub. L. 87-470, § 1; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 2; Apr. 6, 1977, D.C. Law 1-102, § 2(a), (b), 23 DCR 8732; Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Mar. 5, 1981, D.C. Law 3-157, § 2(b), 27 DCR 5117; Sept. 29, 1982, D.C. Law 4-157, §§ 6, 15, 29 DCR 3617; Mar. 10, 1983, D.C. Law 4-204, § 2, 30 DCR 185; Aug. 2, 1983, D.C. Law, 5-16, § 3, 30 DCR 3193; Mar. 8, 1984, D.C. Law 5-51, § 2(a), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 5, 34 DCR 907; Aug. 17, 1991, D.C. Law 9-40, § 2(b), 38 DCR 4974; May 24, 1994, D.C. Law 10-122, § 2(e), 41 DCR 1658; Mar. 26, 1999, D.C. Law 12-202, § 2(b), 45 DCR 8412; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(1), 46 DCR 3142; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-510.
1973 Ed., § 25-111.

Legislative history of Law 13-298. — For
D.C. Law 13-298, see notes following § 25-101.

§ 25-511. Minimum fee for pool buying group retail importation permit.

The minimum annual license fee for a pool buying group agent importation permit shall be \$1,000, in addition to any other license fees prescribed in this title.

(Sept. 30, 2004, D.C. Law 15-187, § 401(j), 51 DCR 6525; Mar. 2, 2007, D.C. Law 16-191, § 47(d)(2), 53 DCR 6794.)

Effect of amendments. — D.C. Law 16-191 validated a previously made technical correction.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 16-191. — For Law 16-191, see notes following § 25-101.

Editor's notes. — Sections 402 and 403 of D.C. Law 15-187 provided:

“Sec. 402. Rules and regulations.

“The Mayor shall promulgate proposed rules and regulations to administer this title within 180 days of its effective date. The proposed rules and regulations, as well as any subse-

quent rules and regulations amending this title, shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the rules and regulations, in whole or in part, by resolution with the 45-day review period, the proposed rules and regulations shall be deemed approved.

“Sec. 403. Applicability.

“Section 401 shall apply upon the effective date of the regulations promulgated under section 402.”

CHAPTER 6. PROTESTS, REFERENDUM, AND COMPLAINTS.

Sec.

25-601. Standing to file protest against a license.

25-602. Filing a protest — Timing and requirements.

Sec.

25-603 to 25-608. [Repealed].

25-609. ANC comments.

§ 25-601. Standing to file protest against a license.

The following persons may protest the issuance or renewal of a license, the approval of a substantial change in the nature of operation as determined by the Board under § 25-404, a new owner license renewal, or the transfer of a license to a new location:

(1) An abutting property owner;

(2) A group of no fewer than 5 residents or property owners of the District sharing common grounds for their protest; provided, that in a moratorium zone established under § 25-351 (or in existence as of May 3, 2001), a group of no fewer than 3 residents or property owners of the District sharing common grounds for their protest;

(3) A citizens association incorporated under the laws of the District of Columbia located within the affected area; provided, that the following conditions are met:

(A) Membership in the citizens association is open to all residents of the area represented by the association; and

(B) A resolution concerning the license application has been duly approved in accordance with the association's articles of incorporation or bylaws at a duly called meeting, with notice of the meeting being given at least 10 days before the date of the meeting.

(4) An affected ANC;

(5) In the case of property owned by the District within a 600-foot radius of the establishment to be licensed, the Mayor;

(6) In the case of property owned by the United States within a 600-foot radius of the establishment to be licensed, the designated custodian of the property; or

(7) The Metropolitan Police Department District Commander, or his or her designee, in whose Police District the establishment resides.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 26, 2001, D.C. Law 14-42, § 6(d), 48 DCR 7612; Sept. 30, 2004, D.C. Law 15-187, § 101(x), 51 DCR 6525; Mar. 2, 2007, D.C. Law 16-191, § 47(a), 53 DCR 6794.)

Effect of amendments. — D.C. Law 14-42 validated the previously made technical correction in par. (2).

D.C. Law 15-187 deleted “, or initiate a referendum as set forth in § 25-604” following “new location” in the lead-in language; and rewrote par. (3) which had read as follows: “(3)

A citizens association incorporated under the laws of the District of Columbia located within the affected area;”.

D.C. Law 16-191, in the introductory language, inserted “or” preceding “the transfer”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 6(d) of

Technical Amendments Emergency Act of 2001 (D.C. Act 14-108, August 3, 2001, 48 DCR 7622).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 14-42. — For Law 14-42, see notes following § 25-120.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 16-191. — For Law 16-191, see notes following § 25-101.

Delegation of Authority. — Delegation of Authority to the Director of the Office of Property Management to Protest the Issuance or Renewal of Alcoholic Beverage Licenses Pursuant to D.C. Official Code § 25-601(5)(2001), see Mayor's Order 2004-182, November 9, 2004 (51 DCR 11351).

§ 25-602. Filing a protest — Timing and requirements.

(a) Any person objecting, under § 25-601, to the approval of an application shall notify the Board in writing of his or her intention to object and the grounds for the objection within the protest period.

(b) If the Board has reason to believe that the applicant did not comply fully with the notice requirements set forth in subchapter II of Chapter 4, it shall extend the protest period as needed to ensure that the public has been given notice and has had adequate opportunity to respond.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-602.
1973 Ed., § 25-115.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-603. Referendum process — General provisions. [Repealed].

Repealed.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(y), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-603. 1973 Ed., § 25-115.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

CASE NOTES

In general.

Alcoholic Beverage Control Board may, and indeed must, reject petition proposal in opposition to liquor license application if petition is discriminatory or unlawful, even though Alcoholic Beverage Control Act does not explicitly authorize Board to disapprove or dismiss petition. D.C. Code 1981, § 25-115(e). *Coumaris v. District of Columbia Alcoholic Beverage Control Bd.*, 660 A.2d 896, 1995 D.C. App. LEXIS 127 (1995).

Alcoholic Beverage Control Board's conclu-

sion that statute, relating to the objections of neighboring property owners to the grant of an application for a liquor license, was inapplicable to applicant's license transfer application was neither arbitrary nor capricious; the Board properly concluded that there was a Class "A" license in existence at the proposed new location and on the date the application for transfer was filed. D.C. Code 1973, § 25-115(c). *Donnelly v. District of Columbia Alcoholic Beverage Control Bd.*, 452 A.2d 364, 1982 D.C. App. LEXIS 474 (1982).

§ 25-604. Application to initiate a referendum process. [Repealed].

Repealed.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30 2004, D.C. Law 15-187, § 101(y), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-604. 1973 Ed., § 25-115.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Delegation of Authority. — Delegation of

Authority to the Director of the Office of Property Management to Protest the Issuance or Renewal of Alcoholic Beverage Licenses Pursuant to D.C. Official Code § 25-601(5)(2001), see Mayor's Order 2004-182, November 9, 2004 (51 DCR 11351).

CASE NOTES

ANALYSIS

Basis for objection.
In general.

Basis for objection.

Alcoholic Beverage Control Board may, and indeed must, reject petition proposal in opposition to liquor license application if petition is

discriminatory or unlawful, even though Alcoholic Beverage Control Act does not explicitly authorize Board to disapprove or dismiss petition. D.C. Code 1981, § 25-115(e). *Coumaris v. District of Columbia Alcoholic Beverage Control Bd.*, 660 A.2d 896, 1995 D.C. App. LEXIS 127 (1995).

Alcoholic Beverage Control Board was re-

quired to articulate legal basis of its authority to disapprove or dismiss petition proposal in opposition to liquor license application for objector's false representations; although it was possible that purging misrepresentations would not undo damage caused by falsehoods in petition, Board did not explain why it took more drastic action, not explicitly authorized under governing statute, of dismissing petition. D.C. Code 1981, § 25-115(e)(3). *Coumaris v. District of Columbia Alcoholic Beverage Control Bd.*, 660 A.2d 896, 1995 D.C. App. LEXIS 127 (1995).

In general.

If petition proposal in opposition to liquor license application contains defect that can be

cured, Alcoholic Beverage Control Board may revise proposed statement with objector's consent or may request objector to revise statement. D.C. Code 1981, § 25-115(e)(3). *Coumaris v. District of Columbia Alcoholic Beverage Control Bd.*, 660 A.2d 896, 1995 D.C. App. LEXIS 127 (1995).

On petition for review of order granting application for transfer of retail liquor license, evidence did not support claim that Alcoholic Beverage Control Board had furnished petitioners with ambiguous and misleading instructions for preparation of protest petitions. D.C. Code §§ 25-111(f), 25-115(a), par. 6(b, c), 25-117. *Schiffmann v. District of Columbia Alcoholic Beverage Control Board*, 302 A.2d 235, 1973 D.C. App. LEXIS 249 (1973).

§ 25-605. Referendum—ANC review of petition proposal and statement. [Repealed].

Repealed.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(y), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-605. 1973 Ed., § 25-115.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

CASE NOTES

In general.

Remarks by member of Alcoholic Beverage Control Board, who was also member of Advisory Neighborhood Commission (ANC) which opposed application for liquor license, to effect that conditions in area of license applicant's business were worse than indicated by Board investigator, could not be ground for reversal of Board's denial of application; applicants did not show that positions held by member were so incompatible as to overcome presumption that Board members acted fairly in ruling on application. D.C. Code 1981, § 25-111(a)(6). *Park v.*

District of Columbia Alcoholic Beverage Control Bd., 555 A.2d 1029, 1989 D.C. App. LEXIS 49 (1989).

Advisory neighborhood commission had no capacity to seek court review of action of District of Columbia Alcoholic Beverage Control Board in issuing liquor license; area residents who were commission members, however, had standing to initiate such review and to assert rights of commission itself. D.C. Code §§ 1-171a et seq., 1-171i(g), 1-1502(9), 1-1510, 25-111(g), 25-114, 25-115(b); D.C. Code Court of Appeals Rules, rule 15. *Kopff v. District of*

Columbia Alcoholic Beverage Control Board, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

In proceedings before District of Columbia Alcoholic Beverage Control Board on application for liquor license, requirement in duties and responsibilities of the Advisory Neighborhood Commissions Act of 1975 that "great weight" be given to views of advisory neighbor-

hood commissions implied that explicit reference should be given by Board to each ANC issue and concern as such, that specific findings and conclusions with respect to each should be made, and that ANC be acknowledged as source of issue or concern. D.C. Code §§ 1-171i(d), 25-115(b). *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1977 D.C. App. LEXIS 311 (1977).

§ 25-606. Circulation of approved statement. [Repealed].

Repealed.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(y), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-606. 1973 Ed., § 25-115.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

§ 25-607. Approval of petitions submitted to the Board. [Repealed].

Repealed.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(y), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-607. 1973 Ed., § 25-115.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

§ 25-608. Licenses exempt from referendum process. [Repealed].

Repealed.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 14; Aug. 25, 1937, 50 Stat. 802, 803, ch. 766, §§ 1, 2; June 15, 1938, 52 Stat. 691, ch. 396, § 3; June 29, 1953, 67 Stat. 103, ch. 159, § 404(e), (f); Aug. 2, 1968, 82 Stat. 616, Pub. L. 90-450, title IV, § 404; Mar. 5, 1981, D.C. Law 3-146, § 4, 27 DCR 4753; Sept. 29, 1982, D.C. Law 4-157, §§ 8, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(4), (c), 30 DCR 5927; June 29, 1984, D.C. Law 5-97, § 2, 31 DCR 2556; Mar. 7, 1987, D.C. Law 6-217, § 9, 34 DCR 907; June 5, 1987, D.C. Law 7-7, § 2, 34 DCR 2640; Oct. 3, 1992, D.C. Law 9-174, § 2(b), (c), 39 DCR 5859; May 24, 1994, D.C. Law 10-122, § 2(f), 41 DCR 1658; Apr. 20, 1999, D.C. Law 12-261, § 2003(q)(2), 46 DCR 3142; Oct. 20, 1999, D.C. Law 13-39, § 2, 46 DCR 6548; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(y), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-608. 1973 Ed., § 25-115.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

§ 25-609. ANC comments.

The affected ANC shall notify the Board in writing of its recommendations, if any, not less than 7 calendar days before the date of the hearing. Whether or not the ANC participates as a protestant, the Board shall give great weight to the ANC recommendations as required by subchapter V of Chapter 3 of Title 1. The applicant shall have the opportunity to respond to the ANC recommendations in a manner to be prescribed in the rules adopted by the Board.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

STANDARDS OF OPERATION

CHAPTER 7. STANDARDS OF OPERATION.

Subchapter I. Staff Requirements

Sec.

- 25-701. Board-approved manager required.
- 25-702. Employees — Notice of employee's criminal conviction.

Subchapter II. Posting of Signs

- 25-711. Posting and carrying of licenses.
- 25-712. Warning signs regarding dangers of alcohol consumption during pregnancy required.
- 25-713. Retail licensee required to post current legal drinking age and notice of requirement to produce valid identification displaying proof of age.

Subchapter III. Hours; Noise Restrictions; Control of Litter

- 25-721. Hours of sale and delivery for manufacturers and wholesalers.
- 25-722. Hours of sale and delivery for off-premises retail licensees.
- 25-723. Hours of sale and service for on-premises retail licensees and temporary licensees.
- 25-724. Board authorized to further restrict hours of operation.
- 25-725. Noise from licensed premises.
- 25-726. Control of litter.

Subchapter IV. Sale on Credit, Gifts, and Loans

- 25-731. Credit and delinquency.
- 25-732. [Repealed].
- 25-733. Delivery and payment records and reports.
- 25-734. Sale by retailer of beverages on credit prohibited.
- 25-735. Gifts and loans from manufacturer prohibited.
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- 25-741. Go-cups and back-up drinks prohibited.
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Sec.

- 25-751. Limitations on container size.
- 25-752. Containers to be labeled.
- 25-753. Keg registration required; procedures specified.
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Subchapter VII. Physical Space and Advertising

- 25-761. Structural requirements.
- 25-762. Substantial changes in operation must be approved.
- 25-763. Restrictions on use of signs.
- 25-764. Advertisements related to alcoholic beverages in general.
- 25-765. Advertisement on windows and doors of licensed establishment.
- 25-766. Prohibited statements.

Subchapter VIII. Reporting; Importation

- 25-771. Reporting.
- 25-772. Unlawful importation of beverages.

Subchapter IX. Minors and Intoxicated Persons

- 25-781. Sale to minors or intoxicated persons prohibited.
- 25-782. Restrictions on minor's entrance into licensed premises.
- 25-783. Production of valid identification document required; penalty.
- 25-784. Sale or distribution of beverages by minor prohibited.
- 25-785. Delivery, offer, or otherwise making available to persons under 21; penalties.

Subchapter X. Temporary Surrender of License — Safekeeping

- 25-791. Temporary surrender of license — Safekeeping.

Subchapter XI. Valet Parking

- 25-796. [Repealed].

Subchapter XI-A. Limitation on transfer of responsibility for licensee Security

- 25-797. Limitation on transfer of responsibility for licensee security.

Subchapter XII. Reimbursable Details

- 25-798. Reimbursable details.

Subchapter I. Staff Requirements.

§ 25-701. Board-approved manager required.

(a) A person designated to manage an establishment shall possess a manager's license.

(b) A licensee shall notify the Board within 7 calendar days of a manager's conviction for other than a minor traffic violation.

(c) This section shall not apply to the holder of a wholesaler's license that is not open to the public or to licensees who personally superintend the establishment during licensed hours of sale.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; July 18, 2008, D.C. Law 17-201, § 5(b), 55 DCR 6289.)

Effect of amendments. — D.C. Law 17-201, in subsec. (c), substituted "the holder of a wholesaler's license that is not open to the public or to licensees" for "licensees".

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 17-201. — For Law 17-201, see notes following § 25-101.

§ 25-702. Employees — Notice of employee's criminal conviction.

A licensee shall immediately notify the Board in writing if the licensee discovers that a employee who sells or serves any alcoholic beverage has, at any time up to 5 years before or during her or his employment, been convicted for other than minor traffic violations.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Subchapter II. Posting of Signs.

§ 25-711. Posting and carrying of licenses.

(a) A person receiving a license to manufacture, sell, or permit the consumption of alcoholic beverages shall frame the license under glass and post it conspicuously in the licensed establishment. If a voluntary agreement is a part of the license, the license shall be marked "voluntary agreement on file" by the Board, and the licensee shall make a copy of the voluntary agreement immediately accessible to any member of the public, official of ABRA, or officer of the Metropolitan Police Department upon request.

(b) The licensee under a retail license or a club license, shall post, in a conspicuous place on the front window or front door of the licensee's premises, the correct name or names of the licensee or licensees and the class and number of the license in plain and legible lettering not less than one inch nor more than 1.25 inches in height.

(c) A licensee under a temporary license shall have the license available for inspection by any member of the Board, employee of the Board, or member of

the Metropolitan Police Department during the event for which the license was issued.

(d) A licensee under a solicitor's license shall, while soliciting orders, carry the license upon his or her person and shall exhibit the license, upon request, to any member of the Board, employee of the Board, or member of the Metropolitan Police Department.

(e) A licensee under a manager's license shall, while managing a licensed establishment, carry the license upon his or her person and shall exhibit the license, upon request, to any member of the Board, employee of the Board, or member of the Metropolitan Police Department.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-712. Warning signs regarding dangers of alcohol consumption during pregnancy required.

(a) A licensee shall post in a conspicuous place, in accordance with regulations, a sign which reads: "Warning: Drinking alcoholic beverages during pregnancy can cause birth defects."

(b) If the Board determines that action in addition to that required by subsection (a) of this section is necessary to accomplish the objectives of this title, the Board may require additional warnings.

(c) The Board shall prepare the signs and make them available at no charge to licensees.

(d) Each day of noncompliance shall constitute a separate violation of this section.

(e) A violation of this section shall be punishable by a civil penalty not to exceed \$100.

(f) This section shall not apply to the holder of a wholesaler's license that is not open to the public.

(Jan. 24, 1934, ch. 4, § 47, as added Nov. 19, 1985, D.C. Law 6-57, § 2, 32 DCR 5722; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; July 18, 2008, D.C. Law 17-201, § 5(c), 55 DCR 6289.)

Prior Codifications. — 1981 Ed., § 25-712.

Effect of amendments. — D.C. Law 17-201 added subsec. (f).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 6-57. — Law 6-57, the "Consuming Alcohol During Pregnancy Warning Signs Act of 1985," was introduced in Council and assigned Bill No. 6-198,

which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on July 9, 1985, and September 10, 1985, respectively. Signed by the Mayor on September 30, 1985, it was assigned Act No. 6-80 and transmitted to both Houses of Congress for its review.

Legislative history of Law 17-201. — For Law 17-201, see notes following § 25-101.

§ 25-713. Retail licensee required to post current legal drinking age and notice of requirement to produce valid identification displaying proof of age.

A retail licensee shall post a notice, maintained in good repair and in a place clearly visible from the point of entry to the establishment, stating:

(1) The minimum age required for the purchases of an alcoholic beverage; and

(2) The obligation of the patron to produce a valid identification document displaying proof of legal drinking age.

(Jan. 24, 1934, 48 Stat. 331, ch. 4, § 20; Aug. 27, 1935, 49 Stat. 901, ch. 756, § 10; June 29, 1953, 67 Stat. 104, ch. 159, § 404(g); Sept. 29, 1982, D.C. Law 4-157, § 12, 29 DCR 3617; Sept. 26, 1984, D.C. Law 5-106, § 2, 31 DCR 3381; Feb. 24, 1987, D.C. Law 6-178, § 2(a), 33 DCR 7654; Mar. 7, 1987, D.C. Law 6-217, § 12, 34 DCR 907; Sept. 11, 1993, D.C. Law 10-12, § 2(c), 40 DCR 4020; May 24, 1994, D.C. Law 10-122, § 2(i), 41 DCR 1658; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-713.
1973 Ed., § 25-121.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Subchapter III. Hours; Noise Restrictions; Control of Litter.

§ 25-721. Hours of sale and delivery for manufacturers and wholesalers.

(a) A licensee under a manufacturer's license or a wholesaler's license shall sell and deliver alcoholic beverages only between the hours of 6:00 a.m. and 1:00 a.m., Monday through Saturday; provided, that licensees may also make deliveries between 5:00 a.m. and 6:00 a.m., Monday through Saturday.

(b) In addition to the provisions of subsection (a) of this section, the licensee under a manufacturer's license, class A or B, or a wholesaler's license, class A or B, may deliver alcoholic beverages to a licensee under a temporary license, class F or G, license between the hours of 9:00 a.m. and 9:00 p.m. on Sunday.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(a) of Inaugural Celebration Extension of Hours Public Safety Emergency Act of 2008 (D.C. Act 17-616, December 19, 2008, 56 DCR 44).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-722. Hours of sale and delivery for off-premises retail licensees.

(a) A licensee under an off-premises retailer's license, class A or B, may sell and deliver alcoholic beverages only between the hours of 9:00 a.m. and

midnight, Monday through Saturday, and during those same hours on December 24 and 31 of each year.

(b) The Board may also permit a licensee under an off-premises retailer's license, class B, to sell or deliver alcoholic beverages between the hours of 9:00 a.m. and midnight on Sundays.

(c) A licensee under a retailer's license, class B, which meets the requirements of § 25-303(c)(1) through (3), may also sell or deliver alcoholic beverages between the hours of 9:00 a.m. and 10:00 p.m. on Sundays and between the hours of 10:00 p.m. and midnight, Monday through Sunday, and on December 24 and December 31 of each year.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(z), 51 DCR 6525; Sept. 14, 2011, D.C. Law 19-21, § 8122, 58 DCR 6226.)

Effect of amendments. — D.C. Law 15-187 rewrote the section.

D.C. Law 19-21, in subsecs. (a) and (b), substituted "midnight" for "10 p.m."

Emergency legislation. — For temporary (90 day) addition of section, see § 2 of Independence Day Class A Retailer Sales Emergency Act of 2010 (D.C. Act 18-451, June 28, 2010, 57 DCR 5667).

For temporary (90 day) amendment of section, see § 8012 of Fiscal Year 2012 Budget Support Emergency Act of 2011 (D.C. Act 19-93, June 29, 2011, 58 DCR 5599).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 19-21. — For history of Law 19-21, see notes under § 47-305.02.

Short title. — Short title: Section 8121 of D.C. Law 19-21 provided that subtitle M of title VIII of the act may be cited as "Off-premise Alcohol Act of 2011".

Editor's notes. — Section 8124 of D.C. Law 19-21 provided: "Sec. 8124. This subtitle shall apply as of July 1, 2011."

§ 25-723. Hours of sale and service for on-premises retail licensees and temporary licensees.

(a) The licensee under a hotel license may make available in the room of a registered adult guest, and charge to the registered guest if consumed, closed miniature containers of alcoholic beverages at all hours on any day of the week.

(b) Except as provided in § 25-724 and subsections (c) and (d) of this section, the licensee under a on-premises retailer's license or a temporary license may sell or serve alcoholic beverages on any day and at any time except between the following hours:

(1) 2:00 a.m. and 8:00 a.m., Monday through Friday, excluding District and federal holidays;

(2) 3:00 a.m. and 8:00 a.m. on Saturday, and on District and federal holidays; and

(3) 3:00 a.m. and 8:00 a.m. on Sunday.

(c) On each January 1st, the licensee under an on-premises retailer's license or a temporary license may sell or serve alcoholic beverages until 4:00 a.m.

(d)(1) During the beginning of daylight savings time pursuant to § 28-2711, on the second Sunday in March of each year, a licensee under an on-premises retailer's license may sell and serve alcoholic beverages between 3:00 a.m. and 4:00 a.m., if the licensee:

(A) Registers with the Board;
 (B) Pays a registration fee of \$200; and
 (C) Provides written notification, no later than 10 days prior to the beginning of daylight savings time, to the Board and the Metropolitan Police Department of its extended hours of operation.

(2) The fees collected pursuant to this subsection shall be used to fund the Reimbursable Detail Subsidy Program in the ABRA.

(3) The Chief of Police may suspend a licensee's privilege to operate and sell or serve alcoholic beverages during the extended hour authorized by paragraph (1) of this subsection if the licensee's operation presents a danger to the public health, safety, or welfare.

(4) A violation of paragraph (1) of this subsection shall constitute a secondary tier violation subject to the penalties set forth in § 25-830(d).

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Mar. 25, 2009, D.C. Law 17-361, § 2(c)(1), 56 DCR 1204; Sept. 14, 2011, D.C. Law 19-21, § 8142, 58 DCR 6226; Dec. 2, 2011, D.C. Law 19-45, § 2, 58 DCR 8937.)

Effect of amendments. — D.C. Law 17-361, in subsec. (b), substituted "Friday, excluding District and federal holidays" for "Friday" in par. (1) and substituted "Saturday, excluding District and federal holidays" for "Saturday" in par. (2).

D.C. Law 19-21 rewrote subsec. (b)(3), which formerly read:

"(3) 3:00 a.m. and 10:00 a.m. on Sunday."

D.C. Law 19-45, in subsec. (b), substituted "§ 25-724 and subsections (c) and (d) of this section" for "§ 25-724"; and added subsec. (d).

Emergency legislation. — For temporary (90 day) amendment of section, see § 2 of Inaugural Celebration Extension of Hours Emergency Act of 2008 (D.C. Act 17-614, December 19, 2008, 56 DCR 40).

For temporary (90 day) amendment of section, see § 2(b) of Inaugural Celebration Extension of Hours Public Safety Emergency Act of 2008 (D.C. Act 17-616, December 19, 2008, 56 DCR 44).

For temporary (90 day) addition, see § 2 of World Cup Extension of Hours Emergency Act

of 2010 (D.C. Act 18-433, June 7, 2010, 57 DCR 4958).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 17-361. — For Law 17-361, see notes following § 25-113.

Legislative history of Law 19-21. — For history of Law 19-21, see notes under § 47-305.02.

Legislative history of Law 19-45. — Law 19-45, the "Daylight Savings Time Extension of Hours Act of 2011", was introduced in Council and assigned Bill No. 19-119, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on July 12, 2011, and September 21, 2011, respectively. Signed by the Mayor on October 11, 2011, it was assigned Act No. 19-175 and transmitted to both Houses of Congress for its review. D.C. Law 19-45 became effective on December 2, 2011.

Short title. — Short title: Section 8141 of D.C. Law 19-21 provided that subtitle O of title VIII of the act may be cited as "Opening Hours Act of 2012".

§ 25-724. Board authorized to further restrict hours of operation.

At the time of initial application or renewal of any class of license, the Board may further limit the hours of sale and delivery for a particular applicant (1) based on the Board's findings of fact, conclusions of law, and order following a protest hearing, or (2) under the terms of a voluntary agreement.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-725. Noise from licensed premises.

(a) The licensee under an on-premises retailer's license shall not produce any sound, noise, or music of such intensity that it may be heard in any premises other than the licensed establishment by the use of any:

(1) Mechanical device, machine, apparatus, or instrument for amplification of the human voice or any sound or noise;

(2) Bell, horn, gong, whistle, drum, or other noise-making article, instrument, or device; or

(3) Musical instrument.

(b) This section shall not apply to:

(1) Areas in the building which are not part of the licensed establishment;

(2) A building owned by the licensee which abuts the licensed establishment;

(3) Any premises other than the licensed establishment which are located within a C-1, C-2, C-3, C-4, C-M, or M zone, as defined in the zoning regulations for the District; or

(4) Sounds, noises, or music occasioned by normal opening of entrance and exit doors for the purpose of ingress and egress.

(c) The licensees under this subchapter shall comply with the noise level requirements set forth in Chapter 27 of Title 20 of the District of Columbia Municipal Regulations.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-726. Control of litter.

(a) The licensee under a retailer's license shall take reasonable measures to ensure that the immediate environs of the establishment, including adjacent alleys, sidewalks, or other public property immediately adjacent to the establishment, or other property used by the licensee to conduct its business, are kept free of litter.

(b) The licensee under a retailer's license shall comply with the Litter Control Expansion Amendment Act of 1987, effective October 9, 1987 (D.C. Law 7-38; 23 DCMR § 720).

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Subchapter IV. Sale on Credit, Gifts, and Loans.

§ 25-731. Credit and delinquency.

(a) For the purposes of this section, the term “payment” means the delivery to the manufacturer or wholesaler of cash or a check, draft, or other order for payment; provided, that the check, draft, or other order of payment is drawn only on the bank account of the retailer.

(b) No alcoholic beverage shall be sold by a manufacturer or wholesaler to a retailer, or purchased by a retailer, except on the following terms: (1) full payment in cash on delivery, or (2) full payment in cash before the 16th day of the month following the month of purchase or delivery.

(c) A retailer who fails to make payment in full in accordance with the terms of purchase shall not, during the period of delinquency, make any further purchases except for cash on delivery, and, during the period of delinquency, a manufacturer or wholesaler who has knowledge of such delinquency shall not sell any alcoholic beverages to the retailer except for cash on delivery.

(d) Subsections (b) and (c) of this section shall constitute a reasonable extension of credit and no enlargement or extension of such terms, whether cash or credit, shall be granted by the manufacturer or wholesaler or accepted by the retailer.

(e) Repealed.

(f) Repealed.

(g) Repealed.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Mar. 25, 2009, D.C. Law 17-361, § 2(c)(2), 56 DCR 1204.)

Effect of amendments. — D.C. Law 17-361 repealed subsecs. (e), (f), and (g), which had read as follows:

“(e) The failure of a retailer who contracts to purchase an alcoholic beverage for full payment in cash on delivery to make full payment upon delivery shall constitute a violation of this chapter.

“(f) A retailer shall not satisfy the obligation to pay for an alcoholic beverage unless the payment is dated on or before the date payment is due and is, upon presentation, promptly honored by the bank on which it is drawn.

“(g) The failure of a manufacturer or wholesaler to deposit the payment in the manufacturer’s or wholesaler’s bank for credit or collection, or present the payment to the bank on which it is drawn, within 5 days from the receipt of a payment shall constitute a violation of this chapter. Each day that the failure continues shall constitute a separate violation.”

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 17-361. — For Law 17-361, see notes following § 25-113.

§ 25-732. Payment plan for use in extenuating circumstances. [Repealed].

Repealed.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Mar. 25, 2009, D.C. Law 17-361, 2(c)(3), 56 DCR 1204.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 17-361. — For Law 17-361, see notes following § 25-113.

§ 25-733. Delivery and payment records and reports.

(a) A delivery of an alcoholic beverage to a licensee shall be accompanied by an invoice of sale or delivery which shall bear the date of delivery of the alcoholic beverages.

(b) Before the 26th day of each month, each manufacturer and wholesaler shall file with each other manufacturer or wholesaler within the District, on a form prescribed by the Board, a statement under penalties of perjury showing the following:

(1) The name, including trade name, and address of each retailer who has been required to make payment in cash for alcoholic beverages under § 25-731(c);

(2) All delinquent accounts; and

(3) All checks, drafts, or other orders for payment received from any retailer, which, since the previous report, were dishonored when presented for payment, when such dishonored checks, drafts, or other orders for payment exceed \$15,000.

(c) A manufacturer or wholesaler who, after receiving notification of delinquency by a retailer under § 25-731(c), extends credit to any retailer, shall be deemed to have violated § 25-731(b).

(d) Repealed.

(e) Repealed.

(f) Repealed.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Mar. 25, 2009, D.C. Law 17-361, § 2(c)(4), 56 DCR 1204.)

Effect of amendments. — D.C. Law 17-361, in subsec. (b)(3), substituted “presented for payment, when such dishonored checks, drafts, or other orders for payment exceed \$15,000” for “presented for payment”; and repealed subsecs. (d), (e), and (f), which had read as follows:

“(d) Before March 2, June 2, September 2, and January 2 of each year, each manufacturer and wholesaler shall submit to the Board, on a form prescribed by the Board, a list of the following:

“(1) All retailers that have been required to make payment in cash for alcoholic beverages under 25-731(c), during the preceding 90 days; and

“(2) All accounts that have been delinquent

during the preceding 90 days, including the amount of the delinquency.

“(e) Each manufacturer and wholesaler shall, within 24 hours of receipt from the bank or other depository of notice of dishonor of a check, draft, or other order for payment which the manufacturer or wholesaler received from a retailer, notify in writing the Board of the notice of dishonor.

“(f) Failure to file timely a report required by this section shall constitute a violation of this chapter.”

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 17-361. — For Law 17-361, see notes following § 25-113.

§ 25-734. Sale by retailer of beverages on credit prohibited.

(a) A licensee under a retailer’s license shall not sell on credit any alcoholic beverages except as provided in this section.

(b) For purposes of this section, the extension of credit by the licensee under an off-premises retailer’s license in connection with the sale of an alcoholic beverage through a document, device, or plan intended or adapted for the

purpose of establishing credit, except through the use of a credit card, shall be considered a sale on credit.

(c) This section shall not prohibit a club from extending credit to its members or the guests of members or a hotel from extending credit to its registered guests.

(d) This section shall not prohibit the licensee under an on-premises retailer's license from accepting payment by credit card for sales of alcoholic beverages to customers.

(Jan. 24, 1934, 48 Stat. 336, ch. 4, § 35; Dec. 8, 1970, 84 Stat. 1394, Pub. L. 91-535, § 6; Sept. 29, 1982, D.C. Law 4-157, § 14, 29 DCR 3617; Mar. 7, 1987, D.C. Law 6-217, § 15, 34 DCR 907; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-734. 1973 Ed., § 25-133.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-157. — For

legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 6-217. — For legislative history of D.C. Law 6-217, see Historical and Statutory Notes following § 25-101.

CASE NOTES

ANALYSIS

Credit.

Rights of owner.

Credit.

Liquor store owner's acceptance of postdated check for portion of sum due for liquor sold violated statute proscribing sale of liquor on credit. D.C. Code § 25-133. *Fields v. Hunter*, 368 A.2d 1156, 1977 D.C. App. LEXIS 414 (1977).

Rights of owner.

Statute prohibiting credit sales of liquor was

not enacted for protection of liquor store owners but to protect public interest. D.C. Code § 25-133. *Fields v. Hunter*, 368 A.2d 1156, 1977 D.C. App. LEXIS 414 (1977).

Even though buyer of liquor on credit was not without fault, seller, liquor store owner was not entitled to enforce the illegal agreement. D.C. Code § 25-133. *Fields v. Hunter*, 368 A.2d 1156, 1977 D.C. App. LEXIS 414 (1977).

§ 25-735. Gifts and loans from manufacturer prohibited.

(a) A manufacturer, whether or not licensed under this title, shall not engage in the following transactions with a wholesale or retail licensee:

- (1) Loan or give money;
- (2) Sell, rent, loan, or give equipment, furniture, fixtures, or property; or
- (3) Give or sell a service.

(b) A retail licensee shall not engage in the following transactions with a manufacturer, whether or not licensed under this title:

- (1) Receive or accept a loan or gift of money;
- (2) Purchase from, rent from, borrow, or receive by gift equipment, furniture, fixtures, or property; or
- (3) Accept or receive a service.

(c) Notwithstanding subsections (a) and (b) of this section, with the prior approval of the Board, a manufacturer may sell, give, rent, or loan to a retail licensee any service or article of property costing the manufacturer not more than \$500 and a retail licensee may purchase from, rent from, borrow, or

receive by gift from a manufacturer any service or article of property costing the manufacturer not more than \$500.

(d) Notwithstanding subsections (a), (b), and (c) of this section, with the prior approval of the Board, a manufacturer may sell, give, rent, or loan to a retail licensee computer equipment for the purpose of tracking the sale or delivery of alcoholic beverages.

(Jan. 24, 1934, 48 Stat. 330, ch. 4, § 18; Aug. 27, 1935, 49 Stat. 902, ch. 756, § 15; Sept. 29, 1982, D.C. Law 4-157, §§ 10, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(6), 30 DCR 5927; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(aa), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-735. 1973 Ed., § 25-119.

Effect of amendments. — D.C. Law 15-187, in subsecs. (b) and (c), deleted “wholesale or” preceding “retail licensee”; and added subsec. (d).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-157. — For legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 5-51. — For legislative history of D.C. Law 5-51, see Historical and Statutory Notes following § 25-206.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

CASE NOTES

ANALYSIS

Credit regulations.

Loans.

Credit regulations.

Alcoholic Beverage Control Board’s interpretation of regulations restricting credit terms to retailers of alcoholic beverages was neither consistent nor long-standing, and, thus, Board was not entitled to judicial deference usually accorded interpretation by agencies of statutes or regulations which they administer. D.C. Code 1981, §§ 25-101 et seq., 25-119, 25-120. *Superior Beverages, Inc. v. District of Columbia*

Alcoholic Beverage Control Bd., 567 A.2d 1319, 1989 D.C. App. LEXIS 264 (1989).

Loans.

Sections of Alcoholic Beverage Control Act prohibiting a manufacturer or wholesaler of alcoholic beverages from lending money or property to a retailer apply only to a manufacturer or wholesaler who has such a substantial interest in the business of its customer, or in his premises, as in the judgment of the Board may tend to influence the customer to purchase beverages from him. D.C. Code 1961, §§ 25-119, 25-120. *Press Liquors, Inc. v. Weakley*, 317 F.2d 135, 1963 U.S. App. LEXIS 6143 (C.A.D.C. 1963).

§ 25-736. Gifts and loans from wholesaler prohibited.

(a) A licensed wholesaler of alcoholic beverages, whether or not licensed under this title, shall not engage in the following transactions with a retail licensee:

- (1) Lend or give any money;
- (2) Sell equipment, furniture, fixtures, or property, except merchandise sold at the fair market value for resale by the licensee;
- (3) Rent, loan, or give any equipment, furniture, fixtures, or property; or
- (4) Give or sell any service.

(b) A retail licensee shall not engage in the following transactions with a wholesaler:

- (1) Receive or accept any loan or gift of money;
- (2) Purchase equipment, furniture, fixtures, or property, except merchandise purchased at the fair market value for resale;

(3) Rent from, borrow, or receive by gift equipment, furniture, fixtures, or property; or

(4) Receive any service.

(c) Notwithstanding subsections (a) and (b) of this section, with the prior approval of the Board, a wholesaler may sell, give, rent, or loan to a retail licensee any service or article of property costing the wholesaler not more than \$500 and a retail licensee may purchase from, rent from, borrow, or receive by gift from a wholesaler any service or article of property costing the wholesaler not more than \$500.

(d) Notwithstanding subsections (a), (b), and (c) of this section, with the prior approval of the Board, a wholesaler may sell, rent, give, loan to a retail licensee computer equipment for the purpose of tracking the sale or delivery of alcoholic beverages.

(Jan. 24, 1934, 48 Stat. 331, ch. 4, § 19; Aug. 27, 1935, 49 Stat. 903, ch. 756, § 16; Sept. 29, 1982, D.C. Law 4-157, §§ 11, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(7), 30 DCR 5927; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(bb), 51 DCR 6525.)

Prior Codifications. — 1981 Ed., § 25-736. 1973 Ed., § 25-120.

Effect of amendments. — D.C. Law 15-187 added subsec. (d).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-157. — For

legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-103.

Legislative history of Law 5-51. — For legislative history of D.C. Law 5-51, see Historical and Statutory Notes following § 25-206.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

CASE NOTES

ANALYSIS

Credit regulations.
Loans.

Credit regulations.

Term "payment in full," as used in regulations restricting terms of credit which wholesalers of alcoholic beverages may extend to retailers, refers only to terms of parties' purchase agreement and does not apply to actual amount wholesaler charges or retailer agrees to pay. D.C. Code 1981, §§ 25-101 et seq., 25-119, 25-120. *Superior Beverages, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 567 A.2d 1319, 1989 D.C. App. LEXIS 264 (1989).

Regulations restricting terms of credit which wholesalers of alcoholic beverages may extend to retailers are concerned only with time by which retailers must pay for goods and do not prohibit discounts to retailers who pay in cash. D.C. Code 1981, §§ 25-101 et seq., 25-119, 25-120. *Superior Beverages, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 567 A.2d 1319, 1989 D.C. App. LEXIS 264 (1989).

Alcoholic Beverage Control Board's interpretation of regulations restricting credit terms to retailers of alcoholic beverages was neither consistent nor long-standing, and, thus, Board was not entitled to judicial deference usually accorded interpretation by agencies of statutes or regulations which they administer. D.C. Code 1981, §§ 25-101 et seq., 25-119, 25-120. *Superior Beverages, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 567 A.2d 1319, 1989 D.C. App. LEXIS 264 (1989).

Loans.

Sections of Alcoholic Beverage Control Act prohibiting a manufacturer or wholesaler of alcoholic beverages from lending money or property to a retailer apply only to a manufacturer or wholesaler who has such a substantial interest in the business of its customer, or in his premises, as in the judgment of the Board may tend to influence the customer to purchase beverages from him. D.C. Code 1961, §§ 25-119, 25-120. *Press Liquors, Inc. v. Weakley*, 317 F.2d 135, 1963 U.S. App. LEXIS 6143 (C.A.D.C. 1963).

*Subchapter V. Restrictions on Sales, Promotions, and Service.***§ 25-741. Go-cups and back-up drinks prohibited.**

(a) The licensee under an off-premises retailer's license, class A or B, shall not provide go-cups to customers.

(b) The licensee under an on-premises retailer's license shall not serve back-up drinks to customers.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-742. Solicitation of drinks prohibited.

The licensee under an on-premises retailer's license shall not:

(1) Require, permit, suffer, encourage, or induce an entertainer or employee to solicit in the licensed establishment the purchase by a patron of any drink, whether alcoholic or non-alcoholic, or money with which to purchase the drink, for that entertainer or employee, or for any other person other than the patron and guests of the patron; or

(2) Pay to the licensee's agent or manager, or any other person frequenting the licensed establishment, a commission or any other compensation to solicit for herself, himself, or for others, the purchase by the patron of any drink, whether alcoholic or non-alcoholic.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-743. Tie-in purchases prohibited.

(a) A manufacturer or wholesaler shall not require, directly or indirectly, a retailer to purchase any type of alcoholic beverage or other commodity in order to purchase any other alcoholic beverage.

(b) A licensee under an off-premises retailer's license shall not require, directly or indirectly, a consumer to purchase any type of alcoholic beverage or other commodity in order to purchase any other alcoholic beverage.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Subchapter VI. Limitations on Container Number, Size, Labeling, and Storage.

§ 25-751. Limitations on container size.

(a) The licensee under an off-premises retailer's license, class A, may sell and deliver no fewer than 6 miniatures of spirits or wine per purchase.

(b) The licensee under a manufacturer's license, wholesaler's license, or an off-premises retailer's license shall not sell an alcoholic beverage in any container which does not comply with the standards of fill set forth in the most recent regulations issued under the Federal Alcohol Administration Act, approved August 29, 1935 (49 Stat. 977; 27 U.S.C. § 201 et seq.).

(c) No person shall sell or deliver in the District alcoholic beverages in containers of a capacity of $\frac{1}{10}$ gallon, except the following:

- (1) Scotch whiskey, Irish whiskey, brandy, and rum;
- (2) Cordials and liqueurs, cocktails, highballs, gin fizzes, bitters, and similar specialties; or
- (3) Domestic and imported still wines and sparkling wines.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-752. Containers to be labeled.

No rectified or blended spirits shall be sold unless the container in which it is sold shall bear a legible label, firmly affixed, stating the nature and percentage of each ingredient (except water), the age of the ingredient, and the alcoholic content by volume.

(Jan. 24, 1934, 48 Stat. 336, ch. 4, § 36; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-752. 1973 Ed., § 25-134.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-753. Keg registration required; procedures specified.

(a) A licensee under an off-premises retailer's or wholesaler's license shall not sell any alcoholic beverage in a keg to a consumer without having affixed a registration seal on the keg at the time of sale.

(b) A keg registration seal is a seal, decal, sticker, or other device approved by the Board which is designed to be affixed to kegs and which displays a registration number, name of the licensee offering the keg for sale to the consumer, and any other information required by the Board.

(c) At the point of sale of an alcoholic beverage in a keg, the licensee shall complete a keg declaration of receipt on a form provided by the Board receipt, which receipt shall contain the following information:

- (1) Keg registration seal number;

(2) The name and address of the purchaser verified by a valid identification document;

(3) The type and registration number of the identification presented by the purchaser;

(4) A statement signed by the purchaser stating that:

(A) The purchaser is 21 years of age or older;

(B) The purchaser does not intend to allow persons under 21 years of age to consume any of the alcoholic beverage purchased; and

(C) The purchaser will not remove or obliterate the keg registration seal affixed to the keg or allow its removal or obliteration; and

(5) The specific address or location where the alcoholic beverage in the keg will be consumed and the date or dates on which it will be consumed.

(d) Upon return of a registered keg from a consumer, the licensee shall remove or obliterate the keg registration seal and note the removal or obliteration on the keg declaration of receipt form to be retained by the licensee at the licensed establishment. If a keg is made of disposable packaging that does not have to be returned by the consumer to the licensee, the licensee shall indicate on the keg declaration of receipt form that the keg is disposable.

(e) A licensee shall maintain the keg declaration of receipt form on the licensed establishment for 2 years following the date of purchase. These records shall be open at all reasonable times for inspection by the Board, or its authorized representatives, and other law enforcement officers.

(f) This section shall not apply to the wholesale sale of any keg between a wholesaler and a retailer or to the import of any keg by a retailer under this title or regulations promulgated hereunder.

(Jan. 24, 1934, ch. 4, § 48, as added Sept. 11, 1993, D.C. Law 10-12, § 2(e), 40 DCR 4020, and May 24, 1994, D.C. Law 10-122, § 2(l), 41 DCR 1658; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-753.

Emergency legislation. — For temporary addition of section, see § 2(e) of the Underage Drinking Emergency Amendment Act of 1993 (D.C. Act 10-24, May 19, 1993, 40 DCR 3405), § 2(e) of the Underage Drinking Congressional Recess Emergency Amendment Act of 1993 (D.C. Act 10-72, July 29, 1993, 40 DCR 5820) and § 2(e) of the Underage Drinking Emergency Amendment Act of 1994 (D.C. Act 10-236, April 28, 1994, 41 DCR 2601).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 10-12. — Law 10-12, the "Underage Drinking Temporary Amendment Act of 1993," was introduced in Council and assigned Bill No. 10-261. The Bill was adopted on first and second readings on May 4, 1993, and June 1, 1993, respectively. Signed by the Mayor on June 16, 1993, it was assigned Act No. 10-40 and transmitted to both Houses of Congress for its review. D.C. Law 10-12 became effective on September 11, 1993.

Legislative history of Law 10-122. — For legislative history of D.C. Law 10-122, see Historical and Statutory Notes following § 25-785.

§ 25-754. Restrictions on storage of beverages.

(a) Alcoholic beverages shall not be manufactured, kept for sale, or sold by any licensee other than at the licensed establishment; provided, that the Board may permit the storing of beverages upon premises other than the licensed establishment under the following classes of licenses:

(1) Manufacturer's license;

- (2) Wholesaler's license;
- (3) Off-premises retailer's license, class A;
- (4) Common carrier license, class C or D; and
- (5) Caterer's license.

(b) A licensee may not store alcoholic beverages upon premises outside the District.

(Jan. 24, 1934, 48 Stat. 327, ch. 4, § 13; Aug. 24, 1935, 49 Stat. 900, ch. 756, § 8; Dec. 8, 1970, 84 Stat. 1394, Pub. L. 91-535, § 5; Oct. 26, 1977, D.C. Law 2-27, § 2, 24 DCR 3720; Mar. 5, 1981, D.C. Law 3-157, § 2(c), 27 DCR 5117; July 26, 1986, D.C. Law 6-130, § 2, 33 DCR 3405; Mar. 7, 1987, D.C. Law 6-217, § 8, 34 DCR 907; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-754. 1973 Ed., § 25-114.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 2-27. — Law 2-27, the "Variable Licensing Periods Act of 1977," was introduced in Council and assigned Bill No. 2-126, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on June 28, 1977 and July 12, 1977, respectively. Signed by the Mayor on August 1, 1977, it was assigned Act No. 2-61 and transmitted to both Houses of Congress for its review.

Legislative history of Law 3-157. — For

legislative history of D.C. Law 3-157, see Historical and Statutory Notes following § 25-211.

Legislative history of Law 6-130. — Law 6-130, the "Wholesale Liquor Industry Storage Act of 1986," was introduced in Council and assigned Bill No. 6-329, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first, amended first and second readings on April 15, 1986, April 29, 1986 and May 13, 1986, respectively. Signed by the Mayor on May 29, 1986, it was assigned Act No. 6-168 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-217. — For legislative history of D.C. Law 6-217, see Historical and Statutory Notes following § 25-101.

CASE NOTES

ANALYSIS

Civil rights actions.
Validity.

Civil rights actions.

Plaintiff in § 1983 action challenging local warehousing requirements of Wholesale Liquor Industry Storage Act as commerce clause violation was not required to first seek exemption from District of Columbia Alcoholic Beverage Control Board; exhaustion of remedies was not normally required under § 1983, and such act would have been futile since Board could not have provided adequate relief. U.S.C. Const. Art. 1, § 8, cl. 3; 42 U.S.C. § 1983; D.C. Code 1981, § 25-114(f); District of Columbia Alcoholic Beverage Control Act, § 2, 48 Stat. 319. Milton S. Kronheim & Co. v. District of Columbia, 877 F. Supp. 21, 1995 U.S. Dist. LEXIS 2378 (1995), reversed by 91 F.3d 193, 319 U.S. App. D.C. 389, 1996 U.S. App. LEXIS 20027 (1996).

Validity.

District of Columbia's local warehousing requirement for alcoholic beverages is patently discriminatory under the commerce clause; re-

quirement not only deprives out-of-state businesses of access to local market, it also requires that business operations be performed in the District even if they could be performed more efficiently elsewhere. U.S. Const. Art. 1, § 8, cls. 3, 17; D.C. Code 1981, § 25-114(f). Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193, 1996 U.S. App. LEXIS 20027 (C.A.D.C. 1996), writ of certiorari denied by 520 U.S. 1186, 117 S. Ct. 1468, 137 L. Ed. 2d 681, 1997 U.S. LEXIS 2546, 65 U.S.L.W. 3711 (1997).

Nonprotectionist side of the District of Columbia's mixed motive for requiring alcoholic beverage licensees to store beverages in the District placed the requirement squarely within the 21st Amendment's ambit, even though it facially violated the commerce clause. U.S.C. Const. Art. 1, § 8, cls. 3, 17; Amend. 21; D.C. Code 1981, § 25-114(f). Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193, 1996 U.S. App. LEXIS 20027 (C.A.D.C. 1996), writ of certiorari denied by 520 U.S. 1186, 117 S. Ct. 1468, 137 L. Ed. 2d 681, 1997 U.S. LEXIS 2546, 65 U.S.L.W. 3711 (1997).

Under commerce clause, District of Columbia Wholesale Liquor Industry Storage Act, which prohibited sale in District of liquor which was

stored outside District, was discriminatory on its face; Act discriminated against businesses using out-of-state facilities and labor in order to benefit local interest. *Quality Brands, Inc. v.*

Barry, 715 F. Supp. 1138, 1989 U.S. Dist. LEXIS 7342 (D.D.C. 1989), affirmed without opinion by 901 F.2d 1130, 284 U.S. App. D.C. 78 (1990).

Subchapter VII. Physical Space and Advertising.

§ 25-761. Structural requirements.

No license shall be issued for the sale or consumption of beverages in any building, a part of which is used as a dwelling or lodging house, unless the applicant files an affidavit stating to the satisfaction of the Board that access from the portion of the building used as a dwelling or lodging house to the portion where the applicant desires to sell alcoholic beverages is effectively closed; provided, that the provisions of this section shall not apply to a hotel or a club licensed under this title. The Board, by regulation, may provide for waiver of the provisions of this section upon application of a licensee.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-762. Substantial changes in operation must be approved.

(a) Before a licensee may make a change in the interior or exterior, or a change in format, of any licensed establishment, which would substantially change the nature of the operation of the licensed establishment as set forth in the initial application for the license, the licensee shall obtain the approval of the Board in accordance with § 25-404.

(b) In determining whether the proposed changes are substantial, the Board shall consider whether they are potentially of concern to the residents of the area surrounding the establishment, including changes which would:

(1) Increase the occupancy of the licensed establishment or the use of interior space not previously used;

(2) Expand the operation of the licensed establishment to allow for permanent use of exterior public or private space or summer gardens;

(3) Expand the operation of the licensed establishment to another floor, roof, or deck;

(4) Provide for, or expand, an area in which live entertainment would be performed by employees of the establishment, patrons, contract employees, or self-employed individuals, such as dancers or disc jockeys;

(5) Diminish, or expand, the space used by the establishment for service of meals, dining areas, or food preparation areas;

(6) Provide permanent space for dancing by patrons if none existed previously;

(7) Change the exterior design, architecture, or construction of the building in such a way as to convey to the public notice of the fact that alcoholic

beverages are to be, or are sold, dispensed, stored, or distributed in or from the building;

- (8) Provide music or entertainment if none was provided previously;
- (9) Change from recorded to live music or entertainment or the kind of music or entertainment provided;
- (10) Change the entertainment to include nude performances;
- (11) Change from full-menu offerings to offering snack food;
- (12) Change from on-premises consumption of food to carry-out sales or offering carry-out sales if none existed previously;
- (13) Extend the hours of operation;
- (14) Provide mechanical or electronic entertainment devices if these did not exist previously or provide for the installation of additional devices;
- (15) Change the trade name or corporate name, coupled with a change in ownership of the establishment;
- (16) Change the booth sizes;
- (17) Reduce the number of toilet facilities; or
- (18) Increase the number of vessels under the on-premises common carrier license class.

(c) A temporary or permanent reduction in the hours of operation of a licensed establishment shall not constitute a substantial change.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

CASE NOTES

Sufficiency of evidence.

Substantial evidence did not support finding of Alcoholic Beverage Control Board that corporation, doing business as restaurant, made substantial change in operations, with regard to occupancy, without Board approval, as would support imposition of sanctions; fact that corporation indicated on license application that its restaurant would have “capacity” of 99 could

not reasonably be read to impose limit on patrons, number of “seats” specified on certificate of occupancy was not intended as limit on number of patrons, and record did not support Board’s conclusion that corporation agreed to limit on number of patrons that restaurant could admit. 2461 Corp. v. D.C. Alcoholic Bev. Control Bd., 950 A.2d 50, 2008 D.C. App. LEXIS 263 (2008).

§ 25-763. Restrictions on use of signs.

(a) Exterior signs advertising alcoholic beverages, which signs have a total cumulative area in the aggregate in excess of 10 square feet, shall be prohibited.

(b) No sign advertising alcoholic beverages on the exterior of, or visible from the exterior of, any licensed establishment or elsewhere in the District shall be illuminated at any time when the sale of alcoholic beverages at the licensed premises is prohibited.

(c) A sign advertising alcoholic beverages on the exterior of, or visible from the exterior of, any licensed establishment, which is illuminated with intermittent flashes of light shall be prohibited.

(d) A retail licensee shall not erect or maintain at the licensed establish-

ment, except to the extent required by federal law, a sign or lettering using the words “Wholesale,” “Wholesaler,” “Wholesale department,” or any other word or words designed or intended to mislead or deceive the general public into believing that the licensee is licensed to sell alcoholic beverages as a wholesaler.

(e) A sign which does not conform to this section shall be removed.

(f) In addition to the provisions of this section, signage shall be subject to the regulations contained in Chapter 31 of Title 12 of the District of Columbia Municipal Regulations.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Emergency legislation. — For temporary (90 day) amendment of section, see § 6 of the Sign Regulation Emergency Amendment Act of 2012 (D.C. Act 19-387, July 11, 2012, 59 DCR 8491).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-764. Advertisements related to alcoholic beverages in general.

No person shall publish or disseminate, or cause to be published or disseminated, directly or indirectly, through any radio or television broadcast, in any newspaper, magazine, periodical, or other publication, or by any sign, placard, or any printed matter, an advertisement of alcoholic beverages which is not in conformity with this title.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-765. Advertisement on windows and doors of licensed establishment.

(a) Advertisements relating to the prices of alcoholic beverages shall only be displayed in the window of a licensed establishment if the total area covered by the advertisements does not exceed 25% of the window space.

(b) Advertisements relating to alcoholic beverages shall not be displayed on the exterior of any window or on the exterior or interior of any door.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-766. Prohibited statements.

A statement that is false or misleading with respect to any material fact shall be prohibited.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Subchapter VIII. Reporting; Importation.

§ 25-771. Reporting.

(a) Before the 21st day of each month, a licensee under a manufacturer's license shall furnish to the Board, on a form to be prescribed by the Mayor, a statement, under penalties of perjury, showing the quantity of each kind of alcoholic beverage, except beer, manufactured during the preceding calendar month. For the purposes of this section, alcoholic beverages shall not be considered as manufactured until they are ready for sale.

(b) Twice a year, a licensee under a wholesaler's or retailer's license shall furnish to the Board, on a form to be prescribed by the Mayor, a statement, under penalties of perjury, showing:

- (1) The quantity of each kind of beverage, except beer, purchased by the license holder during the preceding 6 calendar months;
- (2) The date of each such purchase;
- (3) The name of the person from whom purchased, including the license number of the vendor, if licensed hereunder; and
- (4) The quantity and kind of beverages in each purchase.

(Jan. 24, 1934, 48 Stat. 332, ch. 4, § 22; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 2; Sept. 29, 1982, D.C. Law 4-157, § 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(8), 30 DCR 5927; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 26, 2001, D.C. Law 14-42, § 6(e), 48 DCR 7612; Mar. 13, 2004, D.C. Law 15-105, § 26(b)(2), 51 DCR 881.)

Prior Codifications. — 1981 Ed., § 25-771. 1973 Ed., § 25-123.

Effect of amendments. — D.C. Law 14-42, in subsec. (a), substituted "calendar month" for "month".

D.C. Law 15-105, in subsec. (a), validated a previously made technical correction.

Emergency legislation. — For temporary (90 day) amendment of section, see § 6(e) of Technical Amendments Emergency Act of 2001 (D.C. Act 14-108, August 3, 2001, 48 DCR 7622).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-157. — For legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 5-51. — For legislative history of D.C. Law 5-51, see Historical and Statutory Notes following § 25-206.

Legislative history of Law 14-42. — For Law 14-42, see notes following § 25-120.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 25-210.

§ 25-772. Unlawful importation of beverages.

(a) Only a licensee under a manufacturer's, wholesaler's, or common carrier's license, or retailer's license under a validly issued import permit shall transport, import, bring, or ship or cause to be transported, imported, brought, or shipped into the District from outside the District any wines, spirits, or beer in a quantity in excess of one case at any one time.

(b) No public or common carrier shall transport or bring into the District wine, spirits, or beer in a quantity in excess of one case per location in any one

calendar month for delivery to any one person in the District other than the licensee under a manufacturer's, wholesaler's, or retailer's license.

(c) This section shall not apply to persons possessing old stocks who are moving into the District, to embassies or diplomatic representatives of foreign countries, to wines imported for religious or sacramental purposes, to wine, spirits, and beer to be delivered to the licensee under a manufacturer's, wholesaler's, or retailer's license, or to any persons wishing to have liquor chocolates delivered to their residence. The term "liquor chocolates" may include other types of candies that have small amounts of liquor contained in the candy.

(d) The penalty for violation of this section shall consist of (1) the forfeiture of the beverages transported, imported, brought, or shipped, or caused to be transported, imported, brought, or shipped in violation of this section, and (2) a fine of not more than \$500 or imprisonment for not more than 6 months.

(e) In addition to other penalties provided in this section, any person who violates the provisions of this section shall be liable for any tax, penalties, and interest provided for in this title.

(Jan. 24, 1934, ch. 4, § 39; Aug. 25, 1937, 50 Stat. 803, ch. 766, § 4; Dec. 26, 1967, 81 Stat. 728, Pub. L. 90-223, § 1; July 24, 1982, D.C. Law 4-131, § 302, 29 DCR 2418; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(cc), 51 DCR 6525; July 18, 2008, D.C. Law 17-201, § 5(d), 55 DCR 6289.)

Prior Codifications. — 1981 Ed., § 25-772. 1973 Ed., § 25-137.

Effect of amendments. — D.C. Law 15-187 rewrote subsec. (c) which had read as follows: "(c) The provisions of this section shall not apply to persons possessing old stocks who are moving into the District, to embassies or diplomatic representatives of foreign countries, nor to wines imported for religious or sacramental purposes, or to wine, spirits, and beer to be delivered to the licensee under a manufacturer's, wholesaler's, or retailer's license."

D.C. Law 17-201, in subsec. (a), substituted "case" for "gallon"; and, in subsec. (b), substituted "case per location" for "quart".

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-131. — For legislative history of D.C. Law 4-131, see Historical and Statutory Notes following § 25-907.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 17-201. — For Law 17-201, see notes following § 25-101.

Subchapter IX. Minors and Intoxicated Persons.

§ 25-781. Sale to minors or intoxicated persons prohibited.

(a) The sale or delivery of alcoholic beverages to the following persons is prohibited:

(1) A person under 21 years of age, either for the person's own use or for the use of any other person, except as provided in § 25-784(b);

(2) An intoxicated person, or any person who appears to be intoxicated; or

(3) A person of notoriously intemperate habits.

(b) A retail licensee shall not permit at the licensed establishment the consumption of an alcoholic beverage by any of the following persons:

(1) A person under 21 years of age;

- (2) An intoxicated person, or any person who appears to be intoxicated; or
- (3) A person of notoriously intemperate habits.

(c) A licensee or other person shall not, at a licensed establishment, give, serve, deliver, or in any manner dispense an alcoholic beverage to a person under 21 years of age, except as provided in § 25-784(b).

(d) A licensee shall not be liable to any person for damages claimed to arise from refusal to sell an alcoholic beverage or refusal to permit the consumption of an alcoholic beverage in its establishment under the authority of this section.

(e) A person alleged to have violated this section may be issued a citation under § 23-1110(b)(1). The person shall not be eligible to forfeit collateral.

(f) Upon finding that a licensee has violated subsections (a), (b), or (c) of this section in the preceding 2 years:

(1) Upon the 1st violation, the Board shall fine the licensee not less than \$2,000, and not more than \$3,000, and suspend the licensee for 5 consecutive days; provided, that the 5-day suspension may be stayed by the Board for one year;

(2) Upon the 2nd violation, the Board shall fine the licensee not less than \$3,000, and not more than \$5,000, and suspend the licensee for 10 consecutive days; provided, that the Board may stay up to 6 days of the 10-day suspension for one year;

(3) Upon the 3rd violation, the Board shall fine the licensee not less than \$5,000, and not more than \$10,000, and suspend the licensee for 15 consecutive days, or revoke the license; provided, that the Board may stay up to 5 days of the 15-day suspension for one year;

(4) Upon the 4th violation, the Board may revoke the license; and

(5) The Board may revoke the license of a licensed establishment that has 5 or more violations of this section within a 5-year period.

(Jan. 24, 1934, 48 Stat. 331, ch. 4, § 20; Aug. 27, 1935, 49 Stat. 901, ch. 756, § 10; June 29, 1953, 67 Stat. 104, ch. 159, § 404(g); Sept. 29, 1982, D.C. Law 4-157, § 12, 29 DCR 3617; Sept. 26, 1984, D.C. Law 5-106, § 2, 31 DCR 3381; Feb. 24, 1987, D.C. Law 6-178, § 2(a), 33 DCR 7654; Mar. 7, 1987, D.C. Law 6-217, § 12, 34 DCR 907; Sept. 11, 1993, D.C. Law 10-12, § 2(c), 40 DCR 4020; May 24, 1994, D.C. Law 10-122, § 2(i), 41 DCR 1658; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 1, 2002, D.C. Law 14-190, § 1702(k), 49 DCR 6968; Mar. 25, 2009, D.C. Law 17-361, § 2(c)(5), 56 DCR 1204.)

Prior Codifications. — 1981 Ed., § 25-781. 1973 Ed., § 25-121.

Effect of amendments. — D.C. Law 14-190 added subsec. (e).

D.C. Law 17-361 added subsec. (f).

Emergency legislation. — For temporary amendment of section, see § 2(c) of the Underage Drinking Emergency Amendment Act of 1994 (D.C. Act 10-236, April 28, 1994, 41 DCR 2601).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-157. — For

legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 5-106. — Law 5-106, the "Alcoholic Beverage Anti-Discrimination Act of 1984," was introduced in Council and assigned Bill No. 5-129, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on May 29, 1984, and June 12, 1984, respectively. Signed by the Mayor on June 29, 1984, it was assigned Act No. 5-148 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-178. — Law 6-178, the “District of Columbia Alcoholic Beverage Control Act Legal Drinking Age Amendment Act of 1986,” was introduced in Council and assigned Bill No. 6-508, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 5, 1986 and November 18, 1986, respectively. Signed by the Mayor on November 25, 1986, it was assigned Act No. 6-229 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-217. — For

legislative history of D.C. Law 6-217, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 10-12. — For legislative history of D.C. Law 10-12, see Historical and Statutory Notes following § 25-753.

Legislative history of Law 10-122. — For legislative history of D.C. Law 10-122, see Historical and Statutory Notes following § 25-785.

Legislative history of Law 14-190. — For Law 14-190, see notes following § 25-101.

Legislative history of Law 17-361. — For Law 17-361, see notes following § 25-113.

CASE NOTES

ANALYSIS

Actions and proceedings.

In general.

Tort actions.

— Defenses, tort actions.

— In general.

— Negligence and causation, tort actions.

— Persons entitled to sue, tort actions.

Actions and proceedings.

Complaint which was brought by victim of shooting committed by District of Columbia police officer and which alleged that bar owner violated a statutory duty owed to the victim by serving the officer at time when it was known or should have been known that the officer was intoxicated and might pose a danger to others stated a cause of action against the bar owner. D.C. Code §§ 25-121, 25-132. *Marusa v. District of Columbia*, 484 F.2d 828, 1973 U.S. App. LEXIS 8264 (C.A.D.C. 1973).

In general.

Substantial evidence established that restaurant was inappropriate for its neighborhood and supported Alcoholic Beverage Control Board's decision to deny renewal of restaurant's liquor license; restaurant patrons had engaged in public urination, drinking and discarding trash in adjacent parking lot, and accosting persons in cars that had stopped outside the premises, restaurant had served patrons who were intoxicated, ejected drunk patrons into neighborhood, and had served at least one under-age individual. D.C. Code 1981, §§ 1-1510(a)(3)(E), (b), 25-115(a), 25-121(a). *K.G.S., Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 531 A.2d 1001, 1987 D.C. App. LEXIS 454 (1987).

Tort actions.

— Defenses, tort actions.

Tavern was not liable to patron who was beaten by another intoxicated patron where, even if the tavern was negligent in serving the intoxicated patron and even if the fight and the

resulting injuries were a foreseeable result of that negligence, injured patron's conduct in being intoxicated himself and in attempting to restrain the other patron was contributorily negligent. *Norwood v. Marrocco*, 586 F. Supp. 101, 1984 U.S. Dist. LEXIS 16158 (1984), affirmed by 780 F.2d 110, 251 U.S. App. D.C. 2, 1986 U.S. App. LEXIS 21216 (1986).

Intoxicated underage patron's own unlawful actions did not constitute contributory negligence or assumption of risk that, as a matter of law, would bar recovery on wrongful death claim of patron's parents against restaurant-bar that apparently served patron in violation of Alcoholic Beverage Control Act prior to patron's being hit by car while walking in road. D.C. Code 1981, § 25-121(b). *Jarrett v. Woodward Bros.*, 751 A.2d 972, 2000 D.C. App. LEXIS 117 (2000).

Tavern patron's contributory negligence is not a bar to recovery for tavern's negligent violation of standard in Alcoholic Beverage Control Act section prohibiting tavern keeper from permitting consumption of alcohol by underage patrons, intoxicated patrons, and patrons who appear to be intoxicated. D.C. Code 1981, § 25-121(b). *Jarrett v. Woodward Bros.*, 751 A.2d 972, 2000 D.C. App. LEXIS 117 (2000).

Assumption of risk is inapplicable to relieve a tavern keeper who has violated standard in Alcoholic Beverage Control Act section prohibiting tavern keeper from permitting consumption of alcohol by underage patrons, intoxicated patrons, and patrons who appear to be intoxicated, as the necessary premise that a plaintiff have knowingly and voluntarily encountered a known risk is antithetical to legislative policy determination that underage and intoxicated persons need to be protected from their choice when it comes to consumption of alcohol, which is prohibited by the statute. D.C. Code 1981, § 25-121(b). *Jarrett v. Woodward Bros.*, 751 A.2d 972, 2000 D.C. App. LEXIS 117 (2000).

— In general.

Cause of action against a tavern keeper could not be implied from the District of Columbia

statute governing sale of intoxicating liquors based on the tortious conduct of a patron who became intoxicated on the premises. D.C. Code 1981, § 25-121. *Norwood v. Marrocco*, 780 F.2d 110, 1986 U.S. App. LEXIS 21216 (C.A.D.C. 1986).

The District of Columbia only assesses liability against tavern owners who serve obviously intoxicated parties that injure a third party. *Wadley v. Aspillaga*, 163 F.Supp.2d 1, 2001 U.S. Dist. LEXIS 14418 (2001).

Under District of Columbia law, statute that imposes liability against tavern owners, who serve obviously intoxicated persons who then injure a third party, was not intended to impose liability on persons other than tavern owners. *Wadley v. Aspillaga*, 163 F.Supp.2d 1, 2001 U.S. Dist. LEXIS 14418 (2001).

Tavern keeper may be held liable for damages caused by intentional torts of intoxicated patron. *Norwood v. Marrocco*, 586 F. Supp. 101, 1984 U.S. Dist. LEXIS 16158 (1984), affirmed by 780 F.2d 110, 251 U.S. App. D.C. 2, 1986 U.S. App. LEXIS 21216 (1986).

District of Columbia law applies when cause of action is cognizable under District of Columbia tort law on basis of violation within District of Columbia of District of Columbia statute or regulation, even though injury occurs nearby in Maryland where similar statute has been interpreted by Maryland's highest court as not supporting liability. *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.*, 534 A.2d 1268, 1987 D.C. App. LEXIS 502 (1987), remanded by 699 A.2d 348, 1997 D.C. App. LEXIS 192 (D.C. 1997).

The legislative purpose in enacting this section was not to convert a tavern keeper into an insurer against intentional torts committed by intoxicated patrons who were served additional liquor. *Kesner v. Rumors, Inc.*, 116 WLR 2021 (Super. Ct. 1988).

— Negligence and causation, tort actions.

In determining whether tavern keeper was liable to member of public as a result of violation of Alcoholic Beverage Control Act by serving person already intoxicated or apparently intoxicated, jury must first surmount threshold question of whether in fact statute has been violated, and defendant in turn may present evidence as to whether violation was excusable under circumstances or whether other acts of

due care negate negligence implied by statutory violation. D.C. Code 1981, § 25-121(b). *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.*, 534 A.2d 1268, 1987 D.C. App. LEXIS 502 (1987), remanded by 699 A.2d 348, 1997 D.C. App. LEXIS 192 (D.C. 1997).

Unexcused violation by tavern keeper of Alcoholic Beverage Control Act, by serving person already intoxicated or apparently intoxicated renders tavern keeper negligent per se, and where injuries are proximately caused to member of public by that violation, tavern keeper may be liable in damages. D.C. Code 1981, § 25-121(b). *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.*, 534 A.2d 1268, 1987 D.C. App. LEXIS 502 (1987), remanded by 699 A.2d 348, 1997 D.C. App. LEXIS 192 (D.C. 1997).

In considering issue of proximate cause for purpose of determining whether tavern keeper is liable to member of public for serving person already intoxicated or apparently intoxicated, jury is not free to find that customer's consumption of alcohol was intervening cause of harm to plaintiff, thereby negating proximate cause as it relates to tavern keeper's furnishing of drinks. D.C. Code 1981, § 25-121(b). *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.*, 534 A.2d 1268, 1987 D.C. App. LEXIS 502 (1987), remanded by 699 A.2d 348, 1997 D.C. App. LEXIS 192 (D.C. 1997).

— Persons entitled to sue, tort actions.

Intoxicated underage patron, or his or her parents, may sue a tavern keeper for negligence for violation of standard in Alcoholic Beverage Control Act section prohibiting tavern keeper from permitting consumption of alcohol by underage patrons, intoxicated patrons, and patrons who appear to be intoxicated; such a patron is a "member of the class" that the statute was designed to protect. D.C. Code 1981, § 25-121(b). *Jarrett v. Woodward Bros.*, 751 A.2d 972, 2000 D.C. App. LEXIS 117 (2000).

Patron of a bar who was the victim of an intentional assault by an intoxicated patron, and who is not claiming to be the victim of an accident, is not within the class of persons who are within the ambit of statutory protection of subsection (b) which thus cannot serve as the basis of a cause of action. *Kesner v. Rumors, Inc.*, 116 WLR 2021 (Super. Ct. 1988).

§ 25-782. Restrictions on minor's entrance into licensed premises.

(a) The licensee under an off-premises retailer's license, class A, shall not permit a person under 18 years of age to enter the licensed establishment between the hours of 8 a.m. and 3 p.m. on any day in which the public schools of the District are in session during the regular school year.

(b) It shall be an affirmative defense to a charge of violating subsection (a)

of this section that the licensee or a licensee's employee was shown a valid identification document indicating that the minor was 18 years of age or older, which document the licensee or the licensee's employee reasonably believed to be valid, and that the licensee or the licensee's employee reasonably believed that the person was 18 years of age or older or was not truant or unlawfully absent from school.

(c) Subsection (a) of this section shall not apply to a licensee under a retailer's license, class A, for a supermarket if its primary business and purpose is the sale of a full range of fresh, canned, and frozen food items, and if the sale of alcoholic beverages is incidental to the primary purpose and constitutes no more than 25% of total volume of gross receipts on an annual basis.

(d) Except as otherwise permitted, a licensee shall not deny admittance to a person displaying a valid identification document displaying proof of legal drinking age.

(e) The provisions of this section notwithstanding, a licensee not shall discriminate on any basis prohibited by Unit A of Chapter 14 of Title 2.

(Jan. 24, 1934, 48 Stat. 331, ch. 4, § 20; Aug. 27, 1935, 49 Stat. 901, ch. 756, § 10; June 29, 1953, 67 Stat. 104, ch. 159, § 404(g); Sept. 29, 1982, D.C. Law 4-157, § 12, 29 DCR 3617; Sept. 26, 1984, D.C. Law 5-106, § 2, 31 DCR 3381; Feb. 24, 1987, D.C. Law 6-178, § 2(a), 33 DCR 7654; Mar. 7, 1987, D.C. Law 6-217, § 12, 34 DCR 907; Sept. 11, 1993, D.C. Law 10-12, § 2(c), 40 DCR 4020; May 24, 1994, D.C. Law 10-122, § 2(i), 41 DCR 1658; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-782.
1973 Ed., § 25-121.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

CASE NOTES

In general.

Section of human rights law prohibiting age discrimination in public accommodations does not apply to limitations on minors' access to liquor establishments. D.C. Code §§ 25-103(n), 25-121. *D. T. Corp. v. District of Columbia Alcoholic Beverage Control Board*, 407 A.2d 707, 1979 D.C. App. LEXIS 475 (1979).

Act of 1873 of the Legislative Assembly for the District of Columbia making it a misdemeanor for restaurant proprietors and propri-

etors of similar establishments to refuse to serve any well-behaved respectable person without regard to race or color, was not repealed by any act of Congress. Act Cong. Feb. 21, 1871, 16 Stat. 419, §§ 1 et seq., 3, 18; Comp.St.1894, c. 16, § 151 et seq.; Act Cong. March 3, 1901, 31 Stat. 1189, §§ 1 et seq., 1636, 1640. D.C. Code 1940, §§ 25-101 et seq., 25-121. *District of Columbia v. John R. Thompson Co.*, 81 A.2d 249, 1951 D.C. App. LEXIS 168 (Cr.App. 1951).

§ 25-783. Production of valid identification document required; penalty.

(a) A licensee shall refuse to sell, serve, or deliver an alcoholic beverage to any person who, upon request of the licensee, fails to produce a valid identification document.

(b) A licensee or his agent or employee shall take steps reasonably necessary to ascertain whether any person to whom the licensee sells, delivers, or serves an alcoholic beverage is of legal drinking age. Any person who supplies a valid

identification document showing his or her age to be the legal drinking age shall be deemed to be of legal drinking age.

(c) Upon finding that a licensee has violated subsection (a) or (b) of this section in the preceding 2 years:

(1) Upon the first violation, the Board shall fine the licensee not less than \$1,000, and not more than \$2,000, and suspend the licensee for 5 consecutive days. The 5-day suspension may be stayed by the Board for one year if all employees who serve alcoholic beverages in the licensed establishment complete an alcohol training program within 3 months.

(2) Upon the second violation, the Board shall fine the licensee not less than \$2,000, and not more than \$4,000, and suspend the licensee for 10 consecutive days. The Board may stay up to 6 days of the 10-day suspension for one year if all employees who serve alcoholic beverages in the licensed establishment complete an alcohol training program within 3 months.

(3) Upon the third violation, the Board shall fine the licensee not less than \$4,000, and not more than \$10,000, and suspend the licensee for 15 consecutive days, or revoke the license. The Board may stay up to 5 days of the 15-day suspension for one year if all employees who serve alcoholic beverages in the licensed establishment complete an alcohol training program within 3 months.

(4) Upon the fourth violation, the Board may revoke the license.

(5) The Board may revoke the license of a licensed establishment that has 5 or more violations of this section within a 5-year period.

(d) The provisions of this section notwithstanding, no licensee shall discriminate on any basis prohibited by Unit A of Chapter 14 of Title 2.

(Jan. 24, 1934, 48 Stat. 331, ch. 4, § 20; Aug. 27, 1935, 49 Stat. 901, ch. 756, § 10; June 29, 1953, 67 Stat. 104, ch. 159, § 404(g); Sept. 29, 1982, D.C. Law 4-157, § 12, 29 DCR 3617; Sept. 26, 1984, D.C. Law 5-106, § 2, 31 DCR 3381; Feb. 24, 1987, D.C. Law 6-178, § 2(a), 33 DCR 7654; Mar. 7, 1987, D.C. Law 6-217, § 12, 34 DCR 907; Sept. 11, 1993, D.C. Law 10-12, § 2(c), 40 DCR 4020; May 24, 1994, D.C. Law 10-122, § 2(i), 41 DCR 1658; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-783.
1973 Ed., § 25-121.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

CASE NOTES

ANALYSIS

Actions and proceedings.
In general.

Actions and proceedings.

Petitioner who complained that nightclub violated Alcohol Beverage Control Act, related regulations, and his constitutional rights when it excluded him for his failure to present identification proving he was 21 years of age or older did not have statutory or constitutional right to hearing before Alcoholic Beverage Control Board and, therefore, did not have any right of judicial review of Board's decision. D.C.

Code 1981, §§ 1-1502(8), 1-1510(a), 11-722, 25-106, 25-121. *Jones v. District of Columbia Alcoholic Beverage Bd.*, 621 A.2d 385, 1993 D.C. App. LEXIS 54 (1993).

In general.

Section of human rights law prohibiting age discrimination in public accommodations does not apply to limitations on minors' access to liquor establishments. D.C. Code §§ 25-103(n), 25-121. *D. T. Corp. v. District of Columbia Alcoholic Beverage Control Board*, 407 A.2d 707, 1979 D.C. App. LEXIS 475 (1979).

Act of 1873 of the Legislative Assembly for the District of Columbia making it a misde-

meanor for restaurant proprietors and proprietors of similar establishments to refuse to serve any well-behaved respectable person without regard to race or color, was not repealed by any act of Congress. Act Cong. Feb. 21, 1871, 16 Stat. 419, §§ 1 et seq., 3, 18;

Comp.St.1894, c. 16, § 151 et seq.; Act Cong. March 3, 1901, 31 Stat. 1189, §§ 1 et seq., 1636, 1640. D.C. Code 1940, §§ 25-101 et seq., 25-121. *District of Columbia v. John R. Thompson Co.*, 81 A.2d 249, 1951 D.C. App. LEXIS 168 (Cr.App. 1951).

§ 25-784. Sale or distribution of beverages by minor prohibited.

(a) Except as provided in subsection (b) of this section, a licensee shall not allow any person under 21 years of age to sell, give, furnish, or distribute an alcoholic beverage.

(b) A licensee may allow an employee who is 18 years of age or older to sell, serve, or deliver an alcoholic beverage on the licensed premises; provided, that no employee under 21 years of age shall serve as a bartender.

(Jan. 24, 1934, 48 Stat. 331, ch. 4, §§ 20, 25; Aug. 27, 1935, 49 Stat. 901, ch. 756, §§ 10, 12; June 29, 1953, 67 Stat. 104, ch. 159, § 404(g); Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 3(b); Sept. 29, 1982, D.C. Law 4-157, § 12, 29 DCR 3617; Sept. 26, 1984, D.C. Law 5-106, § 2, 31 DCR 3381; Feb. 24, 1987, D.C. Law 6-178, § 2(a), (b), 33 DCR 7654; Mar. 7, 1987, D.C. Law 6-217, §§ 12, 13, 34 DCR 907; Sept. 11, 1993, D.C. Law 10-12, § 2(c), 40 DCR 4020; May 24, 1994, D.C. Law 10-122, § 2(i), 41 DCR 1658; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-784. 1973 Ed., § 25-121.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 6-178. — For

legislative history of D.C. Law 6-178, see Historical and Statutory Notes following § 25-781.

Legislative history of Law 6-217. — For legislative history of D.C. Law 6-217, see Historical and Statutory Notes following § 25-101.

§ 25-785. Delivery, offer, or otherwise making available to persons under 21; penalties.

(a) A person who is not a licensee shall not, within the District, purchase an alcoholic beverage for the purpose of delivering the alcoholic beverage to a person who is under 21 years of age.

(b) A person who is a licensee shall not, within the District, offer, give, provide, or otherwise make available an alcoholic beverage to a person who is under 21 years of age, except if necessary to allow the person to perform lawful employment responsibilities that require the person to have temporary possession of alcoholic beverages.

(c) A person who violates any provision of this section shall:

(1) Upon conviction for the first offense, be fined not more than \$1,000, or imprisoned up to 180 days, or both;

(2) Upon conviction for the second offense committed within 2 years from the date of any such previous offense, be fined not more than \$2,500, or imprisoned up to 180 days, or both;

(3) Upon conviction for the third or any subsequent offense committed

within 2 years from the date of any such previous offense, be fined not more than \$5,000, or imprisoned up to one year, or both.

(d) A person alleged to have violated this section may be issued a citation under § 23-1110(b)(1). The person shall not be eligible to forfeit collateral.

(Jan. 24, 1934, ch. 4, § 30a, as added May 24, 1994, D.C. Law 10-122, § 2(k), 41 DCR 1658; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-785.
Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 10-122. — Law 10-122, the “Alcoholic Beverage Control Act and Rules Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-207, which was referred to the Commit-

tee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 21, 1994, it was assigned Act No. 10-214 and transmitted to both Houses of Congress for its review. D.C. Law 10-122 became effective on May 24, 1994.

Subchapter X. Temporary Surrender of License — Safekeeping.

§ 25-791. Temporary surrender of license — Safekeeping.

(a) A license which is discontinued for any reason shall be surrendered by the licensee to the Board for safekeeping. The Board shall hold the license until the licensee resumes business at the licensed establishment or the license is transferred to a new owner. If the licensee has not initiated proceedings to resume operations or transfer the license within 60 days after suspension, the Board may deem this license abandoned after giving notice to the licensee. The licensee has 14 days to respond to the Board’s notice to request continued safekeeping.

(b) The Board may extend the period of safekeeping beyond 60 days for reasonable cause, such as fire, flood, other natural disaster; rebuilding or reconstruction; or to complete the sale of the establishment.

(c) Licenses in safekeeping beyond 60 days, as extended by the Board, shall be reviewed by the Board every 6 months to ensure that the licensee is making reasonable progress on returning to operation.

(d) This section shall not relieve a licensee from the responsibility for renewing the license upon its expiration.

(e) If a licensee notifies the Board that the licensee has ceased to do business under the license or if the Board cancels the license under this section, the license shall be marked as “canceled.”

(f) Licenses which are restored after being held in safekeeping for longer than 2 years shall be subject to the license renewal process set forth in Chapter 4.

(g) A license suspended by the Board under this title shall be stored at the Board.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Mar. 13, 2004, D.C. Law 15-105, § 104(a), 51 DCR 881.)

Effect of amendments. — D.C. Law 15-105 validated a previously made technical correction.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 25-210.

CASE NOTES

Authority of Board.

Liquor licensee's attempt to have the Alcoholic Beverage Control Board designate its license as cancelled, before the board could revoke it, did not deprive board of authority to revoke license based on its ultimate conclusion

that the continued operation of licensee's establishment presented an imminent danger to the health and safety of the public. 800 Water St., Inc. v. D.C. Alcoholic Bev. Control Bd., 992 A.2d 1272, 2010 D.C. App. LEXIS 204 (2010).

Subchapter XI. Valet Parking.

§ 25-796. Valet parking. [Repealed].

Repealed.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Mar. 13, 2004, D.C. Law 15-105, § 104(b), 51 DCR 881; Mar. 2, 2007, D.C. Law 16-191, § 48(k), 53 DCR 6794; July 18, 2008, D.C. Law 17-201, § 5(e), 55 DCR 6289.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 25-210

Legislative history of Law 16-191. — For Law 16-191, see notes following § 25-101.

Legislative history of Law 17-201. — For Law 17-201, see notes following § 25-101.

Subchapter XI-A. Limitation on transfer of responsibility for licensee Security.

§ 25-797. Limitation on transfer of responsibility for licensee security.

(a) The holder of an on-premises retailer's license may rent out or provide the licensed establishment for use by a third party or promoter for a specific event; provided, that the licensee maintains ownership and control of the licensed establishment for the duration of the event, including modes of ingress or egress, and the staff of the establishment, including bar and security staff.

(b) Under no circumstances shall a licensee permit the third party or promoter to be responsible for providing security or maintain control over the establishment's existing security personnel.

(c) A violation of this section shall constitute a primary tier violation under section 25-830(c)(1).

(July 18, 2008, D.C. Law 17-201, § 5(f), 55 DCR 6289.)

Legislative history of Law 17-201. — For Law 17-201, see notes following § 25-101.

Subchapter XII. Reimbursable Details.

§ 25-798. Reimbursable details.

(a) For the purposes of this section, the term:

(1) Agreement means a written contract, including provisions for the staffing requirement of the reimbursable details in accordance with subsection (c) of this section, and compensation of the MPD by the licensee when reimbursable details are requested by the licensee.

(2) MPD means Metropolitan Police Department.

(3) Reimbursable detail means an assignment of MPD officers to patrol the surrounding area of an establishment for the purpose of maintaining public safety, including the remediation of traffic congestion and the safety of public patrons, during their approach and departure from the establishment.

(b) A licensee or licensees, independently or in a group, may enter into an agreement with the MPD to provide for reimbursable details.

(c) Subject to adequate staffing of the police service areas and an assessment by the MPD of its staffing requirements, the MPD may staff reimbursable details as requested by the licensee. The MPD shall only use officers for this purpose who are overtime and would not otherwise be on duty at the time of the reimbursable detail.

(d) The MPD shall establish policies and procedures to implement the provisions of this section.

(e) The Mayor shall, in consultation with licensees, promulgate policies, rules and procedures to identify entertainment areas in the District, and establish security plans thereunder delineating the reimbursable detail deployment needs of those areas.

(Sept. 23, 2005, D.C. Law 16-20, § 2(a), 52 DCR 6575.)

Temporary Amendment of Section. — Section 2 of D.C. Law 17-380, in subsec. (b), substituted “group, including an association, which includes licensees in its membership, may” for “group, may”.

Section 4(b) of D.C. Law 17-380 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2 of Reimbursable Details Clarification Emergency Amendment Act of 2008 (D.C. Act 17-683, January 12, 2009, 56 DCR 1109).

Legislative history of Law 16-20. — Law 16-20, the “Emergency Suspension of Liquor Licenses Act of 2005”, was introduced in Council and assigned Bill No. 16-134 which was referred to the Committee of Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on May 3, 2005, and June 7, 2005, respectively. Signed by the Mayor on June 29, 2005, it was assigned Act No. 16-120 and transmitted to both Houses of Congress for its review. D.C. Law 16-20 became effective on September 23, 2005.

CHAPTER 8. ENFORCEMENT, INFRACTIONS, AND PENALTIES.

Subchapter I. Enforcement

- Sec.
25-801. Authority of the Board to enforce this title; enforcement responsibilities of ABRA investigators and Metropolitan Police Department.
25-802. Examination of premises, books, and records.
25-803. Search warrants for illegal alcoholic beverages; disposition of seized beverages.
25-804. Notifications from DCRA, Fire Department, and Metropolitan Police Department.
25-805. Nuisance.

Subchapter II. Revocation, Suspension, and Civil Penalties

- 25-821. Revocation or suspension — General provisions.
25-822. Mandatory revocation.

Sec.

- 25-823. Revocation or suspension for violations of this title or misuse of licensed premises.
25-824. Revocation when wholesale or retail licensee is subject to undue influence by manufacturer.
25-825. Revocation when retail licensee is subject to undue interest by wholesaler.
25-826. Summary revocation or suspension.
25-827. Request for suspension or revocation of license by Chief of Police.
25-828. Notice of suspension or revocation.
25-829. Cease and desist orders.
25-830. Civil penalties.
25-831. Penalty for violation where no specific penalty provided; additional penalty for failure to perform certain required acts.
25-832. Prompt notice of investigative reports.

Subchapter I. Enforcement.

§ 25-801. Authority of the Board to enforce this title; enforcement responsibilities of ABRA investigators and Metropolitan Police Department.

(a) The Board shall have the authority to enforce the provisions of this title with respect to licensees and with respect to any person not holding a license and selling alcohol in violation of the provisions of this title.

(b) Subject to subsection (c) of this section, ABRA investigators and the Metropolitan Police Department shall issue citations for civil violations of this title that are set forth in the schedule of civil penalties established under § 25-830.

(c) A citation for any violation for which the penalty includes the suspension of a license shall be issued under the direct authority of the Board as a result of an investigation carried out by ABRA investigators.

(d) Prosecutions for misdemeanors under this title shall be prosecuted and initiated by information filed in the Superior Court of the District of Columbia by the Corporation Counsel. Prosecutions for felonies under this title shall be prosecuted by the United States Attorney for the District of Columbia.

(e) Violations committed by an unlicensed person selling alcohol in violation of the provisions of this title shall be forwarded by the Board to the Corporation Counsel for prosecution.

(f) ABRA investigators may request and check the identification of a patron inside of or attempting to enter an establishment with an alcohol license. ABRA investigators may seize evidence that substantiates a violation under this title, which shall include seizing alcoholic beverages sold to minors and fake identification documents used by minors.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(dd), 51 DCR 6525.)

Effect of amendments. — D.C. Law 15-187 added subsec. (f).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

§ 25-802. Examination of premises, books, and records.

(a) An applicant for a license, and each licensee, shall allow any member of the Board, any ABRA investigator, or any member of the Metropolitan Police Department full opportunity to examine, at any time during business hours:

(1) The premises where an alcoholic beverage is manufactured, kept, sold, or consumed for which an application for a license has been made or for which a license has been issued; and

(2) The books and records of the business for which an application for a license has been made or for which a license has been issued.

(b) ABRA investigators shall examine the premises and books and records of each licensed establishment in the District at least once each year. The investigators shall make reasonable efforts to ensure that the licensee will know in advance the date of the inspection.

(May 3, 2001, D.C. Law 13-298, § 101, 47 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-803. Search warrants for illegal alcoholic beverages; disposition of seized beverages.

If a search warrant is issued by any judge of the Superior Court of the District of Columbia or by a United States Magistrate for the District of Columbia for premises where any alcoholic beverages are manufactured for sale, kept for sale, sold, or consumed in violation of this title, the alcoholic beverages and any other property designed for use in connection with the unlawful manufacture for sale, keeping for sale, selling, or consumption may be seized and shall be subject to such disposition as the court may make thereof.

(Jan. 24, 1934, 48 Stat. 334, ch. 4, § 29; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; June 29, 1953, 67 Stat. 104, ch. 159, § 404(i); July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-803. 1973 Ed., § 25-129.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

CASE NOTES

ANALYSIS

Grounds for seizure.

In general.

Search incidental to arrest.

Time for application or issuance.

Time of execution.

Grounds for seizure.

Where police officer went to defendant's apartment in response to call that there was found property on premises, rather than to investigate criminal activity or to make arrest, and woman who met him at door invited him inside and showed him some cases of beer that she had found on back porch, there was no search within scope of Fourth Amendment; officer was legally entitled to seize beer after he then received information indicating that beer had been stolen from a train. *U.S. Const. Amend. 4. United States v. Gaskin*, 368 A.2d 1138, 1977 D.C. App. LEXIS 408 (1977).

In general.

Where, in searching defendant's premises under a valid search warrant authorizing search for alcoholic beverages or any property designed for use in connection with violation of Alcoholic Beverage Control Act, police officer looked behind a movable partition closing off a fireplace and discovered two large clean paper bags in the midst of rubble, and, although the feel and weight of such bags indicated to him that they did not contain bottles, the officer looked into the bags and discovered therein a quantity of marihuana, the officer's action in looking into the bags did not constitute an unreasonable search, but was lawful. *U.S. v. White*, 122 F.Supp. 664, 1954 U.S. Dist. LEXIS 3280 (D.D.C.1954).

Search incidental to arrest.

Police officer's mere observation of motorist whom he stopped and subsequently arrested for driving while under influence of intoxicating liquor did not constitute a "search". *Johnson v. District of Columbia*, 119 A.2d 444, 1956 D.C. App. LEXIS 167 (Cr.App. 1956).

Where police officer purchased whisky from certain party with marked money in attempt to locate his source of supply, and as purchase was being completed, another officer appeared with warrant for party's arrest, arrested party stated he had purchased the whisky from defendant, and officers searched defendant, found part of the marked money on him, and arrested him, officers had no right to search defendant, and evidence found in such search should have

been excluded in prosecution for keeping for sale and selling alcohol beverage without license to do so. *D.C. Code 1951, § 25-109. Smallwood v. District of Columbia*, 116 A.2d 599, 1955 D.C. App. LEXIS 263 (Cr.App. 1955).

Time for application or issuance.

The test of whether too long a period of time had passed between commission of unlawful acts and issuance of a search warrant is one of reasonableness, although a less flexible standard is applied when the warrant is one that must be based on "positive" knowledge. *D.C. Code 1961, § 25-129(h). Underdown v. District of Columbia*, 217 A.2d 659, 1966 D.C. App. LEXIS 152 (App. 1966).

Elapse of nine days between time police officer purchased liquor on premises and time officer made application for night search warrant based on policeman's affidavit describing sale of alcoholic beverages on premises without a license was not unreasonable under circumstances including showing that officer described the premises as having a bar and a bartender, tables enough for at least 20 persons and food and beverage service. *D.C. Code 1961, §§ 25-109, 25-129(h). Underdown v. District of Columbia*, 217 A.2d 659, 1966 D.C. App. LEXIS 152 (App. 1966).

A lapse of four days between time police officers observed illegal activities on premises and time police department made application for search warrant based on policeman's affidavit describing sale of alcoholic beverages on premises without a license was not, under the circumstances, unreasonable as a matter of law. *D.C. Code 1951, § 25-129(h). Williams v. District of Columbia*, 167 A.2d 893, 1961 D.C. App. LEXIS 198 (Cr.App. 1961).

Time of execution.

Five-day delay in execution of night warrant for search of premises where alcoholic beverages were being sold without a license was not unreasonable since an after-hours liquor establishment might operate only on weekend evenings so that it was reasonable to wait until following weekend to execute the warrant. *D.C. Code 1961, § 25-129(h). Underdown v. District of Columbia*, 217 A.2d 659, 1966 D.C. App. LEXIS 152 (App. 1966).

Since the statute and warrant for search of premises for alcoholic beverages provided that it must be executed within 10 days, execution before expiration of that time limit was reasonable. *D.C. Code 1961, § 25-129(i). Underdown v. District of Columbia*, 217 A.2d 659, 1966 D.C. App. LEXIS 152 (App. 1966).

§ 25-804. Notifications from DCRA, Fire Department, and Metropolitan Police Department.

(a) In accordance with procedures that the Mayor shall establish, the Department of Consumer and Regulatory Affairs and the Fire Department shall promptly notify the Board if a licensed establishment is the subject of a citation or other enforcement action for a violation of laws or regulations enforced by these departments.

(b) If a licensed establishment is the subject of an incident report by the Metropolitan Police Department, the Metropolitan Police Department shall file a copy of the incident report with the Board. The Board shall make the report available for public inspection upon request.

(Jan. 24, 1934, 48 Stat. 330, ch. 4, § 17; Aug. 27, 1935, 49 Stat. 900, ch. 756, § 9; Aug. 25, 1937, 50 Stat. 803, ch. 766, § 3; Apr. 26, 1950, 64 Stat. 88, ch. 106; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 3(a); Sept. 29, 1982, D.C. Law 4-157, §§ 9, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(5), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 11; 34 DCR 907; Sept. 11, 1993, D.C. Law 10-12, § 2(b), 40 DCR 4020; May 24, 1994, D.C. Law 10-122, § 2(h), 41 DCR 1658; Apr. 30, 1998, D.C. Law 12-97, § 2, 45 DCR 1517; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-804.
1973 Ed., § 25-118.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-805. Nuisance.

(a) Any building, ground, or premises where an alcoholic beverage is manufactured, sold, kept for sale, or permitted to be consumed in violation of this title shall be a nuisance.

(b) An action to enjoin any nuisance defined in subsection (a) of this section may be brought in the name of the District of Columbia by the Corporation Counsel in the Civil Branch of the Superior Court of the District of Columbia against any person conducting or maintaining such nuisance or knowingly permitting such nuisance to be conducted or maintained.

(Jan. 24, 1934, ch. 4, § 41; June 29, 1953, 67 Stat. 104, ch. 159, § 404(j); July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-805.
1973 Ed., § 25-139.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Subchapter II. Revocation, Suspension, and Civil Penalties.

§ 25-821. Revocation or suspension — General provisions.

(a) Except as provided in § 25-826, the Board shall not revoke or suspend a license until the licensee has been given an opportunity to be heard in his or her defense.

(b) If a license is revoked or suspended, no part of the license fee shall be returned.

(c) If the Board revokes a license, no license shall be issued to the same person or persons whose license is so revoked for any other location for 5 years following the revocation, except as provided below.

(d) If the Board revokes a manager's license, a manager's license shall not be issued to the same person for 2 years.

(e) Subsection (c) of this section shall not apply to licenses revoked by the Board for procedural reasons.

(f) The remaining alcoholic beverage stock of a licensee whose license has been revoked shall be disposed of only with the approval of the Board.

(Jan. 24, 1934, 48 Stat. 330, ch. 4, § 17; Aug. 27, 1935, 49 Stat. 900, ch. 756, § 9; Aug. 25, 1937, 50 Stat. 803, ch. 766, § 3; Apr. 26, 1950, 64 Stat. 88, ch. 106; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 3(a); Sept. 29, 1982, D.C. Law 4-157, §§ 9, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(5), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 11; 34 DCR 907; Sept. 11, 1993, D.C. Law 10-12, § 2(b), 40 DCR 4020; May 24, 1994, D.C. Law 10-122, § 2(h), 41 DCR 1658; Apr. 30, 1998, D.C. Law 12-97, § 2, 45 DCR 1517; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-821. 1973 Ed., § 25-118.

Emergency legislation. — For temporary amendment of section, see § 2(b) of the Underage Drinking Emergency Amendment Act of 1994 (D.C. Act 10-236, April 28, 1994, 41 DCR 2601).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-157. — For legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 5-51. — For legislative history of D.C. Law 5-51, see Historical and Statutory Notes following § 25-206.

Legislative history of Law 6-217. — For legislative history of D.C. Law 6-217, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 10-12. — For

legislative history of D.C. Law 10-12, see Historical and Statutory Notes following § 25-753.

Legislative history of Law 10-122. — For legislative history of D.C. Law 10-122, see Historical and Statutory Notes following § 25-785.

Legislative history of Law 12-97. — Law 12-97, the "Suspension of Liquor Licenses Amendment Act of 1998," was introduced in Council and assigned Bill No. 12-83, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on December 4, 1997, and January 6, 1998, respectively. Signed by the Mayor on January 26, 1998, it was assigned Act No. 12-271 and transmitted to both Houses of Congress for its review. D.C. Law 12-97 became effective on April 30, 1998.

Delegation of Authority. — Delegation of Authority—Office of the Secretary, see Mayor's Order 97-87, May 6, 1997 (44 DCR 2958).

CASE NOTES

ANALYSIS

Authority of Board.
Hearings.
In general.

Authority of Board.

Liquor licensee's attempt to have the Alcoholic Beverage Control Board designate its license as cancelled, before the board could revoke it, did not deprive board of authority to revoke license based on its ultimate conclusion that the continued operation of licensee's estab-

lishment presented an imminent danger to the health and safety of the public. 800 Water St., Inc. v. D.C. Alcoholic Bev. Control Bd., 992 A.2d 1272, 2010 D.C. App. LEXIS 204 (2010).

Hearings.

Former liquor licensee's insurer's argument, that revocation of its license to serve alcohol, and the statutory five-year ban on obtaining a license, could not take place unless it had been given a hearing before the Alcoholic Beverage Control Board, and an opportunity to be heard in its defense, was waived for appellate review,

since licensee did not raise argument before the board. 800 Water St., Inc. v. D.C. Alcoholic Bev. Control Bd., 992 A.2d 1272, 2010 D.C. App. LEXIS 204 (2010).

In general.

Some mixing of prosecutorial and adjudicative functions by Alcoholic Beverage Control Board is necessary part of administrative scheme and does not per se violate due process. D.C. Code § 25-118. James Bakalis & Nickie Bakalis, Inc. v. Simonson, 434 F.2d 515, 1970 U.S. App. LEXIS 7873 (C.A.D.C. 1970).

Liquor licensee's action seeking review of District of Columbia Alcoholic Beverage Control Board's revocation of its license presented a live controversy, even though licensee's lease had expired, given that revocation of a liquor license carried collateral consequences regarding issuance of future licenses for the holder of the license. Levelle, Inc. v. D.C. Alcoholic Bev. Control Bd., 924 A.2d 1030, 2007 D.C. App. LEXIS 259 (2007).

§ 25-822. Mandatory revocation.

The Board shall revoke the license of a licensee as a result of any of the following events during the period for which the license was issued:

(1) The licensee has been convicted of multiple violations of the terms of this title or the regulations issued under this title and the penalties set forth in Chapter 8 or established by the Board require revocation;

(2) The licensee has knowingly permitted, in the licensed establishment (A) the illegal sale, or negotiations for sale, or the use, of any controlled substance identified in the CSA, or (B) the possession or sale, or negotiations for sale, of drug paraphernalia in violation of the CSA or Chapter 11 of Title 48. Successive sales, or negotiations for sale, over a continuous period of time shall be deemed evidence of knowing permission; or

(3) The licensee has been convicted of a felony.

(Jan. 24, 1934, 48 Stat. 330, ch. 4, § 17; Aug. 27, 1935, 49 Stat. 900, ch. 756, § 9; Aug. 25, 1937, 50 Stat. 803, ch. 766, § 3; Apr. 26, 1950, 64 Stat. 88, ch. 106; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 3(a); Sept. 29, 1982, D.C. Law 4-157, §§ 9, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(5), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 11; 34 DCR 907; Sept. 11, 1993, D.C. Law 10-12, § 2(b), 40 DCR 4020; May 24, 1994, D.C. Law 10-122, § 2(h), 41 DCR 1658; Apr. 30, 1998, D.C. Law 12-97, § 2, 45 DCR 1517; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-822.
1973 Ed., § 25-118.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-823. Revocation or suspension for violations of this title or misuse of licensed premises.

The Board may fine, as set forth in the schedule of civil penalties established under § 25-830, and suspend, or revoke the license of any licensee during the license period if:

(1) The licensee violates any of the provisions of this title, the regulations promulgated under this title, or any other laws of the District, including the District's curfew law;

(2) The licensee allows the licensed establishment to be used for any unlawful or disorderly purpose;

(3) The licensee fails to superintend in person, or through a manager approved by the Board, the business for which the license was issued;

(4) The licensee allows its employees or agents to engage in prostitution, as defined under § 22-2701.01(1) [now § 22-2701.01(3)], or engage in sexual acts or sexual contact, as defined under § 22-3001, at the licensed establishment;

(5) The licensee fails or refuses to allow an ABRA investigator, a designated agent of ABRA, or a member of the Metropolitan Police Department to enter or inspect without delay the licensed premises or examine the books and records of the business, or otherwise interferes with an investigation; or

(6) The licensee fails to follow its voluntary agreement, security plan, or Board order.

(Jan. 24, 1934, 48 Stat. 330, ch. 4, § 17; Aug. 27, 1935, 49 Stat. 900, ch. 756, § 9; Aug. 25, 1937, 50 Stat. 803, ch. 766, § 3; Apr. 26, 1950, 64 Stat. 88, ch. 106; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 3(a); Sept. 29, 1982, D.C. Law 4-157, §§ 9, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(5), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 11; 34 DCR 907; Sept. 11, 1993, D.C. Law 10-12, § 2(b), 40 DCR 4020; May 24, 1994, D.C. Law 10-122, § 2(h), 41 DCR 1658; Apr. 30, 1998, D.C. Law 12-97, § 2, 45 DCR 1517; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Mar. 13, 2004, D.C. Law 15-105, § 4, 51 DCR 881; Sept. 30, 2004, D.C. Law 15-187, § 101(ee), 51 DCR 6525; July 18, 2008, D.C. Law 17-201, § 6(a), 55 DCR 6289; Mar. 25, 2009, D.C. Law 17-361, § 2(d)(2), 56 DCR 1204.)

Prior Codifications. — 1981 Ed., § 25-823. 1973 Ed., § 25-118.

Effect of amendments. — D.C. Law 15-105, in par. (1), substituted “of the District” for “if the District”.

D.C. Law 15-187, in pars. (2) and (3), made nonsubstantive changes; and added par. (4).

D.C. Law 17-201, in the lead-in text, substituted “may fine, as set forth in the schedule of civil penalties established under § 25-830, suspend,” for “may suspend”; in par. (1), substituted “laws of the District, including the District’s curfew law” for “laws of the District”; in par. (3), deleted “or” from the end; in par. (4),

substituted a semicolon for a period at the end; and added pars. (5) and (6).

D.C. Law 17-361, in the lead-in language, substituted “and suspend” for “suspend”.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 15-105. — For Law 15-105, see notes following § 25-210.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 17-201. — For Law 17-201, see notes following § 25-101.

Legislative history of Law 17-361. — For Law 17-361, see notes following § 25-113.

CASE NOTES

ANALYSIS

Defenses.

Discretion of Board.

Due process.

Equal protection.

Grounds for suspension or revocation.

Injunction.

Order of suspension or revocation.

Period for which license issued.

Review.

Sufficiency of evidence.

Defenses.

Mere fact that “B-girl” operation was not illegal per se on licensed premises was not defense by licensee in proceeding to suspend license on ground that female employee of licensee had made solicitation for prostitution on premises. 25 D.C. Code § 25-118. *Am-Chi Restaurant, Inc. v. Simonson*, 396 F.2d 686, 1968 U.S. App. LEXIS 7135 (C.A.D.C. 1968).

Licensee could not plead a violation of regulation prohibiting sales after 2:00 A.M. as a defense to statutory violation of failure to su-

perintend business, and since business was ongoing, albeit illegally after hours, without an approved manager in charge, statutory violation was established. D.C. Code § 25-118. 2447 Good Hope Road, Inc. v. District of Columbia Alcoholic Beverage Control Board, 295 A.2d 513, 1972 D.C. App. LEXIS 264 (1972).

Discretion of Board.

The Alcoholic Beverage Control Board does not have authority to prohibit further purchases by a liquor retailer who is delinquent in the payment of his account to wholesalers but can only revoke or suspend license of retailer for violating rules or regulations concerning credit. D.C. Code 1961, § 25-118. *Press Liquors, Inc. v. Weakley*, 317 F.2d 135, 1963 U.S. App. LEXIS 6143 (C.A.D.C. 1963).

Revocation of petitioner's retailer's Class "C" alcoholic beverage license by Alcoholic Beverage Control Board was not an abuse of discretion, despite claim that, in imposing sanction, Board treated petitioner differently than others in similar situations and, in so doing, ignored its own precedents and procedures and failed to justify different treatment accorded petitioner, where petitioner admitted charges alleging unlawful receipt and possession of unstamped distilled spirits, concealment of goods on restaurant premises with intent to defeat collection of taxes (both felonies), failing to superintend business, and permitting an unregistered .22 caliber rifle to be kept on premises. D.C. Code §§ 25-102 et seq., 25-118; 26 U.S.C. (I.R.C.1954) §§ 5601(a)(11), 5604(a)(1), 7201, 7206. *Alrob Enterprises, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 337 A.2d 497, 1975 D.C. App. LEXIS 378 (1975).

Due process.

Some mixing of prosecutorial and adjudicative functions by Alcoholic Beverage Control Board is necessary part of administrative scheme and does not per se violate due process. D.C. Code § 25-118. *James Bakalis & Nickie Bakalis, Inc. v. Simonson*, 434 F.2d 515, 1970 U.S. App. LEXIS 7873 (C.A.D.C. 1970).

Where evidence relied on by Alcoholic Beverage Control Board to find that licensee failed to superintend in person, or through an approved manager, business for which class "C" retailer's license was issued satisfied statutory test of substantial evidence, ultimate conclusion of Board, to revoke license was within scope of its statutory discretion, notwithstanding claim that outright revocation of license amounted to "economic execution" and was so harsh as to deny licensee due process of law. D.C. Code § 25-118. 2447 Good Hope Road, Inc. v. District of Columbia Alcoholic Beverage Control Board, 295 A.2d 513, 1972 D.C. App. LEXIS 264 (1972).

Equal protection.

Fifteen-day suspension of liquor license when

doorman refused to permit entry of police officers unless each paid a \$2 admission charge though he was told that they were on official business and identification was displayed, and when manager of the premises failed to intervene to provide officers with full opportunity to examine the premises as required by regulations, was within Alcoholic Beverage Control Board's statutory authority and discretion, despite contention that, when compared with sanctions imposed in other cases, such suspension failed to accord licensee equal protection, equal justice, and due process. D.C. Code § 25-118. *Meteor Corp. v. District of Columbia Alcoholic Beverage Control Board*, 316 A.2d 545, 1974 D.C. App. LEXIS 381 (1974).

Grounds for suspension or revocation.

Fourteen-day suspension of liquor license was warranted where licensee permitted "B-girl" operation on its premises and female employee made solicitation for act of prostitution on premises. 25 D.C. Code § 25-118. *Am-Chi Restaurant, Inc. v. Simonson*, 396 F.2d 686, 1968 U.S. App. LEXIS 7135 (C.A.D.C. 1968).

An "unlawful or disorderly purpose," under the Alcoholic Beverage Regulation provision allowing the Alcoholic Beverage Control Board to suspend a liquor license, can be imputed to a licensee who engages in a method of operation that is conducive to unlawful or disorderly conduct. *Levelle, Inc. v. D.C. Alcoholic Bev. Control Bd.*, 924 A.2d 1030, 2007 D.C. App. LEXIS 259 (2007).

Alcoholic Beverage Control Board had authority to discipline licensee for violating statutes and regulations governing employment of minors. D.C. Code 1981, § 25-118. *Club 99 v. District of Columbia Alcoholic Beverage Control Bd.*, 457 A.2d 773, 1982 D.C. App. LEXIS 521 (1982).

Dance performed on premises of retail liquor licensee by dancer who wore bikini-type panties and who wrapped her legs around shoulders of male customers who were leaning over rim of stage did not overstep constitutional protections and was not ground for suspension of liquor license. U.S. Const. Amend. 1; D.C. Code §§ 22-2001(a)(1)(B), 22-2701, 25-118. 4934, Inc. v. Washington, 375 A.2d 20, 1977 D.C. App. LEXIS 453 (1977).

Inasmuch as Alcoholic Beverage Control Board grounded its suspension of retail liquor license upon asserted violation of statute forbidding presentation of obscene exhibitions, the suspension order would stand or fall upon question whether dance performed by go-go dancer was the kind of performance forbidden by the statute and order could not be sustained on theory of broader power to regulate liquor licensees. U.S. Const. Amend. 1; D.C. Code §§ 22-2001(a)(1)(B), 22-2701, 25-118. 4934, Inc.

v. Washington, 375 A.2d 20, 1977 D.C. App. LEXIS 453 (1977).

Injunction.

An injunction against enforcement of order of Alcoholic Beverage Control Board revoking liquor license should not issue for any period while failure of Board of Commissioners of District of Columbia to reach a decision on appeal is caused by unavoidable circumstances such as absence of a commissioner or necessary delay in considering and deciding the case. D.C. Code 1940, § 25-106. *Lambros v. Young*, 145 F.2d 341, 1944 U.S. App. LEXIS 2508 (1944).

Where statute provided that decision of Board of Commissioners of District of Columbia on questions of fact on appeal from Alcoholic Beverage Control Board should be final, but order revoking liquor license was upheld by a one to one vote, an injunction would be granted against enforcement of order which would terminate when appeal was reinstated, and after appeal was reinstated the license would stand suspended during time reasonably necessary for commissioners to reach a final decision. D.C. Code 1940, § 25-106. *Lambros v. Young*, 145 F.2d 341, 1944 U.S. App. LEXIS 2508 (1944).

Order of suspension or revocation.

Alcoholic Beverage Control Board should articulate its standards for suspension of liquor license in its order of suspension. 25 D.C. Code § 25-118. *Am-Chi Restaurant, Inc. v. Simonson*, 396 F.2d 686, 1968 U.S. App. LEXIS 7135 (C.A.D.C. 1968).

Period for which license issued.

Word "period," within District of Columbia statute authorizing revocation or suspension of a liquor license if, during period for which license was issued, licensee fails to superintend in person, or through an approved manager, business for which license is issued, means duration of license and not lawful day-to-day business hours. D.C. Code § 25-118. 2447 *Good Hope Road, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 295 A.2d 513, 1972 D.C. App. LEXIS 264 (1972).

Review.

Where separate suspensions of liquor license for 21 days in the first case and 17 days in the second case were not strictly for separate acts constituting violations on separate days but for a continuous course of conduct, and investigation in both cases was completed 30 days before hearing in first case, the two cases should have been treated as one case and licensee was entitled to review of suspension by commissioners on theory that license was suspended for period of more than 30 days. D.C. Code §§ 25-106, 25-118. *James Bakalis & Nickie Bakalis*,

Inc. v. Simonson, 434 F.2d 515, 1970 U.S. App. LEXIS 7873 (C.A.D.C. 1970).

Findings of Alcoholic Beverage Control Board are presumptively valid. D.C. Code § 25-118. *James Bakalis & Nickie Bakalis, Inc. v. Simonson*, 434 F.2d 515, 1970 U.S. App. LEXIS 7873 (C.A.D.C. 1970).

Under statute governing appeal to Board of Commissioners of District of Columbia from Alcoholic Beverage Control Board, provision that decision of commissioners on questions of fact should be final means that the Board of Commissioners must actually make a decision. D.C. Code 1940, § 25-106. *Lambros v. Young*, 145 F.2d 341, 1944 U.S. App. LEXIS 2508 (1944).

Where statute governing appeal to Board of Commissioners of District of Columbia from Alcoholic Beverage Control Board provided that decision of commissioners on questions of fact should be final, the judicial rule which requires affirmance of judgment or order of trial court when an appellate court is evenly divided was inapplicable. D.C. Code 1940, § 25-106. *Lambros v. Young*, 145 F.2d 341, 1944 U.S. App. LEXIS 2508 (1944).

The effect of a one to one vote of Board of Commissioners of District of Columbia upholding order of Alcoholic Beverage Control Board revoking liquor license is an interim affirmance of the Board which suspends the license until final decision of the Commissioners. D.C. Code 1940, § 25-106. *Lambros v. Young*, 145 F.2d 341, 1944 U.S. App. LEXIS 2508 (1944).

While license of any person appealing from order of Alcoholic Beverage Control Board revoking license is suspended until final decision of Board of Commissioners of District of Columbia, the commissioners have no right to cause suspension of license to continue indefinitely by arbitrarily refusing to decide issue of fact. *Lambros v. Young*, 145 F.2d 341, 1944 U.S. App. LEXIS 2508 (1944).

Sufficiency of evidence.

Testimony by officers was sufficient to support charges of violation of Alcoholic Beverage Control Act and regulations by more than substantial evidence. D.C. Code § 25-118. *James Bakalis & Nickie Bakalis, Inc. v. Simonson*, 434 F.2d 515, 1970 U.S. App. LEXIS 7873 (C.A.D.C. 1970).

Substantial evidence of a correlation between increased incidents of crime within 1,000 feet of liquor licensee's establishment and the operation of the establishment supported Alcoholic Beverage Control Board's revocation of liquor license; Board heard the testimony of two police officers regarding incident in which one patron assaulted another with the broken bottle, and heard testimony as to choking incident, shooting of ambulance personnel, altercation between two male patrons, fatal stabbing near

club entrance, a shooting incident within 1,000 feet of the establishment, and patron's assault on police officer. *Levelle, Inc. v. D.C. Alcoholic Bev. Control Bd.*, 924 A.2d 1030, 2007 D.C. App. LEXIS 259 (2007).

Substantial evidence supported the Alcoholic Beverage Control Board's conclusion that liquor licensee had permitted licensed establishment to be used for an unlawful or disorderly purpose, in support of the Board's revocation of liquor license; the Board heard the testimony of two police officers regarding incident in which one patron assaulted another with the broken bottle and heard testimony of Emergency Management Agency and licensee's security staff as to other security incidents, providing support for finding that there was inadequate staffing or supervision to prevent the disorder at the

establishment. *Levelle, Inc. v. D.C. Alcoholic Bev. Control Bd.*, 924 A.2d 1030, 2007 D.C. App. LEXIS 259 (2007).

Evidence was sufficient to support findings of Alcoholic Beverage Control Board, in revoking petitioner's class "C" retailer's license, that petitioner allowed licensed premises to be used for an unlawful purpose by permitting consumption of alcoholic beverages at a time when consumption was prohibited, failed to frame its license under glass and post same in a conspicuous place on premises, and failed to superintend in person, or through an approved manager, business for which license was issued. *D.C. Code §§ 25-101 et seq.*, 25-106, 25-118. *2447 Good Hope Road, Inc. v. District of Columbia Alcoholic Beverage Control Board*, 295 A.2d 513, 1972 D.C. App. LEXIS 264 (1972).

§ 25-824. Revocation when wholesale or retail licensee is subject to undue influence by manufacturer.

(a) If a manufacturer of alcoholic beverages, whether licensed by this title or not, shall have such a substantial interest, whether direct or indirect, in the business of a wholesale or retail licensee or in the premises on which the licensee's business is conducted as, in the judgment of the Board, may tend to influence the licensee to purchase alcoholic beverages from the manufacturer, the Board may revoke the license of the licensee.

(b) This section shall not apply to the wholesale license held by a person not licensed as a manufacturer in the District owning an establishment for the manufacture of alcoholic beverages outside of the District.

(Jan. 24, 1934, 48 Stat. 330, ch. 4, § 18; Aug. 27, 1935, 49 Stat. 902, ch. 756, § 15; Sept. 29, 1982, D.C. Law 4-157, §§ 10, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(6), 30 DCR 5927; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-824.
1973 Ed., § 25-119.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-825. Revocation when retail licensee is subject to undue interest by wholesaler.

If a wholesaler of alcoholic beverages, whether licensed under this title or not, shall have such a substantial interest, whether direct or indirect, in the business of any retail licensee or in the premises on which the licensee's business is conducted as may tend to influence the licensee to purchase beverages from the wholesaler, the Board may revoke the license of the licensee.

(Jan. 24, 1934, 48 Stat. 331, ch. 4, § 19; Aug. 27, 1935, 49 Stat. 903, ch. 756, § 16; Sept. 29, 1982, D.C. Law 4-157, §§ 11, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(7), 30 DCR 5927; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-825. 1973 Ed., § 25-120.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-157. — For

legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 5-51. — For legislative history of D.C. Law 5-51, see Historical and Statutory Notes following § 25-206.

§ 25-826. Summary revocation or suspension.

(a) If the Board determines, after investigation, that the operations of a licensee present an imminent danger to the health and safety of the public, the Board may summarily revoke, suspend, fine, or restrict, without a hearing, the license to sell alcoholic beverages in the District.

(b) The Board may summarily revoke, suspend, fine, or restrict the license of a licensee whose establishment has been the scene of an assault on a police officer, government inspector or investigator, or other governmental official, who was acting in his or her official capacity, when such assault occurred by patrons who were within 1,000 feet of the establishment.

(c) A licensee may request a hearing within 72 hours after service of notice of the summary revocation, suspension, fine, or restriction of a license. The Board shall hold a hearing within 48 hours of receipt of a timely request and shall issue a decision within 72 hours after the hearing.

(d) A person aggrieved by a final summary action may file an appeal in accordance with the procedures set forth in subchapter I of Chapter 5 of Title 2.

(Jan. 24, 1934, 48 Stat. 330, ch. 4, § 17; Aug. 27, 1935, 49 Stat. 900, ch. 756, § 9; Aug. 25, 1937, 50 Stat. 803, ch. 766, § 3; Apr. 26, 1950, 64 Stat. 88, ch. 106; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 3(a); Sept. 29, 1982, D.C. Law 4-157, §§ 9, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(5), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 11; 34 DCR 907; Sept. 11, 1993, D.C. Law 10-12, § 2(b), 40 DCR 4020; May 24, 1994, D.C. Law 10-122, § 2(h), 41 DCR 1658; Apr. 30, 1998, D.C. Law 12-97, § 2, 45 DCR 1517; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; July 18, 2008, D.C. Law 17-201, § 6(b), 55 DCR 6289.)

Prior Codifications. — 1981 Ed., § 25-826. 1973 Ed., § 25-118.

Effect of amendments. — D.C. Law 17-201, in subsec. (a), substituted “suspend, fine,” for “suspend.”

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 17-201. — For Law 17-201, see notes following § 25-101.

CASE NOTES

In general.

Some mixing of prosecutorial and adjudicative functions by Alcoholic Beverage Control Board is necessary part of administrative

scheme and does not per se violate due process. D.C. Code § 25-118. *James Bakalis & Nickie Bakalis, Inc. v. Simonson*, 434 F.2d 515, 1970 U.S. App. LEXIS 7873 (C.A.D.C. 1970).

§ 25-827. Request for suspension or revocation of license by Chief of Police.

(a) The Chief of Police may request the suspension or revocation of a license

if the Chief of Police determines that there is a correlation between increased incidents of crime within 1,000 feet of the establishment and the operation of the establishment. The determination shall be based on objective criteria, including incident reports, arrests, and reported crime, occurring within the preceding 18 months and within 1,000 feet of the establishment.

(b) The Chief of Police may close an establishment for up to 96 hours, subject to a hearing and disposition by the Board under § 25-826 if he or she finds that:

(1) There is an additional imminent danger to the health and welfare of the public by not doing so; and

(2) There is no immediately available measure to ameliorate the finding in paragraph (1) of this subsection.

(c) The order of the Chief of Police to close an establishment under subsection (b) of this section shall terminate upon the disposition by the Board of the matter under § 25-826.

(Jan. 24, 1934, 48 Stat. 330, ch. 4, § 17; Aug. 27, 1935, 49 Stat. 900, ch. 756, § 9; Aug. 25, 1937, 50 Stat. 803, ch. 766, § 3; Apr. 26, 1950, 64 Stat. 88, ch. 106; Dec. 8, 1970, 84 Stat. 1393, Pub. L. 91-535, § 3(a); Sept. 29, 1982, D.C. Law 4-157, §§ 9, 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(5), 30 DCR 5927; Mar. 7, 1987, D.C. Law 6-217, § 11; 34 DCR 907; Sept. 11, 1993, D.C. Law 10-12, § 2(b), 40 DCR 4020; May 24, 1994, D.C. Law 10-122, § 2(h), 41 DCR 1658; Apr. 30, 1998, D.C. Law 12-97, § 2, 45 DCR 1517; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 23, 2005, D.C. Law 16-20, § 2(b), 52 DCR 6575.)

Prior Codifications. — 1981 Ed., § 25-827. 1973 Ed., § 25-118.

Effect of amendments. — D.C. Law 16-20, rewrote subsec. (b) and added subsec. (c). Prior to amendment, subsec. (b) read as follows: “(b) The Chief of Police may close an establishment for the remainder of the business day if he or she believes that continued operation presents an imminent danger to the health, safety, or welfare of the public.”

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(c) of Inaugural Celebration Extension of Hours Public Safety Emergency Act of 2008 (D.C. Act 17-616, December 19, 2008, 56 DCR 44).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 16-20. — For Law 16-20, see notes following § 25-798.

CASE NOTES

In general.

Substantial evidence supported decision of Alcoholic Beverage Control Board to revoke alcoholic beverage license of operator of night-club; hearing occurred after 17-year-old girl was shot and killed inside club, Board heard conflicting testimony about whether marijuana use and underage drinking occurred at club, and Board credited testimony of numerous witnesses with respect to underage drinking, use of controlled substances, repeated violent incidents, and security issues at club. *Aziken v. D.C. Alcoholic Bev. Control Bd.*, 29 A.3d 965, 2011 D.C. App. LEXIS 604 (2011).

Court of Appeals would not consider arguments raised by liquor licensee for the first time in reply brief, on appeal from Alcoholic Beverage Control Board's decision revoking its liquor license, that statute, which allowed Chief of Police to request suspension of license based on a correlation between operation of establishment and increased crime within 1,000 feet of the establishment, did not provide an independent basis for suspension or revocation. *Levelle, Inc. v. D.C. Alcoholic Bev. Control Bd.*, 924 A.2d 1030, 2007 D.C. App. LEXIS 259 (2007).

§ 25-828. Notice of suspension or revocation.

(a) If the Board orders the suspension or revocation of a license, the Board shall post a notice in a conspicuous place at or near the main street entrance of the outside of the establishment.

(b) The posted notice shall state that the license has been suspended, the period of the suspension, and that the suspension is ordered because of a violation of this title or of the regulations promulgated under this title.

(c) Any person willfully removing, obliterating, or defacing the notice shall be guilty of a violation of this chapter.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Sept. 30, 2004, D.C. Law 15-187, § 101(ff), 51 DCR 6525.)

Effect of amendments. — D.C. Law 15-187 added subsec. (c).

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

CASE NOTES

In general.

Alcoholic Beverage Control Board should articulate its standards for suspension of liquor license in its order of suspension. 25 D.C. Code

§ 25-118. *Am-Chi Restaurant, Inc. v. Simonson*, 396 F.2d 686, 1968 U.S. App. LEXIS 7135 (C.A.D.C. 1968).

§ 25-829. Cease and desist orders.

(a) If the Board or the Mayor, after investigation but before a hearing, has cause to believe that a person is violating any provision of this title and the violation has caused, or may cause, immediate and irreparable harm to the public, the Board or the Mayor may issue an order requiring the alleged violator to cease and desist immediately from the violation. The order shall be served by certified mail or delivery in person.

(b)(1) The alleged violator may, within 15 days after the service of the order, submit a written request to the Board to hold a hearing on the alleged violation.

(2) Upon receipt of a timely request, the Board shall conduct a hearing in accordance with the procedures set forth in subchapter I of Chapter 5 of Title 2 and issue a decision within 90 days after the hearing.

(c)(1) The alleged violator may, within 10 days after the service of an order, submit a written request to the Board for an expedited hearing on the alleged violation.

(2) Upon receipt of a timely request for an expedited hearing, the Board shall conduct a hearing within 10 days after the date of receiving the request and shall deliver to the alleged violator at his or her last known address a written notice of the hearing by any means guaranteed to be received at least 5 days before the hearing date.

(3) The Board shall issue a decision within 30 days after an expedited hearing.

(d) If a request for a hearing is not made under subsections (b) and (c) of this section, the order of the Board or the Mayor shall be final.

(e) If, after a hearing, the Board determines that the alleged violator is not in violation of this title, the Board shall revoke the order.

(f) If a person fails to comply with a lawful order of the Board or the Mayor under this section, the Board may petition the Superior Court of the District of Columbia for an order compelling compliance or take any other action authorized by this subchapter.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-830. Civil penalties.

(a) Within 90 days after May 3, 2001, the Board shall submit proposed regulations setting forth a schedule of civil penalties (“schedule”) for violations of this title to the Council for a 60-day period of review, including Saturdays, Sundays, holidays, and periods of Council recess. If the Council does not approve, in whole or in part, the proposed regulations by resolution with the 60-day review period, the regulations shall be deemed disapproved. The schedule shall replace all civil penalties, except as expressly provided in this title.

(b) The schedule shall be prepared in accordance with the following provisions:

(1) The schedule shall contain 2 tiers that reflect the severity of the violation for which the penalty is imposed:

(A) The primary tier shall apply to more severe violations, including service to minors or violation of hours of sale or service of alcoholic beverages.

(B) The secondary tier shall apply to less severe violations, including the failure to post required signs.

(2) A subsequent violation in the same tier, whether a violation of the same provision or different one, shall be treated as a repeat violation for the purposes of imposing an increased penalty; provided, that all secondary tier infractions cited by ABRA investigators or Metropolitan Police Department Officers, during a single investigation or inspection on a single day, shall be deemed to be one secondary tier violation for the purposes of determining repeat violations under this section.

(c)(1) For primary tier violations, the penalties shall be no less than the following:

(A) For the first violation, no less than \$1,000;

(B) For the second violation within 2 years, no less than \$2,000; and

(C) For the third violation within 3 years, no less than \$4,000;

(2) A licensee who has been found in violation of no more than 3 secondary tier violations and who is subsequently found in violation of a primary tier violation shall be penalized according to a first primary tier violation.

(3) A licensee found in violation of a primary tier offense for the fourth time within 4 years shall have the license revoked.

(d)(1) For secondary tier violations, the penalties shall be no less than the following:

(A) For the first violation, no less than \$250.

(B) For the second violation within 2 years, no less than \$500.

(C) For the third violation within 3 years, no less than \$750.

(2) A licensee found in violation of a secondary tier violation for the fourth time within 4 years shall be penalized according to a first primary tier violation. Every subsequent secondary tier offense within 5 years of the first violation shall be fined according to the schedule for primary tier violations.

(e)(1) Except for an egregious violation as may be later defined by ABC rulemaking, no licensee shall be found to be in violation of a first-time violation of § 25-781 (sales to minors), unless the licensee has been given a written warning, or received a citation, for the violation, or had an enforcement proceeding before the Board, during the 4 years preceding the violation.

(2) A warning for a first-time violation of § 25-781 shall include a description of the violation. The Alcoholic Beverage Regulation Administration shall make available a schedule of fines that could be imposed upon subsequent violation. Within one year of [March 25, 2009], the Board shall submit a report on the status of the warning requirement for § 25-781 violations, including a statement on repeat offenders and subsequent fines or sanctions imposed. The provisions of paragraph (1) of this subsection, and the provisions of § 25-781(f) shall expire one year from [March 25, 2009], unless the Board finds each of the following:

(A) That the warning requirement was effective in correcting behavior that was the subject of the warning for those licensees; and

(B) That the warning requirement contributed to the overall prevention of sales to minors in the District of Columbia.

(3)(A) Within 60 days of [March 25, 2009], the Board shall issue proposed regulations for a comprehensive warning and violation structure, which shall include recommendations on which violations of the act or regulations shall require a warning for a first-time violation prior to penalty.

(B) Proposed rules under this subsection shall be submitted to the Council for a 30-day period of review. The Council may approve these proposed regulations, in whole or in part, by resolution. If the Council has not approved the regulations upon expiration of the 30-day review period, the regulations shall be deemed disapproved.

(f) The Board or the Council may amend the schedule. An amendment by the Board shall be submitted to the Council for its approval in accordance with subsection (a) of this section. The Board may fine for a violation not listed on the schedule consistent with the primary tier violation penalties set forth in subsection (c)(1) of this section.

(g) The schedule and any amendments to the schedule shall be published in the District of Columbia Register and promulgated by the procedure adopted under § 25-211(e).

(h) Penalties or fines assessed under this chapter shall be credited to the General Fund of the District of Columbia.

(May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Mar. 25, 2009, D.C. Law 17-361, § 2(d)(3), 56 DCR 1204.)

Effect of amendments. — D.C. Law 17-361 rewrote subsec. (e) and added the second sentence to subsec. (f). Prior to amendment, subsec. (e) read as follows: “(e) The Board may specify violations for which a licensee may be given a warning before the issuance of a citation for a first violation.”

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 17-361. — For Law 17-361, see notes following § 25-113.

References in text. — The reference in subsection (e)(3)(A) to “the act” is a reference to the Alcoholic Beverage Enforcement Amendment Act of 2008, effective March 25, 2009 (D.C. Law 17-361; 56 DCR 1204).

Resolutions. — Resolution 15-340, the “Alcoholic Beverage Regulation Civil Penalty Schedule Regulations Approval Resolution of

2003”, was approved effective December 2, 2003.

Resolution 18-488, the “Egregious First Time Sale to Minor Violation Clarification Regulations Approval Resolution of 2010”, was approved effective June 1, 2010.

Resolution 18-522, the “East Dupont Circle Moratorium Zone Regulations Approval Resolution of 2010”, was approved effective June 29, 2010.

Resolution 18-540, the “Drinking and Driving Warning Sign Regulation Approval Resolution of 2010”, was approved effective July 13, 2010.

Resolution 18-701, the “Georgetown Moratorium Zone Revised Approval Resolution of 2010”, was approved effective December 21, 2010.

§ 25-831. Penalty for violation where no specific penalty provided; additional penalty for failure to perform certain required acts.

(a) A person who violates any of the provisions of this title, or regulations under this title, for which no specific penalty is provided shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than \$1,000, or imprisoned for not more than one year, or both.

(b) Any person required to file a return or report or perform any act under the provisions of this title who wilfully fails or refuses to file the return or report or perform the act within the time required shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than \$5,000, or imprisoned for not more than 3 years, or both. The penalty provided herein shall be in addition to other penalties provided by this title.

(c) Violations of this section which are misdemeanors shall be prosecuted on information filed in the Superior Court of the District of Columbia by the Corporation Counsel. Violations of this subsection which are felonies shall be prosecuted by the United States Attorney for the District of Columbia.

(d) A civil fine may be imposed as an alternative sanction for any violation of this title for which no specific penalty is provided, or any rules or regulations issued under the authority of this title, under Chapter 18 of Title 2. Adjudication of an infraction of this chapter shall be under Chapter 18 of Title 2.

(Jan. 24, 1934, 48 Stat. 336, ch. 4, § 33; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); July 24, 1982, D.C. Law 4-131, § 301, 29 DCR 2418; Sept. 26, 1984, D.C. Law 5-106, § 3, 31 DCR 3381; Oct. 5, 1985, D.C. Law 6-42, § 455(b), 32 DCR 4450; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Section references. — This section is referred to in §§ 25-108 and 25-132.

Prior Codifications. — 1981 Ed., § 25-831. 1973 Ed., § 25-132.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-131. — For legislative history of D.C. Law 4-131, see Historical and Statutory Notes following § 25-907.

Legislative history of Law 5-106. — For legislative history of D.C. Law 5-106, see Historical and Statutory Notes following § 25-781.

Legislative history of Law 6-42. — For legislative history of D.C. Law 6-42, see Historical and Statutory Notes following § 25-1009.

CASE NOTES

ANALYSIS

Indictment or information.

Sentence and punishment.

Indictment or information.

Refusal to consolidate counts charging the keeping of liquor for sale was harmless error, where there were valid counts sufficient to uphold conviction and sentence imposed did not exceed maximum which could have been imposed on any single charge. D.C. Code 1940, § 25-132. *Davenport v. District of Columbia*, 67 A.2d 522, 1949 D.C. App. LEXIS 218 (Cr.App. 1949).

Sentence and punishment.

Statute does not compel a criminal sanction for all violations of the Alcoholic Beverage Control Act, but merely provides, with respect to

violations of the Act that are criminal in nature, how they are to be prosecuted: misdemeanors by the Corporation Counsel, and felonies by the U.S. Attorney. *Cass v. District of Columbia*, 829 A.2d 480, 2003 D.C. App. LEXIS 487 (2003), amended by 2003 D.C. App. LEXIS 616 (D.C. Oct. 6, 2003).

Imposition of consecutive 120-day sentences for the keeping of whiskey for sale and selling of whiskey without a license was improper as constituting double punishment for a single offense where defendant had only a single bottle of whiskey which he illegally sold at time of his arrest and there was no proof of a keeping of the whiskey for sale independent of the sale itself. D.C. Code §§ 25-109(a), 25-132; U.S. Const. Amend. 5. *Hicks v. District of Columbia*, 234 A.2d 801, 1967 D.C. App. LEXIS 205 (App. 1967).

§ 25-832. Prompt notice of investigative reports.

(a) ABRA shall provide a licensee with either an investigative report or a public police incident report that may result in a show cause hearing as set forth in § 25-447 within 90 days of the date upon which the incident occurred.

(b) The requirement in subsection (a) of this section shall not apply where [:]

(1) Criminal action is being considered against the licensee or its employees; or

(2) Enforcement action is requested by the Chief of Police under § 25-827.

(Mar. 25, 2009, D.C. Law 17-361, § 2(d)(4), 56 DCR 1204.)

Legislative history of Law 17-361. — For Law 17-361, see notes following § 25-113.

CHAPTER 9. TAXES.

Sec.	Sec.
25-901. Taxes to be levied, collected, and paid on alcoholic beverages except beer.	redetermining, assessing, or reassessing any tax.
25-902. Taxes to be levied, collected, and paid on beer.	25-908. Collection of tax by OTR Director.
25-903. Collection of tax.	25-909. Refund of tax erroneously or illegally collected.
25-904. Importation permit and tax requirement.	25-910. Judicial review of tax determination or denial of refund claim.
25-905. Common carrier licenses and tax requirements.	25-911. Seizure and forfeiture of alcoholic beverages and vehicles for which taxes have not been paid.
25-906. Exemption from tax.	
25-907. Mayor's responsibility in determining,	

§ 25-901. Taxes to be levied, collected, and paid on alcoholic beverages except beer.

There shall be levied, collected, and paid on all of the following alcoholic beverages (1) manufactured by the licensee under a manufacturer's license, (2) imported or brought into the District by a licensee under a wholesaler's license, except alcoholic beverages as may be sold to a dealer licensed under the laws of any state or territory of the United States and not licensed under this title, and (3) imported or brought into the District by a licensee under a retailer's license, a tax at the following rates to be paid by the licensee in the manner hereinafter provided:

(A) A tax of \$.30 on every wine-gallon of wine containing 14% or less of alcohol by volume, other than champagne, sparkling wine, and any wine artificially carbonated, and a proportionate tax at the same rate on all fractional parts of such gallon;

(B) A tax of \$.40 on every wine-gallon of wine containing more than 14% of alcohol by volume, other than champagne, sparkling wine, and any wine artificially carbonated, and a proportionate tax at the same rate on all fractional parts of such gallon;

(C) A tax of \$.45 on every wine-gallon of champagne, sparkling wine, and any wine artificially carbonated, and a proportionate tax at the same rate on all fractional parts of such gallon;

(D) A tax of \$1.50 on every wine-gallon of spirits, and a proportionate tax at the same rate on all fractional parts of such gallon; and

(E) A tax of \$1.50 on every wine-gallon of all other alcoholic beverages, and a proportionate tax at the same rate on all fractional parts of such gallon.

(Jan. 24, 1934, 48 Stat. 332, ch. 4, § 23; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 3; June 18, 1934, 48 Stat. 1014, 1015, ch. 600, §§ 1, 2; Aug. 27, 1935, 49 Stat. 901, 903, ch. 756, §§ 11, 17; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; May 27, 1949, 63 Stat. 135, ch. 146, title V, § 505; May 18, 1954, 68 Stat. 113, ch. 218, title VIII, § 801; Mar. 31, 1956, 70 Stat. 81, ch. 154, title III, §§ 301, 302(a); July 25, 1958, 72 Stat. 418, Pub. L. 85-558, §§ 1-5; Sept. 14, 1961, 75 Stat. 510, Pub. L. 87-238, §§ 1-5; Mar. 2, 1962, 76 Stat. 17, Pub. L. 87-408, § 401; Sept. 30, 1966, 80 Stat. 855, Pub. L. 89-610, title I, § 101(a); Oct. 31,

1969, 83 Stat. 175, Pub. L. 91-106, title V, § 501(a), (b); Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Sept. 29, 1982, D.C. Law 4-157, § 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(9), 30 DCR 5927; Mar. 14, 1985, D.C. Law 5-159, § 25(b), (c), 32 DCR 30; July 25, 1989, D.C. Law 8-17, § 7(a), 36 DCR 4160; May 4, 1990, D.C. Law 8-119, § 2, 37 DCR 1738; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-901. 1973 Ed., § 25-124.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 2-73. — For legislative history of D.C. Law 2-73, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 4-157. — For legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 5-51. — For legislative history of D.C. Law 5-51, see Historical and Statutory Notes following § 25-206.

Legislative history of Law 5-159. — For legislative history of D.C. Law 5-159, see Historical and Statutory Notes following § 25-206.

Legislative history of Law 8-17. — Law 8-17, the "Revenue Amendment Act of 1989," was introduced in Council and assigned Bill

No. 8-224, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on May 2, 1989 and May 16, 1989, respectively. Signed by the Mayor on May 26, 1989, it was assigned Act No. 8-34 and transmitted to both Houses of Congress for its review.

Legislative history of Law 8-119. — Law 8-119, the "Tax Amendment Act of 1990," was introduced in Council and assigned Bill No. 8-371, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on January 30, 1990, and February 13, 1990, respectively. Approved without the signature of the Mayor on March 6, 1990, it was assigned Act No. 8-173 and transmitted to both Houses of Congress for its review.

CASE NOTES

In general.

Wholesaler of imported alcoholic beverages stored in private bonded warehouse under charge of customs official was not liable for District of Columbia excise taxes on sale of such beverages to foreign embassies and interna-

tional organizations. D.C. Code 1961, § 25-124(a); Tariff Act of 1930, § 555, 19 U.S.C. § 1555. *District of Columbia v. International Distributing Corp.*, 331 F.2d 817, 1964 U.S. App. LEXIS 6010 (C.A.D.C. 1964).

§ 25-902. Taxes to be levied, collected, and paid on beer.

(a) There shall be levied, collected, and paid a tax of \$2.79 on every barrel of beer containing not more than 31 gallons, and at the same rate for any other quantity or for the fractional parts thereof, on all beer that is:

(1) Sold by the licensee under a manufacturer's or wholesaler's license, except beer as (A) may have been purchased from a licensee under this title, or (B) may be sold to a dealer licensed under the laws of any state or territory of the United States and not licensed under this title;

(2) Purchased for resale by the licensee under a retailer's license, except beer as may have been purchased from a licensee under this title; or

(3) Brewed or produced by the licensee under a brew pub permit and transferred for consumption at the licensee's restaurant or tavern.

(b)(1) Taxes shall be determined before the beer is dispensed into a container for consumption. A licensee under a brew pub permit shall have a suitable method for measuring the volume of beer, such as a meter or gauge glass.

(2) If the licensee under a brew pub permit uses one or more tanks for tax determination:

(A) Taxes shall be determined each time beer is added to a tax-determination tank; and

(B) The licensee under a brew pub permit may never simultaneously pump into and out of a tax-determination tank.

(3) Beer consumed by employees and visitors at the licensee's restaurant or tavern shall be beer on which the tax has been paid or determined.

(Jan. 24, 1934, ch. 4, § 40; May 16, 1938, 52 Stat. 376, ch. 223, § 8; May 27, 1949, 63 Stat. 136, ch. 146, title V, § 508; May 18, 1954, 68 Stat. 115, ch. 218, title VIII, § 804; Mar. 31, 1956, 70 Stat. 83, ch. 154, § 305; Sept. 30, 1966, 80 Stat. 855, Pub. L. 89-610, title I, § 101(b); Oct. 31, 1969, 83 Stat. 175, Pub. L. 91-106, title V, § 501(c); Sept. 29, 1982, D.C. Law 4-157, § 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(11), 30 DCR 5927; July 25, 1989, D.C. Law 8-17, § 7(b), 36 DCR 4160; Aug. 17, 1991, D.C. Law 9-40, § 2(d), 38 DCR 4974; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-902. 1973 Ed., § 25-138.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-157. — For legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 5-51. — For

legislative history of D.C. Law 5-51, see Historical and Statutory Notes following § 25-206.

Legislative history of Law 8-17. — For legislative history of D.C. Law 8-17, see Historical and Statutory Notes following § 25-901.

Legislative history of Law 9-40. — For legislative history of D.C. Law 9-40, see Historical and Statutory Notes following § 25-101.

CASE NOTES

In general.

Under District of Columbia statute imposing a tax on all beer sold and prescribing monthly reports of beer "sold by him during the preceding calendar month", regulations of the Commissioners taxing beer in warehouse and before

it is sold were not authorized. D.C. Code 1951, §§ 25-103(o), 25-109, 25-124, 25-138 and (a) (1), (b). *American Sales Co. v. District of Columbia*, 292 F.2d 751, 1961 U.S. App. LEXIS 4406 (C.A.D.C. 1961).

§ 25-903. Collection of tax.

(a) Taxes on alcoholic beverages shall be collected by, and paid to, the Deputy Chief Financial Officer for Tax and Revenue of the Office of Tax and Revenue, or any successor ("OTR Director") and shall be deposited in the Treasury of the United States to the credit of the District.

(b) Each licensee identified in §§ 25-901 and 25-902 shall, before the 16th day of each month, furnish to the OTR Director, on a form to be prescribed by the OTR Director, a statement under oath showing the quantity of alcoholic beverage subject to taxation sold by the licensee during the preceding calendar month and shall, before the 16th day of each month, pay to the OTR Director the tax imposed thereon.

(Jan. 24, 1934, 48 Stat. 332, ch. 4, §§ 23, 40; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 3; June 18, 1934, 48 Stat. 1014, 1015, ch. 600, §§ 1, 2; Aug. 27, 1935, 49 Stat. 901, 903, ch. 756, §§ 11, 17; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; May 27, 1949, 63 Stat. 135, ch. 146, title V, §§ 505, 508; May 18, 1954, 68 Stat. 113, ch. 218, title VIII, §§ 801, 804; Mar. 31, 1956, 70 Stat. 81, ch. 154,

title III, §§ 301, 302(a), 305; July 25, 1958, 72 Stat. 418, Pub. L. 85-558, §§ 1-5; Sept. 14, 1961, 75 Stat. 510, Pub. L. 87-238, §§ 1-5; Mar. 2, 1962, 76 Stat. 17, Pub. L. 87-408, § 401; Sept. 30, 1966, 80 Stat. 855, Pub. L. 89-610, title I, § 101(a), (b); Oct. 31, 1969, 83 Stat. 175, Pub. L. 91-106, title V, § 501(a)-(c); Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Sept. 29, 1982, D.C. Law 4-157, § 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(9), (11), 30 DCR 5927; Mar. 14, 1985, D.C. Law 5-159, § 25(b), (c), 32 DCR 30; July 25, 1989, D.C. Law 8-17, § 7(a), (b), 36 DCR 4160; May 4, 1990, D.C. Law 8-119, § 2, 37 DCR 1738; Aug. 17, 1991, D.C. Law 9-40, § 2(d), 38 DCR 4974; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-903.
1973 Ed., §§ 25-124, 25-138.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

CASE NOTES

In general.

Under District of Columbia statute imposing a tax on all beer sold and prescribing monthly reports of beer "sold by him during the preceding calendar month", regulations of the Commissioners taxing beer in warehouse and before

it is sold were not authorized. D.C. Code 1951, §§ 25-103(o), 25-109, 25-124, 25-138 and (a) (1), (b). *American Sales Co. v. District of Columbia*, 292 F.2d 751, 1961 U.S. App. LEXIS 4406 (C.A.D.C. 1961).

§ 25-904. Importation permit and tax requirement.

The Board shall not issue an importation permit until the taxes imposed by this chapter have been paid for the alcoholic beverages for which the permit is requested.

(Jan. 24, 1934, 48 Stat. 332, ch. 4, §§ 23, 40; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 3; June 18, 1934, 48 Stat. 1014, 1015, ch. 600, §§ 1, 2; Aug. 27, 1935, 49 Stat. 901, 903, ch. 756, §§ 11, 17; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; May 27, 1949, 63 Stat. 135, ch. 146, title V, §§ 505, 508; May 18, 1954, 68 Stat. 113, ch. 218, title VIII, §§ 801, 804; Mar. 31, 1956, 70 Stat. 81, ch. 154, title III, §§ 301, 302(a), 305; July 25, 1958, 72 Stat. 418, Pub. L. 85-558, §§ 1-5; Sept. 14, 1961, 75 Stat. 510, Pub. L. 87-238, §§ 1-5; Mar. 2, 1962, 76 Stat. 17, Pub. L. 87-408, § 401; Sept. 30, 1966, 80 Stat. 855, Pub. L. 89-610, title I, § 101(a), (b); Oct. 31, 1969, 83 Stat. 175, Pub. L. 91-106, title V, § 501(a)-(c); Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Sept. 29, 1982, D.C. Law 4-157, § 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(9), (11), 30 DCR 5927; Mar. 14, 1985, D.C. Law 5-159, § 25(b), (c), 32 DCR 30; July 25, 1989, D.C. Law 8-17, § 7(a), (b), 36 DCR 4160; May 4, 1990, D.C. Law 8-119, § 2, 37 DCR 1738; Aug. 17, 1991, D.C. Law 9-40, § 2(d), 38 DCR 4974; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-904.
1973 Ed., §§ 25-124, 25-138.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-905. Common carrier licenses and tax requirements.

(a) In the case of a passenger-carrying marine vessel operating in and beyond the District or a club car or a dining car on a railroad operating in and beyond the District for which a retailer's license has been issued under this title, the tax as specified in § 25-901 shall be paid on all taxable beverages as are sold and served by the licensee while passing through or when at rest in the District, in the following manner:

(1) A record shall be made and retained by the licensee of all alcoholic beverages sold and served in the District.

(2) Each licensee shall, before the 11th day of each month, file with the OTR Director, on a form to be prescribed by the OTR Director, a statement under oath, showing the quantity of each kind of alcoholic beverage, except beer and wine, sold under the license in the District during the preceding calendar month and shall pay the tax imposed thereon.

(Jan. 24, 1934, 48 Stat. 332, ch. 4, § 23; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 3; June 18, 1934, 48 Stat. 1014, 1015, ch. 600, §§ 1, 2; Aug. 27, 1935, 49 Stat. 901, 903, ch. 756, §§ 11, 17; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; May 27, 1949, 63 Stat. 135, ch. 146, title V, § 505; May 18, 1954, 68 Stat. 113, ch. 218, title VIII, § 801; Mar. 31, 1956, 70 Stat. 81, ch. 154, title III, §§ 301, 302(a); July 25, 1958, 72 Stat. 418, Pub. L. 85-558, §§ 1-5; Sept. 14, 1961, 75 Stat. 510, Pub. L. 87-238, §§ 1-5; Mar. 2, 1962, 76 Stat. 17, Pub. L. 87-408, § 401; Sept. 30, 1966, 80 Stat. 855, Pub. L. 89-610, title I, § 101(a); Oct. 31, 1969, 83 Stat. 175, Pub. L. 91-106, title V, § 501(a), (b); Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Sept. 29, 1982, D.C. Law 4-157, § 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(9), 30 DCR 5927; Mar. 14, 1985, D.C. Law 5-159, § 25(b), (c), 32 DCR 30; July 25, 1989, D.C. Law 8-17, § 7(a), 36 DCR 4160; May 4, 1990, D.C. Law 8-119, § 2, 37 DCR 1738; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-905.
1973 Ed., § 25-124.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-906. Exemption from tax.

No tax shall be levied and collected on any alcoholic beverage exempt from tax under the laws of the United States, or on any alcohol sold for nonbeverage purposes by the licensee under a manufacturer's or wholesaler's license in accordance with the regulations promulgated by the Council.

(Jan. 24, 1934, 48 Stat. 332, ch. 4, § 23; Apr. 30, 1934, 48 Stat. 654, ch. 181, § 3; June 18, 1934, 48 Stat. 1014, 1015, ch. 600, §§ 1, 2; Aug. 27, 1935, 49 Stat. 901, 903, ch. 756, §§ 11, 17; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; May 27, 1949, 63 Stat. 135, ch. 146, title V, § 505; May 18, 1954, 68 Stat. 113, ch. 218, title VIII, § 801; Mar. 31, 1956, 70 Stat. 81, ch. 154, title III, §§ 301, 302(a); July 25, 1958, 72 Stat. 418, Pub. L. 85-558, §§ 1-5; Sept. 14, 1961, 75 Stat. 510, Pub. L. 87-238, §§ 1-5; Mar. 2, 1962, 76 Stat. 17, Pub. L. 87-408,

§ 401; Sept. 30, 1966, 80 Stat. 855, Pub. L. 89-610, title I, § 101(a); Oct. 31, 1969, 83 Stat. 175, Pub. L. 91-106, title V, § 501(a), (b); Apr. 18, 1978, D.C. Law 2-73, § 3, 24 DCR 7066; Sept. 29, 1982, D.C. Law 4-157, § 15, 29 DCR 3617; Mar. 8, 1984, D.C. Law 5-51, § 2(b)(9), 30 DCR 5927; Mar. 14, 1985, D.C. Law 5-159, § 25(b), (c), 32 DCR 30; July 25, 1989, D.C. Law 8-17, § 7(a), 36 DCR 4160; May 4, 1990, D.C. Law 8-119, § 2, 37 DCR 1738; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-906.
1973 Ed., § 25-124.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

§ 25-907. Mayor's responsibility in determining, redetermining, assessing, or reassessing any tax.

(a) The Mayor shall determine, redetermine, assess, or reassess any tax imposed under this chapter, as follows:

(1) In the case of a fraudulent return or a failure to file a return, whether in good faith or otherwise, the tax may be assessed at any time.

(2) If the tax is determined to be due from any person other than a licensee under this title, the tax may be assessed at any time.

(3) In the case of an incorrect return, the tax shall be assessed within 5 years after the filing of such return.

(4)(A) If a return required by this title is not filed, if the return, when filed, is incorrect or insufficient, or if the tax has been determined to be due from a licensee or any other person, the amount of tax due shall be determined by the Mayor from such information as may be obtainable.

(B) Notice of the determination shall be given to the licensee or any person required to file a return or pay the tax.

(C) The notice shall state that the licensee or other person shall have not less than 30 days after the notice is sent within which to file a protest with the Mayor and show cause or reason why the amount of tax determined to be due should not be paid.

(D) If a protest is not filed within the 30-day period, the tax due, as determined by the Mayor, shall be final.

(E) If a protest is filed within the 30-day period, a hearing shall be conducted by the Mayor, a final decision thereon shall be made, and notice of the decision and a statement of taxes determined to be due shall be sent by registered or certified mail to the last known address of the person liable for the payment of the tax.

(b)(1) A licensee or other person required to file a return or pay the tax, who fails to file the return, fails to file a correct return, or fails to pay the tax to the District within the time required by this chapter, shall be subject to (A) a penalty of 5% of the tax due for each month or fraction thereof that the failure continues, not to exceed 25% in the aggregate, plus (B) interest at the rate of 1 ½% per month on the amount of the tax for each month or fraction thereof during which the failure continues.

(2) If the Mayor determines that the delay was due to reasonable cause, the Mayor may waive all or any part of the penalty, interest, or both.

(3) Unpaid penalty and interest shall be collected in the same manner as the tax imposed by this chapter.

(4) The penalty and interest provided for in this section shall be applicable to any tax determined as a deficiency.

(c) The tax imposed by this chapter, and interest and penalties thereon, shall become, from the time due and payable, a personal debt of the person liable to pay the same to the District. For the purposes of this subsection, the term "person" shall include any officer, and any employee or former employee, of a corporation responsible for the payment of the tax and any member or former member of a partnership, limited liability company, or association, and any employee or former employee, of a partnership, limited liability company, or association responsible for the payment of the tax.

(Jan. 24, 1934, 48 Stat. 319, § 42, as added July 24, 1982, D.C. Law 4-131, § 303, 29 DCR 2418; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-907.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-131. — Law 4-131, the "District of Columbia Tax Enforcement Act of 1982," was introduced in Council and assigned Bill No. 4-257, which was referred

to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on April 27, 1982, and May 11, 1982, respectively. Signed by the Mayor on June 1, 1982, it was assigned Act No. 4-196 and transmitted to both Houses of Congress for its review.

§ 25-908. Collection of tax by OTR Director.

(a) The taxes imposed by this chapter and penalties and interest thereon shall be collected by the OTR Director in the manner provided by law for the collection of taxes due to the District on personal property in force at the time of such collection. The liens for the taxes imposed by this chapter and penalties and interest thereon may be acquired in the same manner that liens for personal property taxes are acquired.

(b) If the OTR Director believes that the collection of a tax imposed by this chapter will be jeopardized by delay, the OTR Director shall, whether or not the time otherwise prescribed by law for filing the return or for paying the tax has expired, immediately assess the tax, plus all interest and penalties, the assessment of which is provided by law. The tax, penalties, and interest shall be immediately due and payable and immediate notice and demand shall be made by the OTR Director for payment.

(c) Upon failure or refusal to pay the tax, penalty, or interest, the OTR Director may collect the tax by distraint.

(Jan. 24, 1934, 48 Stat. 319, § 43, as added July 24, 1982, D.C. Law 4-131, § 303, 29 DCR 2418; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-908.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-131. — For legislative history of D.C. Law 4-131, see Historical and Statutory Notes following § 25-907.

§ 25-909. Refund of tax erroneously or illegally collected.

(a) If any tax has been erroneously or illegally collected by the District, the tax shall be refunded if application under oath is filed with the OTR Director for such refund within 3 years from the payment of the tax.

(b) The application shall be made by the person upon whom the tax was imposed and who has actually paid the tax.

(c) Application for a refund under this section shall be deemed an application for a revision of tax, penalty, or interest and the OTR Director may receive evidence on the application. After making a determination of whether the refund shall be made, the OTR Director shall notify the applicant of the determination.

(Jan. 24, 1934, 48 Stat. 319, § 44, as added July 24, 1982, D.C. Law 4-131, § 303, 29 DCR 2418; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-909.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-131. — For legislative history of D.C. Law 4-131, see Historical and Statutory Notes following § 25-907.

§ 25-910. Judicial review of tax determination or denial of refund claim.

A person aggrieved by a final determination of tax or by a denial of a claim for refund (other than a refund of tax finally determined in § 25-909) may, within 6 months from the date of assessment of the deficiency or from the date of the denial of a claim for refund, appeal to the Superior Court of the District of Columbia in the same manner and to the same extent as set forth in §§ 47-3303, 47-3304, 47-3306, 47-3307, and 47-3308.

(Jan. 24, 1934, 48 Stat. 319, § 45, as added July 24, 1982, D.C. Law 4-131, § 303, 29 DCR 2418; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-910.

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-131. — For legislative history of D.C. Law 4-131, see Historical and Statutory Notes following § 25-907.

§ 25-911. Seizure and forfeiture of alcoholic beverages and vehicles for which taxes have not been paid.

(a) Notwithstanding the provisions of § 25-803, if the taxes levied and imposed on alcoholic beverages by this chapter which have not been paid as required by this chapter, such alcoholic beverages shall be declared contraband goods and shall be forfeited to the District in accordance with the procedure set forth in this section. The Mayor may seize any such alcoholic beverages wherever they are found.

(b) If the Mayor has knowledge or reason to suspect that a vehicle is carrying alcoholic beverages or contains any alcoholic beverages in violation of

the regulations contained in this title concerning the importation of alcoholic beverages, the Mayor may stop the vehicle and inspect it for alcoholic beverages on which the taxes levied and imposed by this chapter have not been paid. If such alcoholic beverages are found, the alcoholic beverages and the vehicle shall be declared contraband goods, shall be seized, and shall be forfeited to the District; provided, that the following vehicles shall not be subject to forfeiture under this section:

(1) A vehicle used by a person as a common carrier in the transaction of business as a common carrier, unless it appears that the owner or other person in charge of the vehicle was a consenting party or privy to the violation on account of which the vehicle was seized.

(2) A vehicle that is subject to seizure and forfeiture under this section by reason of an act committed or omission established by the owner thereof, which act was committed or omitted by any person other than the owner while the vehicle was unlawfully in the possession of a person other than the owner, in violation of the criminal laws of the United States, the District, or any other state.

(c) All property which is seized under subsection (a) or (b) of this section shall be placed under seal or removed to a place designated by the Mayor. A libel action in the name of the District property shall be prosecuted against the property in the Superior Court of the District of Columbia by the Corporation Counsel. Unless good cause is shown to the contrary, the property shall be forfeited to the District.

(d) The property shall not be subject to replevin, but shall be deemed to be in the custody of the Mayor, subject only to the orders, decrees, and judgments of the court.

(e) Notwithstanding the provisions of this section, if the property is subject to seizure and forfeiture on account of failure to comply with the provisions of this title and the Mayor determines that the failure was excusable, the Mayor may return the property to the owner.

(f) If the Mayor determines that any property seized is liable to perish or become greatly reduced in price or value by keeping the property until the completion of forfeiture proceedings, the Mayor may:

(1) Appraise the property and return it to the owner thereof upon the payment of any tax due under this chapter and receipt of a satisfactory bond in an amount equal to the appraised value, which bond may be used to satisfy the final order, decree, or judgment of the court; or

(2) If the owner neglects or refuses to pay the tax and provide the bond, sell the property in the manner provided by the Mayor by regulation and pay the proceeds of the sale, after deducting the reasonable costs of the seizure and sale, to the court to satisfy its final order, decree, or judgment.

(g) After the final order, decree, or judgment is made, forfeited property shall be sold in the same manner as personal property seized for the payment of District taxes. The proceeds of the sale shall be deposited in the General Fund of the District of Columbia. If there is a bona fide prior lien against the forfeited property, the proceeds of the sale of the property shall be applied in the following priority:

(1) the payment of any tax due under this chapter and all expenses incident to the seizure, forfeiture, and sale of the property;

(2) the payment of the lien; and

(3) the remainder shall be deposited with the D.C. Treasurer; provided, that no payment of a lien shall be made if the lienor was a consenting party or privy to the violation of this title for which the property was seized and forfeited. To the extent necessary, liens against forfeited property shall, on good cause shown by the lienor, be transferred from the property to the proceeds of the sale of the property.

(Jan. 24, 1934, 48 Stat. 319, § 46, as added July 24, 1982, D.C. Law 4-131, § 303, 29 DCR 2418; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 26, 2001, D.C. Law 14-42, § 6(f), 48 DCR 7612.)

Prior Codifications. — 1981 Ed., § 25-911.

Effect of amendments. — D.C. Law 14-42 made nonsubstantive changes in pars. (1), (2), and (3) of subsec. (g).

Emergency legislation. — For temporary (90 day) amendment of section, see § 6(f) of Technical Amendments Emergency Act of 2001 (D.C. Act 14-108, August 3, 2001, 48 DCR 7622).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-131. — For legislative history of D.C. Law 4-131, see Historical and Statutory Notes following § 25-907.

Legislative history of Law 14-42. — For Law 14-42, see notes following § 25-120.

CASE NOTES

In general.

Alcoholic spirits remaining on retail liquor dealer's premises for more than 24 hours without having District of Columbia tax stamps affixed were properly condemned and forfeited,

even though dealer had the necessary stamps on his premises. D.C. Code 1961, §§ 25-124(c, e, i). *Apex Liquors, Inc. v. District of Columbia*, 303 F.2d 206, 1962 U.S. App. LEXIS 5068 (C.A.D.C. 1962).

CHAPTER 10. LIMITATIONS ON CONSUMERS.

Sec.	Sec.
25-1001. Drinking of alcoholic beverage in public place prohibited; intoxication prohibited.	25-1006. Prohibition on use of watercraft under certain conditions — Preliminary testing; admissibility of test results.
25-1002. Purchase, possession or consumption by persons under 21; misrepresentation of age; penalties.	25-1007. Prohibition on use of watercraft under certain conditions — Penalties.
25-1003. Prohibition on beverage storage containers in the DC Arena.	25-1008. Prima facie evidence of intoxication.
25-1004. Prohibition on use of watercraft under certain conditions.	25-1009. Operation of locomotive, streetcar, elevator, or horse-drawn vehicle by intoxicated person prohibited.
25-1005. Prohibition on use of watercraft under certain conditions — consent to testing.	

§ 25-1001. Drinking of alcoholic beverage in public place prohibited; intoxication prohibited.

(a) Except as provided in subsections (b) and (c) of this section, no person in the District shall drink an alcoholic beverage or possess in an open container an alcoholic beverage in or upon any of the following places:

- (1) A street, alley, park, sidewalk, or parking area;
- (2) A vehicle in or upon any street, alley, park, or parking area;
- (3) A premises not licensed under this title where food or nonalcoholic beverages are sold or entertainment is provided for compensation;
- (4) Any place to which the public is invited and for which a license to sell alcoholic beverages has not been issued under this title;
- (5) Any place to which the public is invited for which a license to sell alcoholic beverages has been issued under this title at a time when the sale of alcoholic beverages on the premises is prohibited by this title or by the regulations promulgated under this title; or
- (6) Any place licensed under a club license at a time when the consumption of the alcoholic beverages on the premises is prohibited by this title or by regulations promulgated under this title.

(b) Subsection (a)(1) of this section shall not apply if drinking or possession of an alcoholic beverage occurs:

- (1) In or on a structure which projects upon the parking, and which is an integral, structural part, of a private residence, such as a front porch, terrace, bay window, or vault; and
- (2) By, or with the permission of, the owner or resident.

(c) No person, whether in or on public or private property, shall be intoxicated and endanger the safety of himself, herself, or any other person or property.

(d) Any person violating the provisions of subsection (a) or (c) of this section shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than \$500, or imprisoned for not more than 90 days, or both.

(e) Any person in the District who is intoxicated in public and who is not conducting himself or herself in such manner as to endanger the safety of himself, herself, or of any other person or of property shall be treated in accordance with Chapter 6 of Title 24.

(Jan. 24, 1934, 48 Stat. 333, ch. 4, § 28; Aug. 27, 1935, 49 Stat. 901, 902, ch. 756, §§ 13, 14; June 29, 1953, 67 Stat. 104, ch. 159, § 404(h); Aug. 3, 1968, 82 Stat. 618, Pub. L. 90-452, § 2(a); Sept. 29, 1982, D.C. Law 4-157, § 13, 29 DCR 3617; Dec. 3, 1985, D.C. Law 6-64, § 2, 32 DCR 5970; Mar. 26, 1999, D.C. Law 12-206, § 2(b), 45 DCR 8430; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-128. 1973 Ed., § 25-128.

Temporary Amendment of Section. — Section 2(c) of D.C. Law 12-48, in (a), designated the existing text as (1) and added a new (2) to read as follows:

“(2) No person shall bring, or have in his or her possession, anywhere on the premises of the DC Arena, including space referred to in § 25-111(a) (7) (G-1), any container used to hold or store beverages or liquids of any kind, including, but not limited to, bottles and cans. This section shall not apply to a person duly authorized or licensed by the Board to possess, sell, give away, transport, or store alcoholic beverages or containers on the premises of the DC Arena, or to any employee or agency acting for any such duly authorized or licensed person, or to any container provided on the premises of the DC Arena by the lessee or its concessionaires and tenants.”

Section 5(b) of D.C. Law 12-48 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary amendment of section, see § 2(c) of the Alcoholic Beverage Control DC Arena Emergency Amendment Act of 1997 (D.C. Act 12-121, August 1, 1997, 44 DCR 4645), § 2(c) of the

Alcoholic Beverage Control DC Arena Legislative Review Emergency Amendment Act of 1997 (D.C. Act 12-174, October 30, 1997, 44 DCR 6915), and § 2(c) of the Alcoholic Beverage Control DC Arena Congressional Recess Emergency Amendment Act of 1998 (D.C. Act 12-290, February 27, 1998, 45 DCR 1749).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 4-157. — For legislative history of D.C. Law 4-157, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 6-64. — Law 6-64, the “Ban on Possession of Open Alcoholic Beverage Containers Act of 1985,” was introduced in Council and assigned Bill No. 6-185, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on September 10, 1985, and September 24, 1985, respectively. Signed by the Mayor on October 9, 1985, it was assigned Act No. 6-87 and transmitted to both Houses of Congress for its review.

Legislative history of Law 12-48. — For legislative history of D.C. Law 12-48, see Historical and Statutory Notes following § 25-101.

Legislative history of Law 12-206. — For legislative history of D.C. Law 12-206, see Historical and Statutory Notes following § 25-101.

CASE NOTES

ANALYSIS

Capacity to commit and responsibility.

Construction with other laws.

Defenses.

Nature and elements of offense.

Questions of law or fact.

Relation to other crimes.

Sentence and punishment.

Sufficiency of evidence.

Treatment and rehabilitation.

Warrantless arrest or search.

Capacity to commit and responsibility.

Where defendant was convicted of public intoxication, an offense requiring no specific intent, and it was neither argued nor shown that defendant's alcoholic condition had resulted in insanity, his alcoholism per se did not vitiate his criminal responsibility for being in-

toxicated in public place. D.C. Code 1961, § 25-128(a). *Easter v. District of Columbia*, 209 A.2d 625, 1965 D.C. App. LEXIS 184 (App. 1965), reversed by 361 F.2d 50, 124 U.S. App. D.C. 33, 1966 U.S. App. LEXIS 6670 (1966).

Statute providing that trial judge, in any criminal case where evidence indicates that defendant is chronic alcoholic, may suspend proceedings and order hearing to determine whether defendant is chronic alcoholic, and if after hearing it is so determined, court may direct that defendant be committed to clinic for treatment and rehabilitation, did not abrogate common-law rules regarding criminal responsibility of chronic alcoholics nor cancel prohibition by statute of drunkenness in public. D.C. Code 1961, §§ 24-501 et seq., 25-128(a). *Easter v. District of Columbia*, 209 A.2d 625, 1965 D.C. App. LEXIS 184 (App. 1965), reversed by 361

F.2d 50, 124 U.S. App. D.C. 33, 1966 U.S. App. LEXIS 6670 (1966).

Construction with other laws.

Statutory language "other serious traffic or misdemeanor offenses," as used in Victims of Violent Crime Compensation Act of 1996 (VVCA) imposing assessment of \$50-\$250, applied to all misdemeanors, rather than just to "serious" misdemeanors, and included misdemeanor of drinking in public; words "other serious" modified only traffic offenses, as word "or" which separated "traffic" from "misdemeanor" was disjunctive and established relationship of contrast. D.C. Code 1981, § 3-436. Parrish v. District of Columbia, 718 A.2d 133, 1998 D.C. App. LEXIS 175 (1998).

The general authority of court under earlier general statutes to order commitment of defendant defaulting in payment of fine is not limited by later special statute authorizing \$100 fine or 30 days imprisonment or both for drunkenness in specified places, and court could sentence defendant convicted of drunkenness in public park to 150 days confinement in default of payment of \$75 fine, and the mere fact that alternative imprisonment exceeded term which could have been imposed on defendant as primary sentence did not make alternative sentence invalid. Code 1940, §§ 11-606, 11-616, 25-128(b). Peeples v. District of Columbia, 75 A.2d 845, 1950 D.C. App. LEXIS 172 (Cr.App. 1950).

Defenses.

Chronic alcoholism is defense to charge of public intoxication and is not itself a crime. D.C. Code 1961, §§ 24-501 et seq., 25-128 and (a). Easter v. District of Columbia, 361 F.2d 50, 1966 U.S. App. LEXIS 6670 (C.A.D.C. 1966).

Chronic alcoholism resulting in public intoxication cannot be held to be criminal on theory that before sickness became chronic there was in some earlier period a voluntary act or series of acts which led to chronic condition. D.C. Code 1961, §§ 24-501 et seq., 25-128 and (a). Easter v. District of Columbia, 361 F.2d 50, 1966 U.S. App. LEXIS 6670 (C.A.D.C. 1966).

Nature and elements of offense.

Statute prohibiting drinking of alcoholic beverages or possession of open containers of alcoholic beverages "in any street" applies to sidewalks as well as to roadways. D.C. Code 1981, § 25-128(a). Alvarez v. United States, 576 A.2d 713, 1990 D.C. App. LEXIS 138 (1990), writ of certiorari denied by 498 U.S. 875, 111 S. Ct. 203, 112 L. Ed. 2d 164, 1990 U.S. LEXIS 4604, 59 U.S.L.W. 3249 (1990).

Questions of law or fact.

Whether defendant, charged with assault, public intoxication and disorderly conduct in violation of District of Columbia Code, had

mental disease which should have excused him from criminal responsibility was issue of ultimate fact for trier thereof. D.C. Code §§ 22-504, 22-1107, 25-128. Dempsey v. United States, 251 A.2d 650, 1969 D.C. App. LEXIS 230 (App. 1969).

Weight to be given testimony of witnesses who related that conduct of defendant at time of alleged assault, public intoxication and disorderly conduct, in violation of District of Columbia Code, and shortly thereafter was bizarre and weight to be given testimony of government witness who related that defendant was intoxicated at time of alleged offenses and that assault was triggered by refusal to serve him beer was for trier of fact. D.C. Code §§ 22-504, 22-1107, 25-128. Dempsey v. United States, 251 A.2d 650, 1969 D.C. App. LEXIS 230 (App. 1969).

Relation to other crimes.

Former federal prisoners did not by misconduct or neglect cause or bring about their own first degree murder prosecutions, or accessories to first degree murder prosecutions, and thus were not barred from certificate of innocence under Unjust Conviction Act, by being drunk in public, driving after consuming large quantity of alcohol, concealment of unused knives, and reliance on Fifth Amendment rights to silence, since that conduct was unrelated to actual crime charged. Eastridge v. United States, 602 F.Supp.2d 66, 2009 U.S. Dist. LEXIS 40628 (2009), affirmed sub nomine Diamen v. United States, 604 F.3d 653, 390 U.S. App. D.C. 345, 2010 U.S. App. LEXIS 10066 (2010).

Sentence and punishment.

Trial judge may impose fine, on conviction for intoxication on public street, at his discretion according to facts of each case, based in part upon violator's prior record, if any. Coleman v. District of Columbia, 203 A.2d 918, 1964 D.C. App. LEXIS 286 (App. 1964).

Sufficiency of evidence.

Expert medical and psychiatric evidence established that defendant charged with public intoxication was chronic alcoholic who had lost control over his use of alcoholic beverages. D.C. Code 1961, §§ 24-501 et seq., 25-128 and (a). Easter v. District of Columbia, 361 F.2d 50, 1966 U.S. App. LEXIS 6670 (C.A.D.C. 1966).

Evidence was sufficient to support conviction of possession of an open container of alcohol in a vehicle (POCA-V), even in the absence of a chemical test of liquid in glass jar that allegedly contained alcohol, where police officer observed and smelled liquid and recognized, based on his experience, distinctive smell of vodka emanating from clear liquid inside glass jar found next to defendant, smell of alcohol emanated from defendant, as well as from car in which jar was located, and defendant, who was asleep in front

seat of vehicle parked in parking lot, appeared to be intoxicated at time jar was found next to her in car. *Derosiers v. District of Columbia*, 19 A.3d 796, 2011 D.C. App. LEXIS 242 (2011).

Officer's observation of bottle of cognac in motorist's vehicle, with the seal removed and with partial consumption of its contents, provided probable cause to arrest motorist for possession of an open container of alcohol (POCA). *Bean v. United States*, 17 A.3d 635, 2011 D.C. App. LEXIS 159 (2011).

In prosecution for intoxication, evidence was insufficient to support trial judge's finding that defendant was not guilty because of insanity. D.C. Code 1951, §§ 24-301(a, b), 25-128. *Williams v. District of Columbia*, 147 A.2d 773, 1959 D.C. App. LEXIS 222 (Cr.App. 1959).

Treatment and rehabilitation.

Defendant who is determined to be chronic alcoholic may in judge's discretion be committed for treatment or he may be released, but he may not be punished. D.C. Code 1961, §§ 24-501 et seq., 25-128 and (a). *Easter v. District of Columbia*, 361 F.2d 50, 1966 U.S. App. LEXIS 6670 (C.A.D.C. 1966).

In view of past history of seven or eight unsuccessful referrals of defendant to clinic for rehabilitation for alcoholism, it was not an abuse of discretion for trial judge to decline to again refer him for that purpose. D.C. Code 1961, §§ 24-501 et seq., 25-128(a). *Easter v. District of Columbia*, 209 A.2d 625, 1965 D.C. App. LEXIS 184 (App. 1965), reversed by 361 F.2d 50, 124 U.S. App. D.C. 33, 1966 U.S. App. LEXIS 6670 (1966).

A chronic alcoholic, when charged with any misdemeanor other than a charge of public intoxication under this section, may voluntarily request civil commitment in lieu of criminal prosecution for such misdemeanor; and the court may, on its own initiative, civilly commit a chronic alcoholic who has been charged with a violation of this section. *United States of Am. v. Lewis*, 123 WLR 245 (Super. Ct. 1994).

Warrantless arrest or search.

Officer had a reasonable suspicion supported by articulable facts to make a Terry stop in order to investigate whether or not defendant was drinking alcoholic beverages in a public place in violation of District of Columbia law; about 20 people were outside in residential neighborhood, there appeared to be a party atmosphere, defendant was carrying large white styrofoam cup in his hand and brown paper bag under his arm, when five or six officers exited two cars the group began to disperse in other direction from officers, and

defendant voluntarily stated to officer "I ain't doing nothing. I'm just drinking." *United States v. Jones*, 584 F.3d 1083, 2009 U.S. App. LEXIS 23359 (C.A.D.C. 2009), writ of certiorari denied by 130 S. Ct. 2081, 176 L. Ed. 2d 428, 2010 U.S. LEXIS 2894, 78 U.S.L.W. 3565 (U.S. 2010).

Local narcotics officer had authority extended by statute to police officers generally to make arrest without warrant of person committing offense in his presence of drinking alcoholic beverage in public place. D.C. Code 1961, §§ 4-140, 25-128. *Hutcherson v. United States*, 345 F.2d 964, 1965 U.S. App. LEXIS 6198 (C.A.D.C. 1965), writ of certiorari denied by 382 U.S. 894, 86 S. Ct. 188, 15 L. Ed. 2d 151, 1965 U.S. LEXIS 427 (1965).

Officer who observed man in alley drinking from bottle labeled wine had probable cause for arrest without warrant for offense of drinking alcoholic beverage in alley. D.C. Code 1961, § 25-128. *Hutcherson v. United States*, 345 F.2d 964, 1965 U.S. App. LEXIS 6198 (C.A.D.C. 1965), writ of certiorari denied by 382 U.S. 894, 86 S. Ct. 188, 15 L. Ed. 2d 151, 1965 U.S. LEXIS 427 (1965).

Police officer's search of person lawfully arrested for drinking alcoholic beverage in alley wherein heroin was discovered in belt under shirt was justified by lawful arrest and by admission of person arrested that he had weapon which he seemed to be about to reach for under his clothing. D.C. Code 1961, § 25-128; 26 U.S.C. (I.R.C.1954) § 4704(a); Narcotic Drugs Import and Export Act, § 2(c, f), 21 U.S.C. § 174. *Hutcherson v. United States*, 345 F.2d 964, 1965 U.S. App. LEXIS 6198 (C.A.D.C. 1965), writ of certiorari denied by 382 U.S. 894, 86 S. Ct. 188, 15 L. Ed. 2d 151, 1965 U.S. LEXIS 427 (1965).

Police officer's search of defendant on street was not justified on ground that officer could have arrested defendant for being in possession of open container of alcohol; officer's observation of brown paper bag containing gold top can within arms reach in front of defendant was insufficient to warrant arrest for this offense, and officer admitted that he had no intention of arresting defendant for this alleged offense. U.S. Const. Amend. 4; D.C. Code 1981, § 25-128. *United States v. Howard*, 984 F. Supp. 31, 1997 U.S. Dist. LEXIS 19887 (1997).

Police had probable cause to arrest defendant for violating the open container law in their presence, based on his proximity as a front seat passenger in an automobile to an open can of malt liquor lying next to him in plain sight on the center console of the vehicle. *Perkins v. United States*, 936 A.2d 303, 2007 D.C. App. LEXIS 561 (2007).

§ 25-1002. Purchase, possession or consumption by persons under 21; misrepresentation of age; penalties.

(a) No person who is under 21 years of age shall purchase, attempt to purchase, possess, or drink an alcoholic beverage in the District, except as provided under subchapter IX of Chapter 7.

(b)(1) No person shall falsely represent his or her age, or possess or present as proof of age an identification document which is in any way fraudulent, for the purpose of purchasing, possessing, or drinking an alcoholic beverage in the District.

(2) No person shall present a fraudulent identification document for the purpose of entering an establishment possessing an on-premises retailer's license, an Arena C/X license, or a temporary license.

(3) For the purpose of determining valid representation of age, each person shall be required to present to the establishment owner or representative at least one form of valid identification, which shall have been issued by an agency of government (local, state, federal, or foreign) and shall contain the name, date of birth, signature, and photograph of the individual.

(c)(1) Except as provided in paragraph (4)(D) of this subsection, any person who violates any provision of this section shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine and suspension of driving privileges as follows:

(A) Upon the first violation, a fine of not more than \$300 and suspension of driving privileges in the District for 90 consecutive days;

(B) Upon the second violation, a fine of not more than \$600 and suspension of driving privileges in the District for 180 days; and

(C) Upon the third and each subsequent violation, a fine of not more than \$1,000 and suspension of driving privileges in the District for one year.

(2) In lieu of proceeding to trial or disposition under paragraph (1) of this subsection, the Mayor shall offer persons who are arrested, or criminally charged by information, for a first or second violation of this section, the option of completing a diversion program authorized and approved by the Mayor. The Mayor shall determine the content of the diversion program, which may include community service and alcohol awareness and education. If the person rejects enrollment in, or fails to comply with the requirements of, or fails to complete within 6 months, the diversion program, he or she may continue to be prosecuted in accordance with paragraph (1) of this section [subsection]. The Mayor, may, at his discretion, decline to offer diversion to any person who has previously been convicted of, any felony, misdemeanor, or other criminal offense.

(3) As a condition to acceptance into a diversion program, the Mayor may request that the person agree to pay the District, or its agents, a reasonable fee, as established by rule, for the costs to the District of the person's participation in the program; provided, that:

(A) The fee shall not unreasonably discourage persons from entering the diversion program; and

(B) The Mayor may reduce or waive the fee if the Mayor finds that the person is indigent.

(4)(A) Upon the expiration of 6 months following the date of a conviction or a dismissal of a proceeding, or upon the expiration of 6 months following the date of arrest if no information was filed, any person who was arrested for, or criminally charged by information with, any offense under this section may petition the court for an order expunging from the official records all records relating to the arrest, information, trial, conviction, or dismissal of the person; provided, that a nonpublic record shall be retained by the court and the Mayor solely for the purposes of conducting a criminal record check for persons applying for a position as a law enforcement officer or determining whether a person has previously received an expungement under this subsection.

(B) The court shall grant the petition described in subparagraph (A) of this paragraph if the petitioner has no pending charges for and has not been convicted of, any other felony, misdemeanor, or other criminal offense and if any fine imposed as a result of a conviction under this section has been paid; provided, that the court may grant the petition described in subparagraph (A) of this paragraph if, other than a conviction for a misdemeanor under this section, the petitioner has no pending charges for, and has not been convicted of, any felony, misdemeanor, or other criminal offense.

(C) Except as provided by this subsection, the effect of an expungement order shall be to lawfully restore the person receiving the expungement to the status he or she occupied before the arrest or information described in subparagraph (A) of this paragraph. No person for whom an expungement order permitted by this subsection has been entered may be held thereafter, under any provision of law, to be guilty of perjury or otherwise giving a false statement by failing to recite or acknowledge such arrest, information, trial, conviction, or dismissal for which the order permitted by this paragraph has been entered. The expungement of such records shall not relieve the person of the obligation to disclose such arrest, information, trial, conviction, or dismissal in response to a direct questionnaire or application for a position as a law enforcement officer.

(D) No person under the age of 21 shall be criminally charged with the offense of possession or drinking an alcoholic beverage under this section, but shall be subject to civil penalties under subsection (e) of this section.

(6) Failure to pay the fines set forth in paragraph (1) of this subsection shall result in imprisonment for a period not exceeding 30 days.

(7) The Metropolitan Police Department may enforce provisions of this section by issuing to a person alleged to have violated this section a citation under § 23-1110(b)(1). The person shall not be eligible to forfeit collateral.

(d) Repealed.

(e)(1) In lieu of criminal prosecution as provided in subsection (c) of this section, a person who violates any provision of this section shall be subject to the following civil penalties:

(A) Upon the first violation, a fine of not more than \$300 and the suspension of driving privileges in the District for 90 consecutive days;

(B) Upon the second violation, a fine of not more than \$600 and the suspension of driving privileges in the District for 180 days; and

(C) Upon the third or subsequent violation, a fine of not more than \$1,000 and the suspension of driving privileges in the District for one year.

(2) ABRA inspectors or officers of the Metropolitan Police Department may enforce the provisions of this subsection by issuing a notice of civil infraction for a violation of subsections (a) and (b) of this section in accordance with Chapter 18 of Title 2. A violation of this subsection shall be adjudicated under Chapter 18 of Title 2.

(3)(A) In lieu of or in addition to the civil penalties provided under paragraph (1) of this subsection, as a civil penalty, the Mayor may require any person who violates any provision of this section to complete a diversion program authorized and approved by the Mayor. The Mayor shall determine the content of the diversion program, which may include community service, and alcohol awareness and education.

(B) As a condition to acceptance into a diversion program, the Mayor may request that the person agree to pay the District, or its agents, a reasonable fee, as established by rule, for the costs to the District of the person's participation in the program; provided, that:

(i) The fee shall not unreasonably discourage persons from entering the diversion program; and

(ii) The Mayor may reduce or waive the fee if the Mayor finds that the person is indigent.

(Jan. 24, 1934, 48 Stat. 335, ch. 4, § 30; Feb. 24, 1987, D.C. Law 6-178, § 2(c), 33 DCR 7654; Sept. 11, 1993, D.C. Law 10-12, § 2(d), 40 DCR 4020; May 24, 1994, D.C. Law 10-122, § 2(j), 41 DCR 1658; Apr. 9, 1997, D.C. Law 11-187, § 2, 43 DCR 4515; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 26, 2001, D.C. Law 14-42, § 6(g), 48 DCR 7612; Sept. 30, 2004, D.C. Law 15-187, § 101(gg), 51 DCR 6525; Mar. 16, 2005, D.C. Law 15-220, § 2, 51 DCR 9603; Mar. 25, 2009, D.C. Law 17-353, § 189, 56 DCR 1117.)

Prior Codifications. — 1981 Ed., § 25-1002.

1973 Ed., § 25-130.

Effect of amendments. — D.C. Law 14-42 validated the previously made technical correction in subsec. (e)(2).

D.C. Law 15-187 designated the existing text of subsec. (c) as subsection (c)(1); and added par. (2) of subsec. (c).

D.C. Law 15-220 rewrote subsecs. (c) and (e), and repealed subsec. (d), which had read:

"(c)(1) Any person under 21 years of age who falsely represents his or her age for the purpose of purchasing, possessing, or drinking an alcoholic beverage shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined for each offense not more than \$300; provided, that in default in the payment of the fine, the person shall be imprisoned for a period not exceeding 30 days.

"(2) Officers of the Metropolitan Police Department may enforce provisions of this section by issuing to a person alleged to have violated this section a citation under § 23-1110(b)(1).

The person shall not be eligible to forfeit collateral.

"(d) In addition to the penalties provided in subsection (c) of this section, any person who violates any provision of this section shall be subject to the following penalties:

"(1) Upon the first violation, his or her driving privileges in the District shall be suspended for 90 consecutive days;

"(2) Upon the second violation, his or her driving privileges in the District shall be suspended for 180 days; and

"(3) Upon the third violation and each subsequent violation, his or her driving privileges in the District shall be suspended for one year."

"(e)(1) As an alternative sanction to the misdemeanor penalties provided in subsection (c) of this section, a person who violates subsection (a) or (b) of this section shall be subject to the following civil penalties:

"(A) Upon the first violation, a penalty of \$300;

"(B) Upon the second violation, a penalty of \$600; and

“(C) Upon the third and subsequent violations, a penalty of \$1,000 and the suspension of his or her driving privileges in the District for one year.

“(2) ABRA inspectors or officers of the Metropolitan Police Department may enforce the provisions of this subsection by issuing a notice of civil infraction for a violation of subsections (a) or (b) of this section in accordance with Chapter 18 of Title 2. A violation of this subsection shall be adjudicated under Chapter 18 of Title 2.”

D.C. Law 17-353, in subsec. (c)(4)(C), substituted “this paragraph” for “paragraph (4) of this paragraph”.

Temporary Amendment of Section. — Section 2 of D.C. Law 13-165 rewrote subsec. (b), and added subsecs. (d) and (e), to read as follows:

“(b)(1) No person shall falsely represent his or her age, or possess or present as proof of age an identification document which is in any way fraudulent, for the purpose of procuring or consuming an alcoholic beverage in the District.

“(2) No person shall present a fraudulent identification document for the purpose of entering a class C or D licensed ABC establishment in the District.

“(3) For the purposes of determining valid representation of age, each person shall be required to present to the ABC licensed establishment owner or representative at least one form of valid identification, which shall have been issued by an agency of government (local, state, federal, or foreign) and shall contain the name, date of birth, signature, and photograph of the individual.”

“(d)(1) As an alternative sanction to the misdemeanor penalties provided in subsection (b)(1) of this section, any person who violates subsection (b)(1) or (b)(2) of this section shall be subject to the following civil penalties:

“(A) Upon the first violation, a penalty of \$300;

“(B) Upon the second violation, a penalty of \$600; and

“(C) Upon the third and subsequent violations, a penalty of \$1,000 and the suspension of his or her driving privileges in the District for one year.

“(2) ABC inspectors or officers of the Metropolitan Police Department may enforce the provisions of this subsection by issuing a notice of civil infraction for a violation of subsection (b)(1) or (b)(2) of this section, pursuant to the Civil Infractions Act. Adjudication of any infraction of this subsection shall be pursuant to the Civil Infractions Act.”

“(e) The Board shall, within 60 days of the effective date of the Underage Drinking Emergency Amendment Act of 2000, promulgate regulations for the implementation and adminis-

tration of the provisions of the Underage Drinking Emergency Amendment Act of 2000.”.

Section 5(b) of Law 13-165 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90-day) amendment of section, see § 2(d) of the Underage Drinking Emergency Amendment Act of 1994 (D.C. Act 10-236, April 28, 1994, 41 DCR 2601).

For temporary (90-day) amendment of section, see § 2 of the Underage Drinking Emergency Amendment Act of 2000 (D.C. Act 13-351, June 5, 2000, 47 DCR 5028).

For temporary (90-day) amendment of section, see § 2 of the Underage Drinking Congressional Review Emergency Amendment Act of 2000 (D.C. Act 13-412, August 14, 2000, 47 DCR 7287).

For temporary (90 day) amendment of section, see § 6(g) of Technical Amendments Emergency Act of 2001 (D.C. Act 14-108, August 3,

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 6-178. — For legislative history of D.C. Law 6-178, see Historical and Statutory Notes following § 25-781.

Legislative history of Law 10-12. — For legislative history of D.C. Law 10-12, see Historical and Statutory Notes following § 25-753.

Legislative history of Law 10-122. — For legislative history of D.C. Law 10-122, see Historical and Statutory Notes following § 25-785.

Legislative history of Law 11-187. — Law 11-187, the “Alcoholic Beverage Underage Penalties Amendment Act of 1996,” was introduced in Council and assigned Bill No. 11-606, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on June 19, 1996, and July 3, 1996, respectively. Signed by the Mayor on July 22, 1996, it was assigned Act No. 11-340 and transmitted to both Houses of Congress for its review. D.C. Law 11-187 became effective on April 9, 1997.

Legislative history of Law 14-42. — For Law 14-42, see notes following § 25-120.

Legislative history of Law 15-187. — For Law 15-187, see notes following § 25-101.

Legislative history of Law 15-220. — Law 15-220, the “Alcoholic Beverage Penalty Act of 2004,” was introduced in Council and assigned Bill No. 15-823, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on July 13, 2004, and September 21, 2004, respectively. Signed by the Mayor on October 4, 2004, it was assigned Act No. 15-529 and transmitted to both Houses of Congress for its review. D.C. Law 15-220 became effective on March 16, 2005.

Legislative history of Law 17-353. — For Law 17-353, see notes following § 25-113.

CASE NOTES

Penalty under prior law.

The suspension of driving privileges for violations of the Alcoholic Beverage Control Act by underage persons who possess or consume alcohol, or who lie about their age in order to do so, is a civil, rather than a criminal, sanction. *Cass v. District of Columbia*, 829 A.2d 480, 2003 D.C. App. LEXIS 487 (2003), amended by 2003 D.C. App. LEXIS 616 (D.C. Oct. 6, 2003).

The possession of an alcoholic beverage by a person under 21 is punishable only by a civil fine and suspension of driving privileges. *Cass v. District of Columbia*, 829 A.2d 480, 2003 D.C. App. LEXIS 487 (2003), amended by 2003 D.C. App. LEXIS 616 (D.C. Oct. 6, 2003).

Residual misdemeanor penalties in section of Alcoholic Beverage Control Act apply to underage possession of an alcoholic beverage, thus making that act a misdemeanor offense, though section defining that violation imposes civil penalty of suspending driver's license, and though the residual misdemeanor penalties are available only when provision defining the substantive offense does not specify applicable penalty, as section defining underage possession provides that the penalties it sets forth are

imposed in addition to the residual penalties. D.C. Code 1981, §§ 25-130(a), (c)(1), 25-132(a). *District of Columbia v. Morrissey*, 668 A.2d 792, 1995 D.C. App. LEXIS 245 (1995).

Rule of lenity was not implicated by interplay of section of Alcoholic Beverage Control Act defining offense of underage possession and section of same Act setting forth residual misdemeanor penalties, such as to make person convicted of underage possession subject only to suspension of driver's license and not to harsher residual penalties of imprisonment for up to one year and a fine of up to \$1,000, where such a construction would render superfluous and ineffective the reference in section defining that offense to applicability of these harsher penalties. D.C. Code 1981, §§ 25-130(a), (c)(1), 25-132(a); § 25-130(b) (1992). *District of Columbia v. Morrissey*, 668 A.2d 792, 1995 D.C. App. LEXIS 245 (1995).

Possession of alcohol by a person under the age of 21, in violation of the Alcoholic Beverage Control (ABC) Act, was not a criminal offense; conduct was punishable only by a civil fine and suspension of driving privileges. *D.C. v. Agin, et al.*, 132 WLR 1429 (Super. Ct. 2004).

§ 25-1003. Prohibition on beverage storage containers in the DC Arena.

(a) No person shall bring, or have in his or her possession, anywhere on the premises of the DC Arena, including space referred to in section § 25-114, a container used to hold or store beverages or liquids of any kind, including bottles and cans.

(b) This section shall not apply to a person licensed by the Board to possess, sell, give away, transport, or store alcoholic beverages or containers on the premises of the DC Arena; to an employee or agency acting for any such duly authorized or licensed person; or to a container provided on the premises of the DC Arena by the lessee or its concessionaires and tenants.

(Jan. 24, 1934, 48 Stat. 319, Ch. 4, § 28a, as added Mar. 26, 1999, D.C. Law 12-202, § 2(c), 45 DCR 8412; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-1003.

Emergency legislation. — For temporary (90-day) addition of section, see § 2(c) of the Alcoholic Beverage Control DC Arena Emergency Amendment Act of 1998 (D.C. Act 12-478, October 28, 1998, 45 DCR 8010) and § 2(c) of the Alcoholic Beverage Control DC Arena Sec-

ond Emergency Act of 1998 (D.C. Act 12-551, December 24, 1998, 45 DCR 517).

For temporary (90-day) amendment of § 5 of the Alcoholic Beverage Control DC Arena Second Emergency Amendment Act of 1998 (D.C. Act 12-551, December 24, 1998, 45 DCR 517), see § 3 of the Omnibus Regulatory Reform and Alcoholic Beverage Control DC Arena Clarify-

ing Emergency Amendment Act of 1999 (D.C. Act 13-1, January 29, 1999, 46 DCR 2284).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 12-202. — Law 12-202, the “Alcoholic Beverage Control DC Arena Amendment Act of 1998,” was introduced in Council and assigned Bill No. 12-294, which was referred to the Committee on Consumer

and Regulatory Affairs. The Bill was adopted on first and second readings on July 7, 1998, and September 22, 1998, respectively. Signed by the Mayor on October 13, 1998, it was assigned Act No. 12-488 and transmitted to both Houses of Congress for its review. D.C. Law 12-202 became effective on March 26, 1999.

§ 25-1004. Prohibition on use of watercraft under certain conditions.

(a) No person shall operate or be in physical control of any vessel or watercraft, including water skis, aquaplane, sailboard, personal watercraft, or similar device in the District, if:

(1) The person’s alcohol concentration is 0.08 grams or more either per 100 milliliters of blood or per 210 liters of breath or is 0.10 grams or more per 100 milliliters of urine; or

(2) [Repealed].

(3) The person is under the influence of intoxicating liquor or any controlled substance or a combination thereof.

(b) A person under 21 years of age shall not operate or be in physical control of any vessel or watercraft, including water skis, aquaplane, sailboard, personal watercraft, or a similar device in the District if the person’s blood, breath, or urine contains any measurable amount of alcohol.

(c) No person shall operate or be in physical control of any vessel or watercraft while the person is impaired by the consumption of intoxicating liquor.

(d) For the purposes of this section and §§ 25-1005 through 25-1007, the term “controlled substance” has the same meaning as set forth in § 48-901.02(4).

(e) The Harbor Master shall be directly responsible for enforcing this section and shall ensure that the public is made aware of the District’s aggressive enforcement policy through a continual public awareness campaign.

(Apr. 9, 1997, D.C. Law 11-248, §§ 2, 7, 44 DCR 1242; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Mar. 2, 2007, D.C. Law 16-195, § 3(a), 53 DCR 8675.)

Prior Codifications. — 1981 Ed., § 25-1004.

Effect of amendments. — D.C. Law 16-195, in subsec. (a), rewrote par. (1) and repealed par. (2).

Temporary Addition of Section. — Section 2 of D.C. Law 11-201 added §§ 25-127.1 through 25-127.6.

Section 10(b) of D.C. Law 11-201 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90-day) addition of §§ 25-127.1 through 25-127.6, see § 2-7 of the Boating While Intoxi-

cated Emergency Act of 1996 (D.C. Act 11-346, August 8, 1996, 43 DCR 4621), § 2-7 of the Boating While Intoxicated Congressional Review Emergency Act of 1996 (D.C. Act 11-411, October 28, 1996, 43 DCR 6063) and §§ 2-7 of the Boating While Intoxicated Second Congressional Review Emergency Act of 1996 (D.C. Act 11-469, December 30, 1996, 44 DCR 179).

For temporary (90 day) amendment of section, see § 3(a) of Anti-Drunk Driving Clarification Emergency Amendment Act of 2006 (D.C. Act 16-469, July 31, 2006, 53 DCR 6764).

For temporary (90 day) amendment of section, see § 3(a) of Anti-Drunk Driving Clarifi-

cation Second Congressional Review Emergency Amendment Act of 2006 (D.C. Act 16-518, October 27, 2006, 53 DCR 9104).

For temporary (90 day) amendment of section, see § 3(a) of Anti-Drunk Driving Clarification Congressional Review Emergency Amendment Act of 2007 (D.C. Act 17-6, January 16, 2007, 54 DCR 1452).

For temporary (90 day) repeal of section, see § 302 of Comprehensive Impaired Driving and Alcohol Testing Program Emergency Amendment Act of 2012 (D.C. Act 19-429, July 30, 2012, 59 DCR 9387).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 11-201. — Law 11-201, the “Boating While Intoxicated Temporary Act of 1996,” was introduced in Council and assigned Bill No. 11-804. The Bill was adopted on first and second readings on July 3, 1996, and July 17, 1996, respectively. Signed by the Mayor on July 26, 1996, it was assigned Act No. 11-364 and transmitted to both Houses of Congress for its review. D.C. Law 11-201 became effective on April 9, 1997.

Legislative history of Law 11-248. — Law 11-248, the “Boating While Intoxicated Act of 1996,” was introduced in Council and assigned Bill No. 11-567, which was referred to the Committee on Public Works and the Environment. The Bill was adopted in first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-511 and transmitted to both Houses of Congress for its review. D.C. Law 11-248 became effective on April 9, 1997.

Legislative history of Law 16-195. — Law 16-195, the “Anti-Drunk Driving Clarification Amendment Act of 2006,” was introduced in Council and assigned Bill No. 16-463, which was referred to the Committee on Public Works and Environment. The Bill was adopted on first and second readings on July 11, 2006, and October 3, 2006, respectively. Signed by the Mayor on October 18, 2006, it was assigned Act No. 16-488 and transmitted to both Houses of Congress for its review. D.C. Law 16-195 became effective on March 2, 2007.

§ 25-1005. Prohibition on use of watercraft under certain conditions — consent to testing.

(a) If there is a reasonable suspicion to believe that the person is operating or in physical control of any vessel or watercraft while under the influence of, or intoxicated by, alcohol or a controlled substance, he or she shall be deemed to have given consent for 2 chemical tests of the person’s blood, urine, or breath for the purpose of determining the person’s blood-alcohol or drug content. If a person refuses to submit to a chemical test under this section, the Superior Court of the District of Columbia shall order the person not to operate any vessel or watercraft for at least one year.

(b) The arresting police officer or any other appropriate law enforcement official shall elect which chemical test shall be administered to the person; provided, that the person may object to a particular test on valid religious or medical grounds.

(c) The test shall be administered at the direction of a police officer or other appropriate law enforcement official.

(d) Chemical tests shall be performed on all operators involved in a fatal accident. If a person who operates or is in physical control of any vessel or watercraft is declared dead by competent authority, the person shall be deemed to have given his or her consent to chemical tests as soon as practical after the death has been declared to be the result of a fatal accident.

(e) The refusal to submit to either of the 2 tests required in this section shall be admissible in any civil or criminal proceeding arising as a result of the acts alleged to have been committed by the person before the arrest. A refusal to submit to any test as required by this section shall constitute a misdemeanor and, upon conviction, shall be punished by a \$500 fine, imprisonment of 90 days, or both.

(Apr. 9, 1997, D.C. Law 11-248, §§ 3, 7, 44 DCR 1242; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-1005.

Temporary Addition of Section. — See Historical and Statutory Notes following § 25-1004.

Emergency legislation. — For temporary (90-day) addition of section, see Historical and Statutory Notes following § 25-1004.

For temporary (90 day) repeal of section, see § 302 of Comprehensive Impaired Driving and Alcohol Testing Program Emergency Amendment Act of 2012 (D.C. Act 19-429, July 30, 2012, 59 DCR 9387).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 11-201. — For legislative history of D.C. Law 11-201, see Historical and Statutory Notes following § 25-1004.

Legislative history of Law 11-248. — For legislative history of D.C. Law 11-248, see Historical and Statutory Notes following § 25-1004.

§ 25-1006. Prohibition on use of watercraft under certain conditions — Preliminary testing; admissibility of test results.

(a) A law enforcement officer who has reasonable grounds to believe that a person is or has been violating any provision of this section, without making an arrest or issuing a citation, may request the person to submit to a preliminary breath test, to be administered by the officer, who shall use a device which the Mayor has by rule approved for that purpose. Before administering the test, the officer shall advise the person to be tested that the results of the test will be used to aid in the officer's decision whether or not to arrest the person.

(b) The results of a preliminary test shall not be used as evidence by the District in any prosecution and shall not be admissible in any judicial proceedings; provided, that the results of the test may be used, and shall be admissible, in any judicial proceeding in which the validity of the arrest or the conduct of the officer is an issue.

(c) The admissibility of all test results shall be governed by § 50-2205.03.

(Apr. 9, 1997, D.C. Law 11-248, § 4, 44 DCR 1242; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-1006.

Temporary Addition of Section. — See Historical and Statutory Notes following § 25-1004.

Emergency legislation. — For temporary (90-day) addition of section, see Historical and Statutory Notes following § 25-1004.

For temporary (90 day) repeal of section, see § 302 of Comprehensive Impaired Driving and Alcohol Testing Program Emergency Amendment Act of 2012 (D.C. Act 19-429, July 30, 2012, 59 DCR 9387).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 11-201. — For legislative history of D.C. Law 11-201, see Historical and Statutory Notes following § 25-1004.

Legislative history of Law 11-248. — For legislative history of D.C. Law 11-248, see Historical and Statutory Notes following § 25-1004.

§ 25-1007. Prohibition on use of watercraft under certain conditions — Penalties.

(a) A person violating § 25-1004(a) or (b) shall be guilty of a misdemeanor and:

(1) Upon conviction for the first offense, shall be fined an amount not to exceed \$500, imprisoned for not more than 90 days, or both;

(2) Upon conviction for a second offense within a 15-year period, shall be fined an amount not to exceed \$5,000, imprisoned for not more than one year, or both; and

(3) Upon conviction for a third or subsequent offense within a 15-year period, shall be fined an amount not to exceed \$10,000, imprisoned for not more than one year, or both.

(b) A person violating § 25-1004(c) shall be guilty of a misdemeanor and:

(1) Upon conviction for the first offense, shall be fined an amount not to exceed \$300, imprisoned for not more than 30 days, or both;

(2) Upon conviction for a second offense within a 15-year period, shall be fined an amount not to exceed \$1,000, imprisoned for not more than 90 days, or both; and

(3) Upon conviction for the third or subsequent offense within a 15-year period, shall be fined an amount not to exceed \$5,000, imprisoned for not more than one year, or both.

(Apr. 9, 1997, D.C. Law 11-248, § 5, 44 DCR 1242; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959.)

Prior Codifications. — 1981 Ed., § 25-1007.

Temporary Addition of Section. — See Historical and Statutory Notes following § 25-1004.

Emergency legislation. — For temporary (90-day) addition of section, see Historical and Statutory Notes following § 25-1004.

For temporary (90 day) repeal of section, see § 302 of Comprehensive Impaired Driving and Alcohol Testing Program Emergency Amendment Act of 2012 (D.C. Act 19-429, July 30, 2012, 59 DCR 9387).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 11-201. — For legislative history of D.C. Law 11-201, see Historical and Statutory Notes following § 25-1004.

Legislative history of Law 11-248. — For legislative history of D.C. Law 11-248, see Historical and Statutory Notes following § 25-1004.

§ 25-1008. Prima facie evidence of intoxication.

(a) If a person is tried in any court of competent jurisdiction within the District for operating a vessel or watercraft in violation of § 25-1004 or manslaughter committed in the operation of a vessel or watercraft in violation of § 22-2105, and in the course of the trial there is received, based upon a chemical test, evidence of alcohol in the defendant's blood, urine, or breath, such evidence:

(1) Shall, if at the time of testing, defendant's alcohol concentration was 0.05 grams or less per 100 milliliters of blood or per 210 liters of breath or 0.06 grams or less per 100 milliliters of urine, establish a rebuttable presumption

that the defendant was not, at the time, under the influence of intoxicating liquor.

(2) Shall not, if at the time of testing, defendant's alcohol concentration was more than 0.05 grams per 100 milliliters of blood or per 210 liters of breath or more than 0.06 grams per 100 milliliters of urine, but less than 0.08 grams per 100 milliliters of blood or per 210 liters of breath or less than 0.10 grams per 100 milliliters of urine, establish a presumption that the defendant was or was not, at the time, under the influence of intoxicating liquor, but it may be considered with other competent evidence in determining whether the defendant was under the influence of intoxicating liquor.

(Apr. 9, 1997, D.C. Law 11-248, § 6, 44 DCR 1242; May 3, 2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 26, 2001, D.C. Law 14-42, § 6(h), 48 DCR 7612; Mar. 2, 2007, D.C. Law 16-195, § 3(b), 53 DCR 8675.)

Prior Codifications. — 1981 Ed., § 25-1008.

Effect of amendments. — D.C. Law 14-42, in subsec. (a)(2), inserted a comma after "test".

D.C. Law 16-195, in the introductory language, substituted "and in the course of the trial there is received, based upon a chemical test, evidence of alcohol in the defendant's blood, urine, or breath, such evidence:" for "the following standards shall apply to competent evidence based upon a chemical test:"; and rewrote pars. (1) and (2).

Temporary Addition of Section. — See Historical and Statutory Notes following § 25-1004.

Emergency legislation. — For temporary (90-day) addition of section, see Historical and Statutory Notes following § 25-1004.

For temporary (90 day) amendment of section, see § 6(h) of Technical Amendments Emergency Act of 2001 (D.C. Act 14-108, August 3,

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 11-201. — For legislative history of D.C. Law 11-201, see Historical and Statutory Notes following § 25-1004.

Legislative history of Law 11-248. — For legislative history of D.C. Law 11-248, see Historical and Statutory Notes following § 25-1004.

Legislative history of Law 14-42. — For Law 14-42, see notes following § 25-120.

Legislative history of Law 16-195. — For Law 16-195, see notes following § 25-1004.

§ 25-1009. Operation of locomotive, streetcar, elevator, or horse-drawn vehicle by intoxicated person prohibited.

(a) No person shall be intoxicated while in charge of or operating a locomotive; acting as a conductor or brakeman of a car or train of cars; or operating a streetcar, or horse-drawn vehicle.

(b) A person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than \$300, or by imprisonment for not longer than 3 months, or both.

(c) Nothing herein contained shall be construed as repealing or modifying §§ 50-1401.01, 50-1401.02, 50-1403.01, 50-2201.03 through 50-2201.05, and 50-2201.27.

(d) Civil penalties and fees may be imposed as alternative sanctions for any violation of this section in accordance with the procedures under Chapter 18 of Title 2.

(Jan. 24, 1934, 48 Stat. 333, ch. 4, § 27; Oct. 5, 1985, D.C. Law 6-42, § 455(a), 32 DCR 4450; Apr. 9, 1997, D.C. Law 11-248, § 8(a), 44 DCR 1242; May 3,

2001, D.C. Law 13-298, § 101, 48 DCR 2959; Oct. 26, 2001, D.C. Law 14-42, § 6(i), 48 DCR 7612.)

Cross references. — Banks organized under federal law, application of law, see § 26-710.

Prior Codifications. — 1981 Ed., § 25-1009.

1973 Ed., § 25-127.

Effect of amendments. — D.C. Law 14-42 validated the previously made technical correction in subsec. (c).

Emergency legislation. — For temporary amendment of section, see § 8(a) of the Boating While Intoxicated Emergency Act of 1996 (D.C. Act 11-346, August 8, 1996, 43 DCR 4621), § 8(a) of the Boating While Intoxicated Congressional Review Emergency Act of 1996 (D.C. Act 11-411, October 28, 1996, 43 DCR 6063), and § 8(a) of the Boating While Intoxicated Second Congressional Review Emergency Act of 1996 (D.C. Act 11-469, December 30, 1996, 44 DCR 179), and § 8(a) of the Boating While Intoxicated Congressional Review Emergency Act of 1997 (D.C. Act 12-52, March 31, 1997, 44 DCR 2204).

For temporary addition of a new subchapter, consisting of §§ 25-127a.1 through 25-127a.6, see § 2-7 of the Boating While Intoxicated Congressional Review Emergency Act of 1997 (D.C. Act 12-52, March 31, 1997, 44 DCR 2204).

For temporary (90 day) amendment of section, see § 6(i) of Technical Amendments Emer-

gency Act of 2001 (D.C. Act 14-108, August 3, 2001, 48 DCR 7622).

For temporary (90 day) repeal of section, see § 302 of Comprehensive Impaired Driving and Alcohol Testing Program Emergency Amendment Act of 2012 (D.C. Act 19-429, July 30, 2012, 59 DCR 9387).

Legislative history of Law 13-298. — For D.C. Law 13-298, see notes following § 25-101.

Legislative history of Law 6-42. — Law 6-42, the "Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985," was introduced in Council and assigned Bill No. 6-187, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on June 25, 1985, and July 9, 1985, respectively. Signed by the Mayor on July 16, 1985, it was assigned Act No. 6-60 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-201. — For legislative history of D.C. Law 11-201, see Historical and Statutory Notes following § 25-1004.

Legislative history of Law 11-248. — For legislative history of D.C. Law 11-248, see Historical and Statutory Notes following § 25-1004.

Legislative history of Law 14-42. — For Law 14-42, see notes following § 25-120.

TITLE 26. BANKS AND OTHER FINANCIAL INSTITUTIONS.

Chapter

1. Banking Institutions in General.
 - 1A. Automated Teller Machines.
2. Building Associations.
3. Check Cashers.
4. Common Trust Funds.
 - 4A. Community Development by Financial Institutions.
5. Credit Unions.
 - 5A. Data Match Requirements for Financial Institution.
 - 5B. Administration of the Banking Code.
6. Special Account for Office of Banking and Financial Institutions [Repealed].
 - 6A. International Banking.
7. Interstate Banking and Branching.
8. Joint Accounts; Adverse Claimants; Trust Accounts.
 - 8A. Merchant Banks.
9. Money Lenders; Licenses.
10. Money Transmissions.
11. Mortgage Lenders and Brokers.
 - 11A. Home Loan Protection.
12. Savings and Loan Acquisition.
13. Trust, Loan, Mortgage, Safe Deposit and Title Corporations.
14. Universal Bank Certification.

CHAPTER 1. BANKING INSTITUTIONS IN GENERAL.

- | Sec. | Sec. |
|---|---|
| 26-101. Supervision by Comptroller of Currency — Required reports; power to take possession of bank or company. | 26-104. Liability of shareholders — Individual responsibility; applicable federal provisions. |
| 26-102. Supervision by Comptroller of Currency — Examinations; applicable federal provisions; establishment and maintenance of reserves. | 26-105. Liability of shareholders — Termination. |
| 26-103. Banking businesses to be organized under local or federal provisions; approval of Commissioner of the Department of Insurance, Securities, and Banking required; liquidation of solvent institutions; discontinuance of operation; violations; establishment of international banking facility. | 26-106. Declaration of dividends. |
| | 26-107. Restriction on use of words “bank” and “trust company”; violations. |
| | 26-108. [Repealed]. |
| | 26-109. Applicability of provisions on federal reserve banks to nonmember banks. |
| | 26-110. Authority of notaries public associated with corporations. |
| | 26-111. Utility bill payments services. |

§ 26-101. Supervision by Comptroller of Currency — Required reports; power to take possession of bank or company.

Except as provided in the District of Columbia Regional Interstate Banking Act of 1985 Amendments Act of 1985 [D.C. Law 6-107], all savings banks, or savings companies, or trust companies, or other banking institutions, organized under authority of any act of Congress to do business in the District of Columbia, or organized by virtue of the laws of any of the states of this Union, and having an office or banking house located within the District of Columbia where deposits or savings are received, shall be, and are hereby, required to make to the Comptroller of the Currency and to publish all the reports which national banking associations are required to make and publish under the provisions of §§ 161, 163 [repealed], and 164 of Title 12, United States Code, and shall be subject to the same penalties for failure to make such reports as are therein provided, which penalties may be collected by suit before the United States District Court for the District of Columbia. And the Comptroller shall have power, when in his opinion it is necessary, to take possession of any such bank or company, for the reasons and in the manner and to the same extent as are provided in the laws of the United States with respect to national banks; provided, however, the banking institutions having office or banking houses in foreign countries as well as in the District of Columbia shall only be required to make and publish the reports provided for in this section semianually; and provided further, that all publications authorized or required by § 161 of Title 12, United States Code, and all other publications authorized or required by existing law to be made in the District of Columbia, shall be printed in 1 or more daily newspapers of general circulation, published in the City of Washington.

(Mar. 3, 1901, 31 Stat. 1189, ch. 854, § 713; June 30, 1902, 32 Stat. 534, ch. 1329; June 25, 1906, 34 Stat. 458, ch. 3533; Mar. 4, 1933, 47 Stat. 1566, ch. 274, § 2; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; Nov. 23, 1985, D.C. Law 6-63, § 106(a)(4), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in §§ 26-102, 26-104, 26-702.01, 26-710, and 29-1105.

Prior Codifications. — 1981 Ed., § 26-101. 1973 Ed., § 26-101.

Legislative history of Law 6-107. — Law 6-107, the “District of Columbia Regional Interstate Banking Act of 1985,” was introduced in Council and assigned Bill No. 6-276, which was referred to the Committee on Housing and Economic Development. The Bill was adopted on first and second readings on January 14, 1986 and January 28, 1986, respectively. Signed by the Mayor on February 14, 1986, it was assigned Act No. 6-136 and transmitted to both Houses of Congress for its review.

References in text. — The “District of Columbia Regional Interstate Banking Act of 1985 Amendments Act of 1985,” referred to near the beginning of the section, is D.C. Law 6-107.

Section 163 of Title 12, United States Code, referred to near the middle of the first sentence of this section, was repealed by the Act of Sept. 8, 1959, 73 Stat. 466, Pub. L. 86-230, § 22(a).

Transfer of Functions. — Pursuant to Reorganization Plan No. 3 of 1992, effective January 20, 1993, unless another date was designated by the Mayor under Sec. V of the Plan, the D.C. Office of Banking and Financial Institutions (“OBFI”) is hereby transferred from the Deputy Mayor for Economic Development

("DMED") control center to a separate OBFI control center/responsibility center. OBFI will continue to be administered by the Superinten-

dent and will remain a part of the economic development cluster reporting to the Mayor.

CASE NOTES

ANALYSIS

Banks.

Continuing business after charter expires—In general.

—Liability of directors, continuing business after charter expires.

Depositor's right to interest.

Determination of insolvency.

Law governing.

Reorganization and consolidation.

Banks.

Where national banks and savings banks in District of Columbia all engaged in both savings account and commercial banking business, administrative classification of state banks as savings banks and national banks as not savings banks for tax purposes was improper. D.C. Code 1940, §§ 26—101, 47—1701, 47—1703; 12 U.S.C. § 371. *Hamilton Nat. Bank v. District of Columbia*, 156 F.2d 843, 1946 U.S. App. LEXIS 3149 (1946).

A "bank" is an institution which receives and pays out deposits. *Moran v. Cobb*, 120 F.2d 16, 1941 U.S. App. LEXIS 4603 (1941).

Continuing business after charter expires—In general.

Continuance of banking business by state bank located in District of Columbia after expiration of bank's charter, though *ultra vires*, did not have effect of dissolving corporation, but corporation continued to exist so long as state itself took no appropriate action for dissolution. Code Ala.1928, §§ 6383, 6384, 7069; Const.Ala.1901, § 251; D.C. Code 1929, T. 5, §§ 298, 299. *Thompson v. Park Sav. Bank*, 77 F.2d 955, 1935 U.S. App. LEXIS 4753 (1935).

— Liability of directors, continuing business after charter expires.

Directors of bank organized under laws of Alabama and doing business in District of Columbia held not liable personally for deposits made with bank subsequent to date when bank's charter expired under state law, where bank continued banking business after expiration date and directors were not accused of fraud or negligence but merely of failure to liquidate bank. Code Ala.1928, §§ 6383, 6384, 7069; D.C. Code 1929, T. 5, §§ 298, 299; Const.Ala.1901, § 251. *Thompson v. Park Sav. Bank*, 77 F.2d 955, 1935 U.S. App. LEXIS 4753 (1935).

Provisions of state law making directors as liquidating trustees of bank, after expiration of

bank's charter, liable to creditors and stockholders for property coming into their hands, relate solely to assets of bank at date of expiration of charter. Code Ala.1928, § 7069. *Thompson v. Park Sav. Bank*, 77 F.2d 955, 1935 U.S. App. LEXIS 4753 (1935).

Persons becoming depositors in state bank located in District of Columbia after expiration of period of corporate existence limited by charter were charged with knowledge of bank's want of authority to continue with general banking business, and therefore could not hold directors individually liable for their deposits. Code Ala.1928, §§ 6383, 6384, 7069; Const.Ala.1901, § 251; D.C. Code 1929, T. 5, §§ 298, 299. *Thompson v. Park Sav. Bank*, 77 F.2d 955, 1935 U.S. App. LEXIS 4753 (1935).

Depositor's right to interest.

Stockholders of bank organized under state authority and doing business within the District of Columbia, determined to be insolvent by Comptroller of Currency, held not entitled to restoration of assets, where assets were not sufficient to pay both principal of bank's debts and interest thereon in full, as against contention that interest should not be computed upon debts after bank was closed by receivership under which theory bank would allegedly be solvent. D.C. Code 1929, T. 5, § 298; 12 U.S.C. § 191. *U.S. Sav. Bank v. Morgenthau*, 85 F.2d 811, 1936 U.S. App. LEXIS 4248 (1936).

A judgment of United States Court of Appeals for District of Columbia that no part of assets of closed bank organized under state authority and doing business in District of Columbia could be turned over by receiver to stockholders until after principal and interest on debts were paid was *res judicata* of depositors' right to interest on their deposits. 12 U.S.C. §§ 191, 192, 203; D.C. Code 1940, § 26-101. *Parsons v. Barry*, 59 F.Supp. 221, 1944 U.S. Dist. LEXIS 1601 (D.D.C.1944).

When assets of insolvent bank being liquidated under Comptroller of the Currency are sufficient to pay more than 100 per cent of principal amount of depositors' claims, depositors are entitled to interest on their claims from date of suspension until paid, computed at statutory or legal rate of jurisdiction in which the liquidation is had. 12 U.S.C. §§ 191, 192, 203; D.C. Code 1940, § 26-101. *Parsons v. Barry*, 59 F.Supp. 221, 1944 U.S. Dist. LEXIS 1601 (D.D.C.1944).

Interest to depositors in bank in hands of conservator is due and payable for period of

conservatorship as damages or as compensation for withholding of money. 12 U.S.C. §§ 191, 192, 203; D.C. Code 1940, § 26-101. *Parsons v. Barry*, 59 F.Supp. 221, 1944 U.S. Dist. LEXIS 1601 (D.D.C.1944).

Determination of insolvency.

Whether bank organized under state authority and doing business in District of Columbia is "solvent" or "insolvent" depends upon estimate of appraisal of value of its securities, and is matter of judgment and discretion, as regards right of Comptroller of Currency to take possession of such bank on its becoming insolvent. D.C. Code 1929, T. 5, § 298; 12 U.S.C. § 191. *U.S. Sav. Bank v. Morgenthau*, 85 F.2d 811, 1936 U.S. App. LEXIS 4248 (1936).

Where Comptroller of Currency has determined bank to be insolvent and appointed receiver, court will not substitute its judgment for judgment of Comptroller unless it appears by convincing proof that Comptroller's action is plainly arbitrary and made in bad faith. D.C. Code 1929, T. 5, § 298; 12 U.S.C. § 191. *U.S. Sav. Bank v. Morgenthau*, 85 F.2d 811, 1936 U.S. App. LEXIS 4248 (1936).

In action to terminate receivership of bank organized under state authority and doing business in District of Columbia, presumption of correctness of Comptroller of Currency's determination that bank was insolvent could not be overcome by assertion in bill that Comptroller's conduct was arbitrary, wanton, and malicious, where no facts were pleaded except difference in appraisal of assets of bank by respective parties. *U.S. Sav. Bank v. Morgenthau*, 85 F.2d 811, 1936 U.S. App. LEXIS 4248 (1936).

Difference in appraisal of assets of bank by which Comptroller of Currency determined bank was insolvent and appraisal by person seeking termination of receivership claiming bank was solvent held not to overcome presumption of correctness attaching to official determination of Comptroller in exercise of his official duty. D.C. Code 1929, T. 5, § 298; 12 U.S.C. § 191. *U.S. Sav. Bank v. Morgenthau*, 85 F.2d 811, 1936 U.S. App. LEXIS 4248 (1936).

Law governing.

Statute authorizing Comptroller to take pos-

session of bank doing business in District of Columbia for same reasons and to same extent as in case of national banks held not to impose double liability on stockholders of bank, where laws of state of bank's incorporation imposed no such liability. D.C. Code 1929, T. 5, §§ 298, 361; 12 U.S.C. § 63 and note; §§ 64, 87, 143, 191. *Hamilton v. Offutt*, 78 F.2d 735, 1935 U.S. App. LEXIS 3843 (1935).

Bank which obtained state charter for express purpose of doing business exclusively in District of Columbia contracts with reference to laws of District, and its stockholders' contracts are likewise subject to laws of District. *Harper v. Moran*, 76 F.2d 980, 1935 U.S. App. LEXIS 2746 (1935).

Federal statute authorizing comptroller of currency to appoint receivers for insolvent foreign banking corporations doing business in District of Columbia held valid as applied to state bank which conducted business exclusively in District. D.C. Code 1929, T. 5, § 298; 12 U.S.C. §§ 191, 192. *Washington Loan & Trust Co. v. Allman*, 70 F.2d 282, 1934 U.S. App. LEXIS 4128 (1934).

The liquidation of bank organized under West Virginia law and doing business solely in District of Columbia was governed by law of District of Columbia and National Bank Act, and not by law of West Virginia. 12 U.S.C. §§ 191, 192, 203; D.C. Code 1940, § 26-101. *Parsons v. Barry*, 59 F.Supp. 221, 1944 U.S. Dist. LEXIS 1601 (D.D.C.1944).

Reorganization and consolidation.

Comptroller of Currency held justified in refusing to approve of reorganization plan for savings bank whereby depositors, by waiving percentage of deposits, would contribute toward capital structure of reorganized bank beyond amount necessary to restore solvency. *Bank Conservation Act* §§ 203, 207, as amended 12 U.S.C. §§ 203, 207. *Cooper v. Woodin*, 72 F.2d 179, 1934 U.S. App. LEXIS 4491 (1934).

§ 26-102. Supervision by Comptroller of Currency — Examinations; applicable federal provisions; establishment and maintenance of reserves.

(a) The Comptroller of the Currency, in addition to the powers now conferred upon him by law for the examination of national banks, is hereby further authorized, whenever he may deem it advisable, to cause examination to be made into the condition of any bank mentioned in § 26-101. The expense

of such examination shall be paid in the manner provided by § 482 of Title 12, United States Code, relating to the examination of national banks.

(b) The provisions of § 84 of Title 12, United States Code, are hereby extended to apply to all banks and trust companies doing business in the District of Columbia.

(c) Each bank and trust company doing business in the District of Columbia and not a member of the Federal Reserve System shall within 6 months from March 4, 1933, establish and maintain reserves on the same basis and subject to the same conditions as may by law on March 4, 1933, or thereafter be prescribed for national banks located in the District of Columbia, except that such reserves shall be established and maintained at such agency or agencies which shall have the approval of the Comptroller of the Currency; provided, however:

(1) That the required reserves carried by such bank or trust company with an agency or agencies may, under the regulations and subject to such penalties as may be prescribed by the Comptroller of the Currency, be checked against and withdrawn by such bank or trust company for the purpose of meeting existing liabilities; and

(2) That no such bank or trust company shall at any time make new loans or shall pay any dividends unless and until the total reserves required by law shall be fully restored.

(d) After April 11, 1986, subsection (c) of this section shall not apply to banks which are not national banks.

(Mar. 3, 1901, 31 Stat. 1303, ch. 854, § 714; June 25, 1906, 34 Stat. 458, ch. 3533; Mar. 4, 1933, 47 Stat. 1566, ch. 274, § 3; Nov. 23, 1985, D.C. Law 6-63, § 106(a)(5), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168; Apr. 9, 1997, D.C. Law 11-255, § 22, 44 DCR 1271.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-102. 1973 Ed., § 26-102.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-101.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act

of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

CASE NOTES

Reorganization.

Comptroller of Currency held justified in refusing to approve of reorganization plan for savings bank whereby depositors, by waiving percentage of deposits, would contribute toward capital structure of reorganized bank be-

yond amount necessary to restore solvency. Bank Conservation Act §§ 203, 207, as amended 12 U.S.C. §§ 203, 207. *Cooper v. Woodin*, 72 F.2d 179, 1934 U.S. App. LEXIS 4491 (1934).

§ 26-103. Banking businesses to be organized under local or federal provisions; approval of Commissioner of the Department of Insurance, Securities, and Banking required; liquidation of solvent institutions; discontinuance of operation; violations; establishment of international banking facility.

(a) No banking business shall be done in the District of Columbia except by corporations organized in accordance with the provisions of this Code, as amended, or by national banking associations organized in accordance with the laws of the United States or by banks organized in accordance with the laws of another state, except that this subsection shall not apply to:

(1) Corporations engaged in and doing a banking business on March 4, 1933;

(2) Individuals, partnerships, associations, or corporations primarily engaged as brokers in buying, selling, exchanging, and/or otherwise dealing in stocks, bonds, and/or other securities, for the account of others, and incidentally thereto conducts banking transactions; and

(3) Individuals, partnerships, associations, or corporations not doing a bank-of-deposit business.

(b) No corporation shall engage in or do the business of a bank of deposit or a fiduciary business in the District of Columbia nor shall any branch be established to carry on any phase of such banking or fiduciary business in the District of Columbia until the approval and consent of the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] is secured. The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any place of business located in the District of Columbia, at which deposits are received, or checks paid, or money lent, or at which the public is served or any phase of business conducted by the parent institution or unless the branch is otherwise permitted by applicable law of the District of Columbia or by federal law.

(c) No building association, incorporated or unincorporated, shall do a building association business or maintain any office in the District of Columbia until it shall have secured the approval and consent of the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking]; and the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] shall not give consent or approval to any building association to maintain any office or place of business in the District of Columbia, other than a foreign association which qualifies for a certificate of authority under § 26-206, where such association is not incorporated under the laws of the District of Columbia in accordance with Chapter 2 of this title, except that this subsection shall not apply to associations, incorporated or unincorporated, engaged in and doing a building-association business on March 4, 1933.

(d) Except as provided in the District of Columbia Regional Interstate Banking Act of 1985 Amendments Act of 1985 [D.C. Law 6-107], any solvent financial institution in the District of Columbia under the supervision of the Comptroller of the Currency may go into liquidation and discontinue business by the vote of its shareholders owning two-thirds of its stock. Whenever a vote is taken to go into liquidation it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the institution, by its president, secretary, or cashier to the Comptroller of the Currency, and publication thereof to be made for a period of 2 weeks in a newspaper published in the District of Columbia, that the institution has discontinued business and is winding up its affairs, and notifying its creditors to present claims against the institution for payment. The shareholders shall at the time of going into liquidation elect a committee or liquidating agent who shall liquidate the institution. No institution which has gone into voluntary liquidation shall be permitted to resume business but until its liquidation is complete shall remain a legal corporation or association for the purpose of suing or being sued. The liquidating agent shall give satisfactory surety bond to the board of directors of the institution and shall annually, on request of the Comptroller of the Currency, render such reports to the Comptroller as he shall require. Any such institution in liquidation may be examined by the Comptroller of the Currency who, if he finds such institution insolvent, may appoint a receiver and wind up its affairs in the same manner as provided by law for national banking associations.

(e) If any financial institution under the supervision of the Comptroller of the Currency, which has not gone into liquidation and for which a receiver has not already been appointed for other lawful cause, shall discontinue its operations for a period of 60 days, the Comptroller of the Currency may, if he deems it advisable, appoint a receiver for such institution.

(f) Any financial institution over which the Comptroller of the Currency has or had supervision which prior to March 4, 1933, had in any manner ceased to do a banking business shall not resume such banking business and shall advise the Comptroller of the Currency when its business has been fully liquidated, whereupon by operation of this section its charter is terminated. Such financial institution may in the discretion of the Comptroller of the Currency be subject to all provisions of subsection (d) of this section.

(g) Any person, or corporation or any director, officer, employee, agent, or other person who participates in the conduct of affairs of the person or corporation that violates any of the provisions of this section shall be punished by:

- (1) A fine not less than \$1,000;
- (2) Imprisonment not exceeding 1 year; or
- (3) Both a fine not less than \$1,000 and imprisonment not exceeding 1 year.

(h) No international banking facility shall be established in the District of Columbia until approval and consent of the Comptroller of the Currency is secured. For the purposes of this subsection the term "international banking facility" shall have the same meaning as defined in § 204.8(a)(1) of Regulation

D of the Board of Governors of the Federal Reserve System, effective December 3, 1981 (12 CFR 204.8(a)(1)).

(Apr. 26, 1922, 42 Stat. 500, ch. 147; Mar. 4, 1933, 47 Stat. 1564, ch. 274, § 1; Sept. 15, 1951, 65 Stat. 324, ch. 404, § 3; Sept. 17, 1982, D.C. Law 4-150, § 301, 29 DCR 3377; Nov. 23, 1985, D.C. Law 6-63, § 106(b), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168; Aug. 17, 1991, D.C. Law 9-42, § 3, 38 DCR 4981; June 13, 1996, D.C. Law 11-142, § 13, 43 DCR 2159; Apr. 9, 1997, D.C. Law 11-255, § 23, 44 DCR 1271.)

Section references. — This section is referred to in §§ 26-702.1 and 26-704.

Prior Codifications. — 1981 Ed., § 26-103. 1973 Ed., § 26-103.

Legislative history of Law 4-150. — Law 4-150, the “International Banking Facilities Tax, District of Columbia Redevelopment Act of 1945 Amendment, and Cable Television Communications Act of 1981 Technical Clarification Amendment Act of 1982,” was introduced in Council and assigned Bill No. 4-360, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on June 22, 1982 and July 6, 1982, respectively. Signed by the Mayor on July 21, 1982, it was assigned Act No. 4-221 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-101.

Legislative history of Law 8-260. — Law 8-260, the “District of Columbia Interstate Banking Act of 1985 Amendment Temporary Act of 1990,” was introduced in Council and assigned Bill No. 8-735. The Bill was adopted on first and second readings on December 18, 1990, and February 5, 1991, respectively. Signed by the Mayor on February 22, 1991, it was assigned Act No. 8-345 and transmitted to both Houses of Congress for its review.

Legislative history of Law 9-42. — Law 9-42, the “District of Columbia Interstate Banking Act of 1985 Amendment Act of 1991,” was introduced in Council and assigned Bill No. 9-37, which was referred to the Committee

on Economic Development. The Bill was adopted on first and second readings on June 4, 1991, and July 2, 1991, respectively. Signed by the Mayor on July 24, 1991, it was assigned Act No. 9-79 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-68. — Law 10-68, the “Technical Amendments Act of 1993,” was introduced in Council and assigned Bill No. 10-166, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 29, 1993, and July 13, 1993, respectively. Signed by the Mayor on August 23, 1993, it was assigned Act No. 10-107 and transmitted to both Houses of Congress for its review. D.C. Law 10-68 became effective on February 5, 1994.

Legislative history of Law 11-142. — Law 11-142, the “Banking and Branching Act of 1996,” was introduced in Council and assigned Bill No. 11-321, which was referred to the Committee on Economic Development. The Bill was adopted on first and second readings on March 5, 1996, and April 2, 1996, respectively. Signed by the Mayor on April 16, 1996, it was assigned Act No. 11-258 and transmitted to both Houses of Congress for its review. D. C. Law 11-142 became effective on June 13, 1996.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 26-102.

References in text. — The “District of Columbia Regional Interstate Banking Act of 1985 Amendments Act of 1985,” referred to near the beginning of subsection (d), is D.C. Law 6-107.

CASE NOTES

Law governing.

Liability of stockholder is determined by charter and by laws of state in which incorporation is had, but law of another place will

control if parties have that law in view in making contract. *Hamilton v. Offutt*, 78 F.2d 735, 1935 U.S. App. LEXIS 3843 (1935).

§ 26-104. Liability of shareholders — Individual responsibility; applicable federal provisions.

(a) The shareholders, on March 4, 1933, of every savings bank or savings

company other than building associations organized under authority of any act of Congress to do business in the District of Columbia, and of every banking institution organized by virtue of the laws of any of the states of this Union to do or doing a banking business in the District of Columbia, shall be held individually responsible, equally and ratably, and not one for another for all contracts, debts, and engagements of such savings bank, savings company, or banking institution, entered into or incurred subsequent to March 4, 1933, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares. The words "entered into or incurred" as used in this section, shall be held to include any extension or renewal of any contracts, debt, and engagement renewed or extended after March 4, 1933.

(b) The provisions of §§ 55, 62, 65 [repealed], 67, 191 to 194, 197, and 198 to 200 of Title 12, United States Code, are extended to apply to any bank, savings bank, or trust company organized, hereafter organized, or doing a banking business in the District of Columbia and to the shareholders of such institutions, except as limited by the provisions of subsection (a) of this section; provided, however, that the provisions of § 26-101 shall not be construed to be repealed by this section but shall have application to the banks, savings banks, savings companies, other than building associations, and trust companies embraced within this section; provided, further, that the District of Columbia Regional Interstate Banking Act of 1985 [D.C. Law 6-107] Amendments Act of 1985 shall apply to banks which are not national banks.

(c) That portion of § 1348 of Title 28, United States Code, as amended, applying to suits against national banking associations shall be extended and shall apply to all actions arising under the provisions of this section.

(Mar. 4, 1933, 47 Stat. 1566, ch. 274, § 4; Feb. 16, 1934, 48 Stat. 352, ch. 14, § 1; Nov. 23, 1985, D.C. Law 6-63, § 106(c)(1), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in §§ 26-105 and 26-710.

Prior Codifications. — 1981 Ed., § 26-104. 1973 Ed., § 26-104.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-101.

References in text. — Section 65 of Title

12, United States Code, referred to in subsection (b) of this section, was repealed by the Act of Sept. 8, 1959, 73 Stat. 457, Pub. L. 86-230, § 8.

The "District of Columbia Regional Interstate Banking Act of 1985 Amendments Act of 1985," referred to in subsection (b), is D.C. Law 6-107.

CASE NOTES

ANALYSIS

Determination as to necessity for assessments.
Effect of common law.
Enforcement of liability.
Evidence and burden of proof.
Law governing.

Determination as to necessity for assessments.

Determination of Comptroller of Currency as to necessity for assessments on stock of state

bank doing business exclusively in District of Columbia held conclusive without judicial ascertainment of extent of bank's insolvency or of pro rata amount due by stockholders, in view of law of District, though prior judicial determination was required by law of state of incorporation. Const.Ariz. art. 14, § 11; D.C. Code 1929, T. 5, § 298; 12 U.S.C. §§ 191, 192. Harper v. Moran, 76 F.2d 980, 1935 U.S. App. LEXIS 2746 (1935).

Comptroller of Currency appointing receiver

for defaulting or insolvent national bank may call for ratable assessment upon stockholders without previous judicial ascertainment of necessity of appointment of receiver, or of existence of bank's liability. 12 U.S.C. §§ 191, 192. *Harper v. Moran*, 76 F.2d 980, 1935 U.S. App. LEXIS 2746 (1935).

Decision of Comptroller of Currency as to necessity for assessments on stock of state bank doing business exclusively in District of Columbia held not subject to attack or open to review except for fraud. D.C. Code 1929, T. 5, § 298; 12 U.S.C. §§ 191, 192. *Harper v. Moran*, 76 F.2d 980, 1935 U.S. App. LEXIS 2746 (1935).

Effect of common law.

Laws imposing double liability on bank stockholders are in derogation of the common law and cannot be extended beyond the words used. *Moran v. Cobb*, 120 F.2d 16, 1941 U.S. App. LEXIS 4603 (1941).

Statute imposing double liability on shareholders of bank is in derogation of common law and cannot be extended beyond words used. *Hamilton v. Offutt*, 78 F.2d 735, 1935 U.S. App. LEXIS 3843 (1935).

Enforcement of liability.

Receiver appointed by comptroller of currency for insolvent state bank doing business exclusively in District of Columbia held entitled to enforce stockholders' double liability imposed by Constitution of state of bank's organization. D.C. Code 1929, T. 5, § 298; 12 U.S.C. §§ 191, 192; Const.Ariz. art. 14, § 11; Rev.Code Ariz. 1928, § 227. *Washington Loan & Trust Co. v. Allman*, 70 F.2d 282, 1934 U.S. App. LEXIS 4128 (1934).

Evidence and burden of proof.

Burden was on receiver of state bank, doing business in District of Columbia exclusively, to show in his action for amount of 100 per cent. assessment against stockholders of such bank that liabilities which made it insolvent accrued as of time when defendant acquired and owned her stock under state constitution and statute. Code W.Va. 1932, § 3138; Const.W.Va. art. 11, § 6. *Hamilton v. Bergling*, 85 F.2d 249, 1936 U.S. App. LEXIS 4080 (1936).

Receiver of state bank doing business exclusively in District of Columbia was not required to allege in declaration in his suit to collect stock assessments that assets of bank were insufficient to pay liabilities, where Comptroller of Currency had declared necessity for assessment. D.C. Code 1929, T. 5, § 298; 12 U.S.C. §§ 191, 192. *Harper v. Moran*, 76 F.2d 980, 1935 U.S. App. LEXIS 2746 (1935).

Law governing.

Though bank stockholders' statutory liability may be enforced in the District of Columbia by a receiver appointed by the Comptroller of the Currency, both the existence and the duration of the liability must be determined by the law of the state of the bank's incorporation. 12 U.S.C. § 191; D.C. Code 1929, T. 5, § 298. *Moran v. Cobb*, 120 F.2d 16, 1941 U.S. App. LEXIS 4603 (1941).

Court cannot read into District of Columbia statute, authorizing Comptroller of Currency to take possession of any bank doing business in district in manner provided by United States laws respecting national banks, provisions of federal statute imposing double liability on national bank shareholders, in determining liability of stockholder, acquiring shares in state bank doing business in district before passage of federal act imposing such liability on shareholders of such banks. D.C. Code 1929, T. 5, § 298; 12 U.S.C. § 63 and note and § 64; D.C. Code Supp. I, 1933, T. 5, § 300a. *Hamilton v. Bergling*, 85 F.2d 249, 1936 U.S. App. LEXIS 4080 (1936).

In absence of District of Columbia statute imposing double liability on stockholder of state bank, doing business exclusively in district, when she acquired stock, her liability must be determined by bank's charter and laws of state in which it was incorporated. D.C. Code 1929, T. 5, § 298; D.C. Code Supp. I, 1933, T. 5, § 300a. *Hamilton v. Bergling*, 85 F.2d 249, 1936 U.S. App. LEXIS 4080 (1936).

Liability of stockholder is determined by charter and by laws of state in which incorporation is had, but law of another place will control if parties have that law in view in making contract. *Hamilton v. Offutt*, 78 F.2d 735, 1935 U.S. App. LEXIS 3843 (1935).

§ 26-105. Liability of shareholders — Termination.

The additional liability imposed by § 26-104 upon the shareholders of savings banks, savings companies, and banking institutions and the additional liability imposed by § 26-1322 upon the shareholders of trust companies, shall cease to apply on July 1, 1937, with respect to such savings banks, savings companies, banking institutions, and trust companies which shall be transacting business on such date; provided, that not less than 6 months prior to such date, the savings bank, savings company, banking institution, or trust company, desiring to take advantage hereof, shall have caused notice of such

prospective termination of liability to be published in a newspaper published in the District of Columbia and having general circulation therein. In the event of failure to give such notice as and when above provided, a termination of such additional liability may thereafter be accomplished as of the date 6 months subsequent to publication in the manner above provided.

(Aug. 23, 1935, 49 Stat. 720, ch. 614, § 337.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-105.
1973 Ed., § 26-105.

§ 26-106. Declaration of dividends.

Each such savings bank, savings company, banking institution, and trust company shall, before the declaration of a dividend on its shares of common stock, carry not less than one-tenth part of its net profits of the preceding half year to its surplus fund until the same shall equal the amount of its common stock; provided, that for the purposes of this section, any amounts paid into a fund for the retirement of any preferred stock or debentures of any such savings bank, savings company, banking institution, or trust company, out of its net earnings for such half-year period shall be deemed to be an addition to its surplus if, upon the retirement of such preferred stock or debentures, the amount so paid into such retirement fund for such period may then properly be carried to surplus. In any such case the savings bank, savings company, banking institution, or trust company shall be obligated to transfer to surplus the amount so paid into such retirement fund for such period, on account of the preferred stock or debentures as such stock or debentures are retired.

(Aug. 23, 1935, 49 Stat. 720, ch. 614, § 337.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-106.
1973 Ed., § 26-106.

§ 26-107. Restriction on use of words “bank” and “trust company”; violations.

(a) No corporation, association, partnership, or individual shall carry on any business in the District of Columbia under any name or title containing the word “bank” or the words “trust company” unless:

(1) The business is being carried on under the name or title on March 4, 1933;

(2) The business is carried on under the supervision of the Comptroller of the Currency and the name or title is approved by the Comptroller of the Currency; or

(3) The business is carried on under the supervision of the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] and the name or title is approved by the Superintendent of Banking and Financial Institutions [Commissioner].

(b) Any individual who, or corporation, association, or partnership which, violates any of the provisions of this section, and any officer of any such

corporation or association and any officer or member of any such partnership, who assents to any such violation, shall, upon conviction thereof, be fined not more than \$5,000.

(Mar. 4, 1933, 47 Stat. 1567, ch. 274, § 6; Nov. 23, 1985, D.C. Law 6-63, § 106(c)(2), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168; Apr. 30, 1988, D.C. Law 7-104, § 42, 35 DCR 147.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-107. 1973 Ed., § 26-107.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-101.

Legislative history of Law 7-104. — Law 7-104, the “Technical Amendment Act of 1987,”

was introduced in Council and assigned Bill No. 7-346, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 24, 1987, and December 8, 1987, respectively. Signed by the Mayor on December 22, 1987, it was assigned Act No. 7-124 and transmitted to both Houses of Congress for its review.

§ 26-108. Making or repeating false statements. [Repealed].

Repealed.

(Mar. 4, 1933, 47 Stat. 1567, ch. 274, § 7; Apr. 29, 2004, D.C. Law 15-154, § 8, 50 DCR 10996.)

Prior Codifications. — 1981 Ed., § 26-108. 1973 Ed., § 26-108.

Legislative history of Law 15-154. — Law 15-154, the “Elimination of Outdated Crimes Amendment Act of 2003”, was introduced in Council and assigned Bill No. 15-79, which was referred to Committee on the Judiciary. The

Bill was adopted on first and second readings on October 7, 2003, and November 4, 2003, respectively. Signed by the Mayor on November 25, 2003, it was assigned Act No. 15-255 and transmitted to both Houses of Congress for its review. D.C. Law 15-154 became effective on April 29, 2004.

§ 26-109. Applicability of provisions on federal reserve banks to nonmember banks.

All acts prohibited by the provisions of § 501 of Title 12 and §§ 334, 656, 1004, and 1005 of Title 18, United States Code, as amended, and §§ 375, 375a, 376, and 503 of Title 12, and §§ 212, 213, 214, 215, 655, 1005, 1014, 1906, and 1909 of Title 18, United States Code, as amended, in the case of federal reserve banks or member banks thereof, or of directors, officers, or employees of such banks, are likewise prohibited, respectively, in the case of banks in the District of Columbia which are not members of a federal reserve bank, or of directors, officers, or employees of such banks, and shall be punishable by the respective penalties provided in such section; provided, that the District of Columbia Regional Interstate Banking Act of 1985 Amendments Act of 1985 [D.C. Law 6-107] shall apply to banks which are not national banks.

(Mar. 4, 1933, 47 Stat. 1568, ch. 274, § 8; Nov. 23, 1985, D.C. Law 6-63, § 106(c)(3), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-109. 1973 Ed., § 26-109.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-101.

References in text. — The “District of Co-

lumbia Regional Interstate Banking Act of 1985 Amendments Act of 1985,” referred to in the proviso, is D.C. Law 6-107.

§ 26-110. Authority of notaries public associated with corporations.

It shall be lawful for any notary public who is a stockholder, director, officer, or employee of a bank, trust company, or other corporation to take the acknowledgment of any party to any written instrument executed to or by such corporation, or to administer an oath to any other stockholder, director, officer, employee, or agent of such corporation, or to protest for nonacceptance or nonpayment drafts, checks, notes, acceptances, or other negotiable instruments which may be owned or held for collection by such corporation; provided, that it shall be unlawful for any notary public to take the acknowledgment of an instrument executed by or to bank or corporation of which he is a stockholder, director, officer, or employee, where such notary is a party to such instrument, either individually or as a representative of such corporation, or to protest any negotiable instrument owned or held for collection by such corporation, where such notary is individually a party to such instrument; provided further, that it shall be unlawful for any notary public to take the oath of an officer or director of any bank or trust company of which he is an officer, or to take an oath of any person verifying a report of such bank or trust company to the Comptroller of the Currency or the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking], whichever is appropriate.

(Apr. 5, 1939, 53 Stat. 567, ch. 37, § 5; Nov. 23, 1985, D.C. Law 6-63, § 106(d), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-110. 1973 Ed., § 26-110.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-101.

§ 26-111. Utility bill payments services.

(a) Any financial institution that offers utility bill payment services in the District of Columbia shall not charge any consumer a fee for processing a utility bill payment. The requirements of this section shall apply to any financial institution whose deposits or shares are insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the National Credit Union Share Insurance Fund.

(b) Any person who violates this section shall be subject to a civil fine of not more than \$1,000.

(Mar. 9, 1988, D.C. Law 7-85, § 2, 34 DCR 8124.)

Prior Codifications. — 1981 Ed., § 26-111. **Emergency legislation.** — For temporary

addition of § 26-112 1981 Ed., see § 12 of the Child Support and Welfare Reform Compliance

Emergency Amendment Act of 1997 (D.C. Act 12-222, December 23, 1997, 44 DCR 114) and § 13 of the Child Support and Welfare Reform Compliance Congressional Review Emergency Amendment Act of 1998 (D.C. Act 12-309, March 20, 1998, 45 DCR 1923).

Legislative history of Law 7-85. — Law 7-85, the “Utility Bill Payment Act of 1987,” was introduced in Council and assigned Bill No. 7-78, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 10, 1987, and November 24, 1987,

respectively. Signed by the Mayor on December 10, 1987, it was assigned Act No. 7-120 and transmitted to both Houses of Congress for its review.

References in text. — The “Federal Savings and Loan Insurance Corporation”, referred to in (a), has been abolished. For provisions relating to the abolition of the Federal Savings and Loan Insurance Corporation and the transfer of functions, personnel and property of that agency, see §§ 401 to 406 of Pub. L. 101-73, set out as a note under 12 U.S.C. § 1437.

CHAPTER 1A. AUTOMATED TELLER MACHINES.

Sec.	Sec.
26-131.01. Short title.	26-131.08. Point-of-sale terminal surcharge disclosure.
26-131.02. Definitions.	26-131.09. Complaints against an operator of an automated teller machine.
26-131.03. Establishment of an automated teller machine or point-of-sale terminal.	26-131.10. Registration of automated teller machines.
26-131.04. Satellite device or point-of-sale terminal.	26-131.11. Record keeping requirements.
26-131.05. Evaluation of automated teller machine safety.	26-131.12. Penalties.
26-131.06. Lighting of automated teller machine area.	26-131.13. Authority of Commissioner to issue rules and regulations.
26-131.07. Automated teller machine surcharge disclosure.	

§ 26-131.01. Short title.

This chapter may be cited as the “Automated Teller Machine Act of 2000”.
(June 9, 2001, D.C. Law 13-308, § 501, 48 DCR 3244.)

Legislative history of Law 13-308. — Law 13-308, the “21st Century Financial Modernization Act of 2000”, was introduced in Council and assigned Bill No. 13-867, which was referred to the Committee on Economic Development. The Bill was adopted on first and second

readings on November 8, 2000, and December 19, 2000, respectively. Signed by the Mayor on January 26, 2001, it was assigned Act No. 13-597 and transmitted to both Houses of Congress for its review. D.C. Law 13-308 became effective on June 9, 2001.

§ 26-131.02. Definitions.

For the purposes of this chapter, the term:

(1) “Access area” means a paved walkway or sidewalk which is within 50 feet of an automated teller machine. The term “access area” shall not include publicly maintained walkways, sidewalks, or roads.

(2) “Access device” shall have the same meaning as set forth in Federal Reserve System Regulation E, 12 C.F.R. Part 205.

(3) “Automated teller machine” means a stationary or mobile unattended device at which banking transactions, including deposits, withdrawals, or transfers, may be conducted. The term shall include satellite devices and any electronic information-processing device located in the District which accepts or dispenses cash in connection with a credit, deposit, or convenience account. The term shall not include a device which is used solely to facilitate a check guarantee or check authorization or which is used in connection with the acceptance or dispensing of cash on a person-to-person basis, such as by a store cashier.

(4) “Bank” shall have the same meaning as set forth in § 26-551.02(3).

(5) “Candlefoot power” means the light intensity of candles on a horizontal plane at 36 inches above ground level and 5 feet in front of the area to be measured.

(6) “Commissioner” shall have the same meaning as set forth in § 26-551.02(7).

(7) “Control” means the authority to determine how, when, and by whom

an access area, defined parking area, or automated teller machine is to be used and how the access area, defined parking area, or automated teller machine is to be maintained, lighted, and landscaped.

(8) "Customer" means a natural person to whom an access device has been issued for personal, family, or household use.

(9) "Defined parking area" means the portion of a parking area open for customer parking which is: (A) contiguous to an access area; and (B) regularly, principally, and lawfully used for parking, standing, or stopping by persons conducting automated teller machine transactions during hours of darkness. The term "defined parking area" shall not include a parking area which is not open or regularly used for parking by persons conducting automated teller machine transactions during hours of darkness. A parking area shall not be considered open if it is physically closed to access or if conspicuous signs indicate that it is closed. If a multiple level parking area would otherwise be considered a defined parking area under the definition above, only the single parking level deemed by the operator of the automated teller machine to be the most directly accessible to the users of the automated teller machine shall be considered a defined parking area.

(10) "District" means the District of Columbia.

(11) "District bank" shall have the same meaning as set forth in § 26-551.02(12).

(12) "District credit union" shall have the same meaning as set forth in § 26-551.02(13).

(13) "District of Columbia Banking Code" shall have the same meaning as set forth in § 26-551.02(14).

(14) "Federal credit union" means a credit union which has its principal office in the District and is chartered or organized as a federal credit union under the laws of the United States.

(15) "Financial institution" shall have the same meaning as set forth in § 26-551.02(18).

(16) "Hours of darkness" means the period that commences 30 minutes after sunset and ends 30 minutes before sunrise.

(17) "Network" means one or more financial institutions or other persons that:

(A) Own and operate one or more network of satellite devices or point-of-sale terminals; or

(B) Provide communications or processing services to one or more automated teller machines, point-of-sale terminals, or similar retail electronic banking facilities located in the District.

(18) "Operator" means, with respect to an automated teller machine or a point-of-sale terminal, the person who imposes the fee on, or receives the fee from, a customer using the automated teller machine or point-of-sale terminal.

(19) "Out-of-state" means a state other than the District or any foreign country.

(20) "Out-of-state bank" means a bank that is chartered out-of-state and that is not chartered by the District.

(21) "Out-of-state credit union" means a credit union that is chartered out-of-state and that is not chartered by the District.

(22) “Person” shall have the same meaning as set forth in § 26-551.02(21).

(23) “Point-of-sale terminal” means a device located in a business establishment that is used for the purchase of a good or service where a personal identification number is required and where sales transactions can be charged directly to the buyer’s deposit, loan, or credit account, but at which deposit transactions cannot be conducted. The term “point-of-sale terminal” shall not include an access device.

(24) “Satellite device” means an automated teller machine of a bank or credit union which is not located at a physical office of the bank or credit union.

(25) “Surcharge” means a charge, or portion of a charge, imposed by the operator of an automated teller machine or point-of-sale terminal for use of the automated teller machine or point-of-sale terminal.

(June 9, 2001, D.C. Law 13-308, § 502, 48 DCR 3244; Oct. 19, 2002, D.C. Law 14-213, § 18(b), 49 DCR 8140; June 11, 2004, D.C. Law 15-166, § 2(l), 51 DCR 2817.)

Effect of amendments. — D.C. Law 14-213, in par. (6), substituted “Department of Banking and Financial Institutions” for “Department of Banking”.

D.C. Law 15-166, in par. (3), substituted “conducted” for “conduced”; and rewrote par. (6) which had read as follows: “(6) ‘Commissioner’ means the Commissioner of the Department of Banking and Financial Institutions.”

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(l) of Consolidation of Financial Services Emergency Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-131.01.

Legislative history of Law 14-213. — Law 14-213, the “Technical Amendments Act of 2002”, was introduced in Council and assigned Bill No. 14-671, which was referred to the

Committee of the Whole. The Bill was adopted on first and second readings on June 4, 2002, and July 2, 2002, respectively. Signed by the Mayor on July 26, 2002, it was assigned Act No. 14-459 and transmitted to both Houses of Congress for its review. D.C. Law 14-213 became effective on October 19, 2002.

Legislative history of Law 15-166. — Law 15-166, the “Consolidation of Financial Services Amendment Act of 2004”, was introduced in Council and assigned Bill No. 15-518, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on January 6, 2004, and February 3, 2004, respectively. Signed by the Mayor on February 27, 2004, it was assigned Act No. 15-385 and transmitted to both Houses of Congress for its review. D.C. Law 15-166 became effective on June 11, 2004.

§ 26-131.03. Establishment of an automated teller machine or point-of-sale terminal.

(a) A District bank, federal bank, District credit union, or federal credit union may establish in the District, and operate on a transaction fee basis, an automated teller machine. A District bank or a District credit union may establish and operate outside of the District an automated teller machine.

(b) An out-of-state bank that maintains a branch in the District or an out-of-state credit union that maintains a subsidiary office in the District may establish and operate on a transaction fee basis an automated teller machine in the District.

(c) A District bank, federal bank, out-of-state bank, District credit union, federal credit union, out-of-state credit union, or other person may establish and operate a point-of-sale terminal in the District.

(June 9, 2001, D.C. Law 13-308, § 503, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-131.01.

§ 26-131.04. Satellite device or point-of-sale terminal.

(a) A District bank, federal bank, out-of-state bank, District credit union, federal credit union, or out-of-state credit union which has established a satellite device or point-of-sale terminal in the District shall make the satellite device or point-of-sale terminal available on a nondiscriminatory basis for use by any other bank or credit union; provided, the establishing bank or credit union may require the other bank or credit union to pay a non-discriminatory and reasonably proportionate share of all acquisition, installation, and operating costs for the satellite device or point-of-sale terminal. The satellite device or point-of-sale terminal shall identify with equal prominence all of the banks, credit unions, or networks which use the satellite device or point-of-sale terminal.

(b) A District bank, federal bank, out-of-state bank, District credit union, federal credit union, or out-of-state credit union which has established in the District an automated teller machine which is not a satellite device may permit any other bank or credit union to use the automated teller machine; provided, that if such permission is granted:

(1)(A) The automated teller machine which is not a satellite device shall be made available on a nondiscriminatory basis for use by any other bank or credit union; and

(B) The establishing bank or credit union may require a payment by the other bank or credit union of a nondiscriminatory and reasonably proportionate share of all acquisition, installation, and operating costs; and

(2) The automated teller machine shall identify with equal prominence all of the banks, credit unions, and networks which use the automated teller machine.

(c) For the purposes of subsections (a) and (b) of this subsection, the proportionality of the charge shall be based on the number of transactions processed at the satellite device or point-of-sale terminal.

(June 9, 2001, D.C. Law 13-308, § 504, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-131.01.

§ 26-131.05. Evaluation of automated teller machine safety.

(a) An operator of, or person controlling, an automated teller machine shall adopt procedures for evaluating the safety of an automated teller machine. The procedures shall include a consideration of the following:

(1) The extent to which the lighting for the automated teller machine complies, or will comply, with the standards required by this chapter;

(2) The presence of obstructions, including landscaping and vegetation, in

the area of the automated teller machine, the access area, and the defined parking area; and

(3) The incidence of crimes of violence in the immediate neighborhood of the automated teller machine, as reflected in the records of the local law enforcement agency.

(b) This chapter shall not impose a duty to relocate or modify an automated teller machine upon the occurrence of a particular event or circumstance.

(June 9, 2001, D.C. Law 13-308, § 505, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-131.01.

§ 26-131.06. Lighting of automated teller machine area.

(a) A person who controls an access area or a defined parking area shall provide lighting for the access area or defined parking area, and the operator or person controlling an automated teller machine shall provide lighting for the automated teller machine and the exterior of an enclosed automated teller machine installation, during hours of darkness if the automated teller machine is open and operating, according to the following standards:

(1) There shall be a minimum of 10 candlefoot power at the face of the automated teller machine extending unobstructed outward 5 feet.

(2) There shall be a minimum of 2 candlefoot power within 50 feet in all unobstructed directions from the face of the automated teller machine.

(3) If the automated teller machine is located within 10 feet of the corner of a building and the automated teller machine is generally accessible from the adjacent side of the building, there shall be a minimum of 2 candlefoot power along the first 40 unobstructed feet of the adjacent side of the building.

(4) There shall be a minimum of 2 candlefoot power in the portion of the defined parking area within 60 feet of the automated teller machine.

(b) This section shall not apply to an automated teller machine which is located inside a building:

(1) Unless the building is a freestanding installation that exists for the sole purpose of providing an enclosure for the automated teller machine; or

(2) If an automated teller machine transaction can be conducted from outside the building.

(June 9, 2001, D.C. Law 13-308, § 506, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-131.01.

§ 26-131.07. Automated teller machine surcharge disclosure.

(a) An operator of an automated teller machine in the District shall not impose a surcharge upon a customer for the use of an automated teller machine, including a use where there is a sale of a good or service, unless the surcharge is clearly disclosed to the customer electronically on the automated

teller machine. After the disclosure is made, the person using the automated teller machine shall be provided an opportunity to cancel the use of the automated teller machine without incurring a surcharge.

(b) If person using an automated teller machine uses an access device issued by a person other than the operator of the automated teller machine, the operator of the automated teller machine shall disclose to the person using the automated teller machine that, in addition to any surcharge charged by the operator, a fee may be charged by the person's financial institution for the use of the automated teller machine.

(June 9, 2001, D.C. Law 13-308, § 507, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-131.01.

§ 26-131.08. Point-of-sale terminal surcharge disclosure.

(a) An operator of a point-of-sale terminal in the District shall not impose a surcharge upon a person for the use of the point-of-sale terminal unless the surcharge is clearly disclosed to the person before the surcharge is incurred and before the customer is obligated to pay for a good or service.

(b) A disclosure under subsection (a) of this section shall be made as follows:

(1) If the point-of-sale device is purchased before June 9, 2001, or does not have an electronic display, the fee disclosure shall be on a label meeting federal standards or such other standards as may be promulgated by the Commissioner consistent with the purposes of this chapter.

(2) If the point-of-sale device is purchased on or after June 9, 2001, and has an electronic display, the fee disclosure shall be on a label meeting federal standards or such other standards as may be promulgated by the Commissioner consistent with the purposes of this chapter and shall be displayed on the electronic display before the surcharge is incurred and before the person using the point-of-sale terminal is obligated to pay for the good or service being purchased.

(June 9, 2001, D.C. Law 13-308, § 508, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-131.01.

§ 26-131.09. Complaints against an operator of an automated teller machine.

(a) An operator of an automated teller machine shall clearly and conspicuously disclose on a label or sign posted on the automated teller machine, or in clear view of a person viewing the automated teller machine, the name, address, and telephone number of the Department and the operator. The label or sign shall also state that a person may send comments or complaints regarding the automated teller machine to the Department and shall state that the Department is an agency of the District.

(b) The Commissioner may investigate a complaint, in whatever form

received, regarding an automated teller machine. The investigation of the Commissioner under this subsection may include an examination of the automated teller machine. The operator of the automated teller machine shall pay to the Commissioner the reasonable costs and expenses incurred by the Commissioner for the examination or investigation.

(June 9, 2001, D.C. Law 13-308, § 509, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-131.01.

§ 26-131.10. Registration of automated teller machines.

(a) Except as provided in subsections (d) and (e) of this section, an automated teller machine operated in the District shall be registered with the Commissioner by the operator of the automated teller machine. The operator shall pay annually to the Commissioner a nonrefundable registration fee of \$500 for the first automated teller machine operated by the operator in the District and \$50 for each additional automated teller machine operated by the operator in the District. If the operator does not pay the total annual fee imposed under this subsection, each automated teller machine of the operator in the District shall be considered not to be registered under this subsection.

(b) No refund or abatement of a registration fee paid under this section shall be made if the registration is surrendered, cancelled, revoked, or suspended before the expiration of the period for which the fee was paid.

(c) The Commissioner may suspend, revoke, or refuse to renew the registration of an operator under this section if the Commissioner finds that the operator or an owner, director, officer, member, partner, trustee, employee, or agent of the operator has:

- (1) Made a material misstatement in the application for registration;
- (2) Committed a fraud, engaged in dishonest activity, or made a misrepresentation in connection with the operation of the automated teller machine;
- (3) Demonstrated a lack of competence in connection with the operation of the automated teller machine; or
- (4) Violated any provision of this chapter or any regulation promulgated under this chapter.

(d) The registration requirement in subsection (a) of this section shall not apply to automated teller machines owned or operated by a depository institution insured by the Federal Deposit Insurance Corporation.

(e) The Electronic Fund Transfer Act, approved November 10, 1978 (92 Stat. 3728; 15 U.S.C. § 1693 et seq.), and any regulations issued, or that may be issued, under the Electronic Fund Transfer Act, except for those provisions, amendments, or regulations that establish crimes or provide for nonfinancial penalties, are hereby adopted as part of this chapter. Compliance with the Electronic Fund Transfer Act shall be considered to be compliance with this section.

(June 9, 2001, D.C. Law 13-308, § 510, 48 DCR 3244; Oct. 3, 2001, D.C. Law 14-28, § 2602, 48 DCR 6981; Mar. 13, 2004, D.C. Law 15-105, § 60, 51 DCR 881.)

Effect of amendments. — D.C. Law 14-28, in subsec. (a), substituted “Except as provided in subsections (d) and (e) of this section, an automated” for “An automated”; added subsec. (d) relating to applicability of the registration requirement; and added subsec. (e) relating to the Electronic Fund Transfer Act.

D.C. Law 15-105, in subsec. (e), validated previously made technical corrections.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2402 of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-131.01.

Legislative history of Law 14-28. — Law 14-28, the “Fiscal Year 2002 Budget Support Act of 2001”, was introduced in Council and assigned Bill No. 14-144, which was referred to

the Committee Of the Whole. The Bill was adopted on first and second readings on May 1, 2001, and June 5, 2001, respectively. Signed by the Mayor on June 29, 2001, it was assigned Act No. 14-85 and transmitted to both Houses of Congress for its review. D.C. Law 14-28 became effective on October 3, 2001.

Legislative history of Law 15-105. — Law 15-105, the “Technical Amendments Act of 2003”, was introduced in Council and assigned Bill No. 15-437, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 4, 2003, and December 2, 2003, respectively. Signed by the Mayor on January 6, 2004, it was assigned Act No. 15-291 and transmitted to both Houses of Congress for its review. D.C. Law 15-105 became effective on March 13, 2004.

§ 26-131.11. Record keeping requirements.

An operator of an automated teller machine in the District shall maintain and, upon request, make available to the Commissioner, in a form satisfactory to the Commissioner, such books, records, and accounts as will enable the Commissioner to verify the daily activity at each of the operator’s automated teller machines. An operator shall retain the books, records, and accounts referred to in the previous sentence for at least 90 days from the date of the daily activity.

(June 9, 2001, D.C. Law 13-308, § 511, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-131.01.

§ 26-131.12. Penalties.

If the Commissioner finds, after notice and a hearing, that a person has violated this chapter or a rule or regulation promulgated, or order issued, under this chapter, the Commissioner may order the person to pay to the Department a civil penalty in such amount as the Commissioner determines is appropriate; provided, that the amount of the penalty shall not exceed \$1,000 for a violation; provided further, that if there is a continuing violation, the penalty may be no more than the greater of \$1,000 or \$100 multiplied by the number of days that the violation has continued.

(June 9, 2001, D.C. Law 13-308, § 512, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-131.01.

§ 26-131.13. Authority of Commissioner to issue rules and regulations.

The Commissioner may promulgate rules and regulations to implement the

provisions of this chapter in accordance with subchapter I of Chapter 5 of Title 2.

(June 9, 2001, D.C. Law 13-308, § 513, 48 DCR 3244.)

Cross references. — Banking institutions formed under federal statute, application of District law, see § 26-710.

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-131.01.

CHAPTER 2. BUILDING ASSOCIATIONS.

Subchapter I. General

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Subchapter III. Transfer of Remaining Functions to the Superintendent of Banking and Financial Institutions

26-251. Remaining powers, duties, and functions of Comptroller transferred to Superintendent of Banking and Financial Institutions.

Subchapter I. General.

§ 26-201. Formation; general nature and powers.

(a) Any 5 or more persons who desire to form an incorporated building or homestead association, all being citizens of the United States, and a majority of them residents of the District of Columbia, may make, sign, seal, and acknowledge, before some officer authorized to take the acknowledgment of deeds, and file for record in the Office of the Recorder of Deeds, a certificate, in writing, to the same effect as that required in Chapters 1 and 3 of Title 29 for the formation of the corporations therein mentioned.

(b) When such certificate shall have been filed for record as aforesaid, the persons who have signed and acknowledged the same, and their successors, shall become and be a body politic and corporate, in fact and in law, by the name stated in the certificate, and by that name have succession and be capable of suing and being sued in the courts, of the District, and of purchasing, holding, and conveying such real estate as may be necessary to the conduct of its business, and to make reasonable bylaws not inconsistent herewith.

(Mar. 3, 1901, 31 Stat. 1298, ch. 854, §§ 687, 688; July 2, 2011, D.C. Law 18-378, § 3(k)(2), 58 DCR 1720.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-501. 1973 Ed., § 26-401.

Effect of amendments. — D.C. Law 19-378, in subsec. (a), substituted "Chapters 1 and 3 of Title 29" for "Chapter 2 of Title 29".

Legislative history of Law 18-378. — Law 18-378, the "District of Columbia Official Code Title 29 (Business Organizations) Enactment

Act of 2009", was introduced in Council and assigned Bill No. 18-500, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on December 7, 2010, and December 21, 2010, respectively. Signed by the Mayor on February 27, 2011, it was assigned Act No. 18-724 and transmitted to both Houses of Congress for its review. D.C. Law 18-378 became effective on July 2, 2011.

Transfer of Functions. — Pursuant to Reorganization Plan No. 3 of 1992, effective January 20, 1993, unless another date was designated by the Mayor under Sec. V of the Plan, the D.C. Office of Banking and Financial Institutions ("OBFI") is hereby transferred from the

Deputy Mayor for Economic Development ("DMED") control center to a separate OBFI control center/responsibility center. OBFI will continue to be administered by the Superintendent and will remain a part of the economic development cluster reporting to the Mayor.

CASE NOTES

Authority to conduct incidental business and activities.

District of Columbia statutes governing organization and powers of building and loan association, object of Home Loan Bank Board, objects of building and loan association and licensing of agents and brokers for hazard insurance did not preclude building and loan association from obtaining license for, and conducting business of, insurance agent or broker with respect to insurance on property securing loans, as incident to its primary business. D.C. Code §§ 26-401, 26-404, 35-1336. *Goodman v. Perpetual Bldg. Asso.*, 320 F. Supp. 20, 1970 U.S. Dist. LEXIS 12126 (D.D.C.1970).

Building and loan association constitution granting power to do all things reasonably incident to accomplishment of its objectives, and bylaw governing power to provide facilities afforded by federal associations or others organized to do business in any state in which association had office, constituted grant of power to engage in reasonably incidental activities beneficial to association and its members, including qualifying for and placing hazard insurance to protect association's security on loans made by it to members. *Goodman v. Perpetual Bldg. Asso.*, 320 F. Supp. 20, 1970 U.S. Dist. LEXIS 12126 (D.D.C.1970).

§ 26-202. Powers as to stock.

Such corporation shall have power, in its certificate of incorporation or in its bylaws, to provide that its shares of stock may be issued in series; to limit the number of shares which each stockholder may be allowed to hold; to prescribe the entrance fee to be paid by each stockholder at the time of subscribing; and to regulate the instalments to be paid on each share and the times at which they shall be payable. It shall also have power to enforce the payment of all installments and other dues by such fines and forfeitures as its bylaws may from time to time provide.

(Mar. 3, 1901, 31 Stat. 1299, ch. 854, § 689.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-502. 1973 Ed., § 26-402.

§ 26-203. Bonus to be paid by late subscribers.

Any person applying for membership or stock after a month from the time of the incorporation may be required to pay on subscribing such bonus or assessment as may be fixed by said bylaws in order to place said new members or stockholders on a footing with the original members and others holding stock at the time of such application.

(Mar. 3, 1901, 31 Stat. 1299, ch. 854, § 690.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-503. 1973 Ed., § 26-403.

§ 26-204. Object; supervision by federal board; strict compliance with provisions required; exception; violations.

(a) The object of such corporation shall be the accumulation of a capital in money to be derived from the savings and accumulations by the members thereof, to be paid into said corporation in such sums and at such times as may be designated by the bylaws of said corporation, from which the members thereof may obtain advances upon their shares of stock; provided, that the Federal Home Loan Bank Board is authorized, whenever such Board may deem it useful; to cause examination to be made into the condition of any building association incorporated under the provisions of this chapter, as well as any other building or loan association located or doing business in the District of Columbia. The expenses necessarily incurred in making any such examination shall be paid by such association to the Federal Home Loan Bank Board at the time of the making of such examination; and provided further, that every building or loan association located and doing business in the District of Columbia shall make to the Federal Home Loan Bank Board at least 1 report during each year, according to the form which may be prescribed by such Board, verified by the oath or affirmation of the president or secretary of such association and attested by the signature of at least 3 of the directors.

(b) The Federal Home Loan Bank Board shall also have power to take possession of any company or association whenever in the Board's judgment any such company or association is insolvent or is knowingly violating the laws under which it is operated and to liquidate the same in the manner provided in rules and regulations which said Board is hereby authorized to adopt, and said Board may also provide in such rules and regulations a procedure for the voluntary liquidation of any such company or association; and if any such company or association which has not gone into liquidation and for which a receiver has not already been appointed for other lawful cause shall discontinue its operations for a period of 60 days, the Federal Home Loan Bank Board may, if such Board deems it advisable, appoint a receiver for such company or association; provided further, that from and after the 1st day of July, 1909, no person, company, association, copartnership, or corporation shall conduct or carry on in the District of Columbia the kind of business named in this section and § 26-206, without strict compliance in all particulars with the provisions of this section and § 26-206; provided, that building associations organized and in actual operation before March 4, 1909, need not be incorporated. After April 11, 1986, the preceding language in this section shall not apply to entities formed under this chapter. Thereafter the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] shall supervise these entities.

(c) Any person, officer, or agent of any company, firm, or corporation who shall wilfully violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and shall on conviction thereof be punished by a fine of not more than \$1,000 or by imprisonment not longer than 2 years, or by both said punishments, in the discretion of the court. That any wilful false swearing in

regard to any certificate, or report, or public notice required by the provisions of this section and § 26-206 shall be perjury, and shall be punished as such according to the laws of the District of Columbia. And any misappropriation of any of the money of any corporation or company, formed under or availing itself of the privileges of this section and § 26-206, or of any building or loan association located or doing business in the District of Columbia, or any money, funds, or property intrusted to any such corporation, company, or association, shall be held to be theft and shall be punished as such under the laws of said District.

(Mar. 3, 1901, 31 Stat. 1299, ch. 854, § 691; Mar. 4, 1909, 35 Stat. 1058, ch. 303, § 1; Sept. 15, 1951, 65 Stat. 323, ch. 404, § 1; Dec. 1, 1982, D.C. Law 4-164, § 601(i), 29 DCR 3976; Nov. 23, 1985, D.C. Law 6-63, § 106(a)(2), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in §§ 26-702.01 and 26-710.

Prior Codifications. — 1981 Ed., § 26-504. 1973 Ed., § 26-404.

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White collar Crime Act of 1982," was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-107. — Law 6-107, the "District of Columbia Regional Interstate Banking Act of 1985 Amendment Act of 1985," was introduced in Council and assigned Bill No. 6-276, which was referred to the Com-

mittee on Housing and Economic Development. The Bill was adopted on first and second readings on January 14, 1986 and January 28, 1986, respectively. Signed by the Mayor on February 14, 1986, it was assigned Act No. 6-136 and transmitted to both Houses of Congress for its review.

References in text. — The "Home Loan Bank Board," formerly referred to throughout subsections (a) and (b) of this section, was changed to "Federal Home Loan Bank Board" by § 109(a)(3) of the Act of August 11, 1955, 69 Stat. 640. Subsequently the Federal Home Loan Bank Board was abolished. For provisions relating to the abolition of the Federal Home Loan Bank Board and the transfer of functions, personnel and property of that agency, see §§ 401 to 406 of Pub. L. 101-73, set out as a note under 12 U.S.C. § 1437.

§ 26-205. [Reserved].

§ 26-206. Foreign associations.

(a) No foreign association shall make loans of any kind or transact any building and loan business within the District of Columbia or maintain an office in the District of Columbia for the purpose of transacting such business until it procures from the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] a certificate of authority to do such business in said District, after complying with the following provisions:

(1) It shall deposit with the District of Columbia Treasurer \$50,000 in cash, or bonds of the United States, or bonds which the United States guarantees the payment of both principal and interest. A foreign association may collect and use the interest on securities deposited with the District of Columbia Treasurer, as hereinabove provided, so long as it fulfills its obligations and complies with the laws of the District of Columbia. It may also

exchange them for other securities of the United States or for cash. The deposit made by a foreign association with the Office of the Treasurer shall be held as security for all claims of residents of the District of Columbia against such association, and be liable for all judgments or decrees thereon, and subjected to the payment thereof in the same manner as the property of other nonresidents. Should an association cease to do business in said District, the District of Columbia Treasurer, upon a certificate from the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking], may release securities in his discretion, retaining sufficient to satisfy all outstanding liabilities.

(2) It shall file with the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] a certified copy of its charter, constitution, and bylaws, and other rules and regulations showing its manner of conducting business, together with a statement such as is required semiannually from all associations.

(3) It shall file with the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] a power of attorney appointing a citizen of the District of Columbia, resident within said District, the agent or attorney for such foreign association upon whom process of law can be served. There must also be filed a certified copy of the vote or resolution of the directors appointing such agent or attorney, which appointment shall continue until another agent or attorney is substituted, and said writing or power of attorney shall stipulate and agree on the part of such foreign association making the same that any lawful process against said association, which is served on such agent or attorney, shall be of the same legal force and validity as if served on such association within the District of Columbia; and, also, that in the case of the death or absence of the agent or attorney so appointed, service or process may be made upon the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking], and such power of attorney cannot be revoked or modified (except that a new one may be substituted) so long as any liability remains outstanding against such foreign association in the District of Columbia. The term "process," used above, shall be held and deemed to include any writ, summons, or order whereby any action, suit, or proceeding shall be commenced, or which shall be issued in or upon any action, suit, or proceeding by any court, officer, or magistrate.

(4) It shall pay to the Collector of Taxes the following fees:

(A) For filing an application for admission to do business in the District of Columbia, \$500; and

(B) For each certificate of authority and annual renewal thereof, \$200.

(a-1) The Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] shall not issue a certificate of authority to any foreign association pursuant to this subsection after October 12, 1988. After October 12, 1988, the certificate of authority shall be issued pursuant to § 26-1204. The Superintendent [Commissioner] may consider an application for a certificate of authority, which was filed pursuant to this subsection, prior to October 12, 1988 and may grant the application if

the applicant meets the requirements imposed by § 26-1202(a)(3) and any other requirements imposed by the Superintendent [Commissioner]. The Superintendent [Commissioner] may enforce any commitments made by an applicant under this section in accordance with the procedures set forth in § 26-1202(a)(4).

(b) When a foreign association has complied with the provisions of paragraph (3) of subsection (a) of this section, and the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] is satisfied that it is doing or will do its building and loan business in the District of Columbia in accordance with the laws of the District of Columbia, such Superintendent [Commissioner] may issue a Superintendent's [Commissioner's] certificate of authority to such foreign association to do a building and loan business in the District of Columbia. Annually thereafter, if the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] is satisfied as herein provided, the Superintendent [Commissioner] shall issue a renewal of such certificate.

(c) Should the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] find that such foreign association does not conduct its building and loan business in accordance with law, or that the affairs of such association are in unsafe condition, or if such foreign association refuses to permit examination to be made, the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] may revoke the certificate of authority granted, after 90-days notice, to such foreign association to do a building and loan business in the District of Columbia; provided, that upon revocation of such certificate of authority the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] shall mail a notice thereof to the home office of such foreign association and cause a similar notice to be published in at least 1 daily newspaper of general circulation in the District of Columbia. After so notifying said home office and after the publication of said notice, it shall be unlawful for any agent of such foreign association to receive any further payments from shareholders residing in the District of Columbia.

(d) Every foreign association doing a building and loan business in the District of Columbia shall be subject to the same examination as are domestic associations and such examination may include examination of all subsidiaries of such foreign associations and all business operations wherever apparent; provided, that the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] may accept reports of examination by other supervisory agents in lieu of making such examinations and provided that all the actual and necessary expenses of such examinations of such foreign associations shall be paid by the association examined.

(e) Whenever any taxes, fines, penalties, fees, licenses, or conditions precedent are imposed by the laws of any state upon building and loan associations organized or incorporated under the laws of the District of Columbia, and

doing business in the said state, in excess of the taxes, fines, penalties, fees, licenses, or conditions precedent imposed by the laws of the District of Columbia upon foreign associations doing a building and loan business in the District of Columbia, the same taxes, fines, penalties, fees, licenses, or conditions precedent shall be imposed upon every association incorporated under the laws of such state doing, or applying to do, a building and loan business in the District of Columbia, so long as such excess taxes, fines, penalties, fees, licenses, or conditions precedent are imposed by such state; and upon the failure of any association incorporated under the laws of such state to comply therewith the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] shall revoke the certificate of authority of such association to do a building and loan business in the District of Columbia or shall refuse to grant such certificate of authority in the first instance.

(f) A foreign association which does a building and loan business in the District of Columbia without first complying with the provisions of this chapter, or which wilfully violates or fails to comply with the provisions of laws relating to foreign associations, shall forfeit and pay not less than \$25 or more than \$500, to be recovered by an action in the name of the District of Columbia and on collection paid into the Office of the Treasurer.

(Mar. 3, 1901, ch. 854, § 691a; Mar. 4, 1909, 35 Stat. 1059, ch. 303, § 2; July 18, 1939, 53 Stat. 1060, ch. 322, § 1; Sept. 15, 1951, 65 Stat. 323, ch. 404, § 2; Nov. 23, 1985, D.C. Law 6-63, § 106(a)(3), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168; Apr. 30, 1988, D.C. Law 7-104, § 44, 35 DCR 147; Oct. 12, 1988, D.C. Law 7-175, § 18, 35 DCR 6133; Apr. 9, 1997, D.C. Law 11-255, § 24(d), 44 DCR 1271.)

Section references. — This section is referred to in §§ 26-103, 26-204, and 26-710.

Prior Codifications. — 1981 Ed., § 26-506. 1973 Ed., § 26-405.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-204.

Legislative history of Law 7-104. — Law 7-104, the “Technical Amendments Act of 1987,” was introduced in Council and assigned Bill No. 7-346, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 24, 1987, and December 8, 1987, respectively. Signed by the Mayor on December 22, 1987, it was assigned Act No. 7-124 and transmitted to both Houses of Congress for its review.

Legislative history of Law 7-175. — Law 7-175, the “District of Columbia Savings and

Loan Acquisition Amendment Act of 1988,” was introduced in Council and assigned Bill No. 7-399, which was referred to the Committee on Housing and Economic Development. The Bill was adopted on first and second readings on June 28, 1988, and July 12, 1988, respectively. Signed by the Mayor on August 1, 1988, it was assigned Act No. 7-235 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-255. — Law 11-255, the “Second Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

§ 26-207. Advancements — Payments of premiums.

The moneys accumulated from time to time shall be offered to such shareholder or shareholders as shall bid the highest premium for preference or priority of right to an advancement of the ultimate value of 1 or more of his or

their respective shares. The said premium shall consist of a percentage on the amount of the advance and shall be deemed to be a consideration or bonus paid by the shareholder for the present and immediate use and possession of the future or ultimate value of the share so advanced, and shall not be deemed usurious. The said premium may either be deducted in advance from the amount to be advanced to the shareholder or be made payable in monthly installments, in addition to legal interest on the sum advanced, as the bylaws may provide.

(Mar. 3, 1901, 31 Stat. 1299, ch. 854, § 692.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-507. 1973 Ed., § 26-406.

CASE NOTES

ANALYSIS

Assignment of shares as security.
Law governing.
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Usury.

Assignment of shares as security.

Where the borrower from a building association surrenders his stock to the association upon a mortgage loan being made to him, and the stock is not transferred as collateral security for the loan, he becomes a creditor of the association, and in a subsequent accounting he is to be charged with the amount actually received by him on account of the loan with interest, and credited with all payments made, whether by way of dues, interest, or premium. *Croissant v. Empire State Realty Co.*, 29 App.D.C. 538, 1907 U.S. App. LEXIS 5482 (1907).

Law governing.

Where a loan made by a foreign building association to a resident of this District, and secured by a bond and mortgage on real estate here, was arranged here, the papers executed and delivered here, the payments on the indebtedness made to a local representative of the association, and there is no provision in any of the numerous instruments evidencing the contract declaring to the contrary, its interpretation will be governed by the laws of this District. *Croissant v. Empire State Realty Co.*, 29 App.D.C. 538, 1907 U.S. App. LEXIS 5482 (1907).

Where a Maryland building association makes a loan secured by mortgage on land in the District of Columbia, stipulating that the loan is made with reference to the law of Maryland, and the result of an accounting in the District is found to be the same as under the law of Maryland, the rule adopted in that state may be followed. *Middle States Loan, Building*

& Construction Co. v. Baker, 19 App.D.C. 1, 1901 U.S. App. LEXIS 5092 (1901).

Retroactive application of statute.

Code, § 692, providing that premiums to be charged by building associations, as organized thereunder, shall not be deemed usurious, is not retroactive, and does not affect the right of a borrower from a building association to redeem his mortgaged property from a loan, where such right, by reason of a tender of the amount due, existed before the Code went into effect. *Washington Nat. Building & Loan Ass'n of Washington v. Fiske*, 20 App.D.C. 514, 1902 U.S. App. LEXIS 5473 (1902).

Usury.

It does not necessarily follow that a building association loan is usurious because a larger sum is reserved to be paid than the principal and legal interest; the test to determine whether the loan is usurious usually being whether the promise to pay the sum above legal interest depends on a contingency, and not on the happening of a certain event. If it depends on a contingency the loan is not usurious. *Whelpley v. Ross*, 25 App.D.C. 207, 1905 U.S. App. LEXIS 5266 (1905).

A provision in a building association mortgage that the borrower, instead of paying the usual premium, which is a sum of money to be paid for the loan in advance, is to pay monthly during the continuance of the mortgage, a specified sum, called "premium," in addition to the legal rate of interest, is void, as calling for usurious payments; and in an accounting payments so made should be charged as payments on account of the principal debt. *Middle States Loan, Building & Construction Co. v. Baker*, 19 App.D.C. 1, 1901 U.S. App. LEXIS 5092 (1901).

Where a member of a building association, who has borrowed money from the association on a mortgage providing that he shall continue to pay certain sums until the stock represent-

ing the mortgage shall be fully paid up, conveys the mortgaged land to a third person, who is thereupon recognized and admitted into membership by the company, such grantee, whether he has by the terms of the deed to himself agreed to assume the mortgage debt or not, is entitled to credit for usurious payments made by his grantor. *Middle States Loan, Building & Construction Co. v. Baker*, 19 App.D.C. 1, 1901 U.S. App. LEXIS 5092 (1901).

Where, in a building association mortgage, it is provided that of the so-called premium of 60

cents a month 10 cents is to be carried to the operating expense account of the company, the borrower is nevertheless, in the accounting entitled to credit for the entire 60 cents a month paid by him, and not only to 50 cents. There can be no abatement of the usury from 60 to 50 cents a month, because the company chooses to apply 10 cents of it to its operating expenses. *Middle States Loan, Building & Construction Co. v. Baker*, 19 App.D.C. 1, 1901 U.S. App. LEXIS 5092 (1901).

§ 26-208. Advancements — Security.

For every advance made as aforesaid a bond in a penalty equal to the ultimate value of the shares advanced may be required, secured by a first mortgage or deed of trust on real estate, and a pledge of the shares advanced upon, as additional or collateral security, which bond shall be conditioned for the payment at the stated meetings of the corporation of the monthly dues on the share so advanced upon and the interest on the sum advanced, and the installments of premium, if made so payable, and all fines chargeable upon arrears of payments, until said shares shall reach their ultimate value aforesaid, or said advance be otherwise canceled or discharged.

(Mar. 3, 1901, 31 Stat. 1299, ch. 854, § 693.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-508. 1973 Ed., § 26-407.

§ 26-209. Advancements — Participation of all shares in profits.

The shares advanced upon shall participate equally with the other shares in the profits and the amounts paid by the advanced shareholders, together with such proportion of the profits accrued or such rate of interest as said bylaws may determine, the same as allowed on shares withdrawn not advanced upon, less all fines and a proportionate part of losses and other charges incurred.

(Mar. 3, 1901, 31 Stat. 1299, ch. 854, § 694.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-509. 1973 Ed., § 26-408.

§ 26-210. Advancements — Redemption on failure to bid.

Where advances from the funds on hand cannot be made on satisfactory terms, the shareholders failing to bid therefor, the bylaws may provide for the redemption of shares of stock, with the consent of the shareholders, and in case that cannot be done, for the involuntary withdrawal and cancelation of shares, the said shares to be selected by lot, always from the oldest series, until exhausted, or the funds to be applied ratably among the owners of shares of the same series.

(Mar. 3, 1901, 31 Stat. 1300, ch. 854, § 695.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-510.
1973 Ed., § 26-409.

§ 26-211. Withdrawal by shareholder.

A shareholder shall be entitled to withdraw at any time, by giving such notice as the bylaws may require, where no advance has been made on his shares, in which case he shall be entitled to receive the amount of dues paid in by him on each of his shares, together with such proportion of the profits accrued or such rate of interest as said bylaws may determine, less all fines due and a proportionate part of all losses and other charges incurred; provided, that not more than one-half of the funds in the treasury at any time shall be applicable to the demands of the withdrawing shareholders without the consent of the board of trustees.

(Mar. 3, 1901, 31 Stat. 1300, ch. 854, § 696.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-511.
1973 Ed., § 26-410.

§ 26-212. Repayment of advances.

A shareholder who has been advanced may at any time repay his advance upon application to the corporation, whereupon, on settlement of his account, he shall be charged with the full amount of the advance and of the accrued installments of the premium, if that has been added to the advancement and made payable in instalments, together with all monthly dues, interest, and fines accrued and charged, and shall receive credit for all monthly dues paid on his shares and the profits thereon the same as are allowed under the bylaws on shares withdrawn not advanced upon, and, if the premium has been deducted in advance, with such proportion of the premium as the bylaws may direct, and the balance remaining due, over and above such credits, shall be received by said corporation in satisfaction and discharge of said advance; provided, that in case of the insolvency of the association, he shall not be entitled to credit for the full amount of dues paid by him, but shall only be entitled to a dividend upon said amount, in common with the nonadvanced shareholders.

(Mar. 3, 1901, 31 Stat. 1300, ch. 854, § 697.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-512.
1973 Ed., § 26-411.

§ 26-213. Forfeiture of stock.

Any nonadvanced shareholder failing to pay the instalments due on his share and the fines due from him for such time as the bylaws shall determine, shall forfeit his stock, but may, on application, receive a return of the amount paid in on account of his stock, less the accrued fines.

(Mar. 3, 1901, 31 Stat. 1300, ch. 854, § 698.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-513. 1973 Ed., § 26-412.

§ 26-214. Foreclosure of advanced shareholder's security.

In case any advanced shareholder shall fail to pay all dues, interest, or premiums and shall be in arrears for any part of the same for the period of 2 months, the payment of the same and of the principal of the advance may be enforced by a foreclosure of the securities given for the same, and if upon a statement of account, as in case of a voluntary settlement of said advance, as hereinbefore authorized, there shall be any surplus of the proceeds of sale of the property given as security over the amount found due from such advanced shareholder, together with all costs incurred by the corporation, such surplus shall be paid to said defaulting shareholder, or his assigns, and his shares of stock so advanced upon shall be the property of the corporation.

(Mar. 3, 1901, 31 Stat. 1300, ch. 854, § 699.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-514. 1973 Ed., § 26-413.

§ 26-215. Purchase of real property.

Such corporation shall not invest its fund in any real estate except what is necessary for the conduct of its business, but may purchase such property at sales made upon foreclosure of mortgages or in satisfaction of judgments or other liens held by it; provided, that such property so purchased be sold within a reasonable time thereafter.

(Mar. 3, 1901, 31 Stat. 1300, ch. 854, § 700.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-515. 1973 Ed., § 26-414.

Subchapter II. Federal Securities.

§ 26-231. Purchase of federal securities.

The board of directors of any building association incorporated or unincorporated, organized and existing under the laws of the District of Columbia to do or now doing in the District of Columbia a building association business, in their discretion, may purchase the bonds of the Home Owners' Loan Corporation created pursuant to the authority of the Home Owners' Loan Act of 1933, approved June 13, 1933 (and said association is hereby permitted to carry said bonds as an asset at the par value of said bonds) or may subscribe and pay for shares of any federal corporation created or authorized by law to lend money to building and loan associations.

(Mar. 3, 1901, ch. 854, § 55; Mar. 27, 1934, 48 Stat. 506, ch. 96.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-516. 1973 Ed., § 26-415.

References in text. — The Home Owners' Loan Corporation, referred to near the middle of this section, was dissolved by the Act of June 30, 1953, 67 Stat. 126, ch. 170, § 21.

The Home Owners' Loan Act of 1933, ap-

proved June 13, 1933, referred to near the middle of this section, is codified in Chapter 12 of Title 12, United States Code, and, as amended, is referred to as the "Home Owners' Loan Act."

§ 26-232. Exchange of securities or real estate for federal bonds.

Any building association incorporated or unincorporated, organized and existing under the laws of the District of Columbia, to do or now doing, in the District of Columbia, a building association business, is authorized and empowered to exchange mortgages or deeds of trust or the notes or bonds secured thereby or other obligations and liens secured on real estate or any real estate which it may have or hold, for the bonds of the Home Owners' Loan Corporation created pursuant to the authority of the Home Owners' Loan Act of 1933, approved June 13, 1933, and said association is hereby authorized to carry said bonds as an asset at the par value of said bonds.

(Mar. 3, 1901, ch. 854, § 56; Mar. 27, 1934, 48 Stat. 506, ch. 96.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-517. 1973 Ed., § 26-416.

References in text. — The Home Owners' Loan Corporation, referred to in this section, was dissolved by the Act of June 30, 1953, 67 Stat. 126, ch. 170, § 21.

The Home Owners' Loan Act of 1933, approved June 13, 1933, referred to in this section, is codified in Chapter 12 of Title 12, United States Code, and, as amended, is referred to as the "Home Owners' Loan Act."

Subchapter III. Transfer of Remaining Functions to the Superintendent of Banking and Financial Institutions.

§ 26-251. Remaining powers, duties, and functions of Comptroller transferred to Superintendent of Banking and Financial Institutions.

Any powers, duties, and functions of the Comptroller of the Currency with respect to building associations and building and loan associations operating in the District of Columbia which are not transferred to the Federal Home Loan Bank Board by the specific statutory amendments herein contained are also hereby transferred from the Comptroller of the Currency to the Federal Home Loan Bank Board. After April 11, 1986, the powers, duties, and functions referred to in this section shall reside in the Superintendent of Banking and Financial Institutions [now Commissioner of the Department of Insurance, Securities, and Banking].

(Sept. 15, 1951, 65 Stat. 324, ch. 404, § 4; Nov. 23, 1985, D.C. Law 6-63, § 106(e), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-505. 1973 Ed., § 26-404a.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-204.

References in text. — The “Home Loan Bank Board,” formerly referred to throughout this section, was changed to “Federal Home Loan Bank Board” by § 109(a)(3) of the Act of August 11, 1955, 69 Stat. 640. Subsequently, the Federal Home Loan Bank Board was abolished. For provisions relating to the abolition of

the Federal Home Loan Bank Board and the transfer of functions, personnel and property of that agency, see §§ 401 to 406 of Pub. L. 101-73, set out as a note under 12 U.S.C. § 1437.

The words “specific statutory amendments,” referred to in the section, means the amendments made by §§ 1 to 3 of the Act of September 15, 1951, 65 Stat. 324, ch. 404.

CHAPTER 3. CHECK CASHERS.

Sec.	Sec.
26-301. Definitions.	26-313. Limitation of license.
26-302. Requirement of license.	26-314. License for limited station.
26-303. Exemptions.	26-315. Change of location of business or area; other miscellaneous activity.
26-304. Form and contents of application for license.	26-316. Revocation and suspension of license.
26-305. Application and license fees.	26-317. Limitations on fees for cashing checks.
26-306. Bond to accompany application for li- cense.	26-318. Books, accounts, and other records of licensee.
26-307. Minimum liquid assets required.	26-319. Limitations on business.
26-308. Granting of license; investigations.	26-320. Formal investigations.
26-309. Issuance and form of license.	26-321. Cease and desist orders.
26-310. Display of license.	26-322. Authority of Superintendent to issue rules and regulations.
26-311. Time and renewal of license.	26-323. Penalties.
26-311.01. Examinations.	
26-312. Transferability of license.	

§ 26-301. Definitions.

For the purposes of this chapter, the term:

(1) "Check" means any check, draft, money order, personal money order, or other instrument for the transmission or payment of money.

(2) "Check cashing" means the exchange of a check for money delivered to the presenter at the time and place of the presentation.

(3) Repealed.

(4) "Issue date" means, on a check held for deferred deposit, the date the check is cashed and the deferred deposit agreement is originated.

(5) "Licensee" means any person duly licensed by the Superintendent [Commissioner] pursuant to this chapter.

(6) "Limited station" means a type of check cashing business that authorizes the licensee to carry on the business of cashing checks for employees of a single and particular business or office and at a single location at or near such particular business or office site.

(7) "Mobile unit" means any vehicle or other movable structure from which the business of cashing checks is to be conducted.

(8) "Person" means an individual, firm, corporation, business trust, estate, trust, partnership, limited liability company, association, 2 or more persons having a joint or common interest, or any other legal or commercial entity, or group of individuals however organized but does not include the United States government, the government of the District of Columbia, or the United States Postal Service.

(9) "Superintendent" means the Superintendent of the Office of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking].

(May 12, 1998, D.C. Law 12-111, § 2, 45 DCR 1782; Nov. 24, 2007, D.C. Law 17-42, § 2(a), 54 DCR 9988.)

Prior Codifications. — 1981 Ed., § 26-1101.

Effect of amendments. — D.C. Law 17-42

repealed par. (3) which had read as follows: "(3) 'Deferred deposit' means a supplemental check cashing service that allows the maker, in the

event of a need for emergency cash, to write a personal check and receive cash immediately upon presentment and qualification, while delaying the deposit of the check into his or her personal checking account, pursuant to an agreement with the licensed check casher, for a mutually agreed to number of days following the issue date of the check. Post-dating of personal checks cashed and held for deferred deposit shall be prohibited.”

Legislative history of Law 12-111. — Law 12-111, the “Check Cashers Act of 1998,” was introduced in Council and assigned Bill No. 12-338. The Bill was adopted on first and second readings on January 6, 1998, and February 3, 1998, respectively. Signed by the Mayor on February 24, 1998, it was assigned Act No. 12-300 and transmitted to both Houses of Congress for is review. D.C. Law 12-111 became effective on May 12, 1998.

Legislative history of Law 17-42. — Law 17-42, the “Payday Loan Consumer Protection

Amendment Act of 2007”, was introduced in Council and assigned Bill No. 17-132 which was referred to the Committee on Public Service and Consumer Affairs. The Bill was adopted on first and second readings on July 10, 2007, and September 18, 2007, respectively. Signed by the Mayor on October 3, 2007, it was assigned Act No. 17-115 and transmitted to both Houses of Congress for its review. D.C. Law 17-42 became effective on November 24, 2007.

Effective date. — Section 4 of D.C. Law 17-42 provided: “This act shall take effect following the certification by the Chief Financial Officer, through a revised quarterly revenue estimate for fiscal year 2008, that local funds exceed the annual revenue estimates incorporated in the fiscal year 2008 budget and financial plan in an amount sufficient to account for its fiscal effect. The Chief Financial Officer shall set aside revenue to account for the cost of fully implementing this act.”

§ 26-302. Requirement of license.

Except as provided in § 26-303 no person, including a person doing so on May 12, 1998, shall engage in the business of cashing checks for consideration without first obtaining a license from the Superintendent [Commissioner] pursuant to this chapter. No separate license under this chapter shall be required for any agent of a licensee.

(May 12, 1998, D.C. Law 12-111, § 3, 45 DCR 1783.)

Prior Codifications. — 1981 Ed., § 26-1102.

Legislative history of Law 12-111. — For

legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

§ 26-303. Exemptions.

The provisions of the chapter shall not apply to:

(1) Banks, credit unions, trust companies, building and loan associations, and savings and loan associations organized under the laws of the United States or of the District of Columbia or authorized to do business in the District of Columbia;

(2) The United States Postal Service; or

(3) Any person who cashes checks without consideration or a charge.

(May 12, 1998, D.C. Law 12-111, § 4, 45 DCR 1783.)

Prior Codifications. — 1981 Ed., § 26-1103.

Legislative history of Law 12-111. — For

legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

§ 26-304. Form and contents of application for license.

(a) An application for a license under this chapter shall be in writing under

oath in the form prescribed by the Superintendent [Commissioner of the Department of Insurance, Securities, and Banking].

(b) The application shall include:

(1) If the applicant is an individual, the applicant's name, business address and telephone number, and residence address and telephone number;

(2) If the applicant is a partnership or other non-corporate business association, the business name, business address and telephone number, and the residence address and telephone number of each:

(A) General partner, if the applicant is a limited partnership;

(B) General partner who holds the interest in the partnership or more than 10% interest if the applicant is a general partnership; or

(C) Member, if the applicant is a limited liability company or other non-corporate business association;

(3) If the applicant is a corporation:

(A) The name, address, and telephone number of the corporate entity; and

(B) The name, business telephone number, and the residence and telephone number of the president, senior vice presidents, secretary, treasurer, each director, and each stockholder owning or controlling 10% or more of any class of stock in the corporation;

(4) The applicant's business plan;

(5) The name under which the check cashing business is to be conducted;

(6) The name and address of the applicant's registered agent;

(7) The location at which the applicant proposes to conduct business;

(8) If the applicant seeks to conduct business from a mobile unit, the District registration number or other identification of the mobile unit and the area in which the applicant proposes to operate the mobile unit;

(9) If the applicant seeks to conduct business from a limited station, the group of employees that would be served and the location at which these employees would be served; and

(10) Any other information that the Superintendent [Commissioner] requires.

(May 12, 1998, D.C. Law 12-111, § 5, 45 DCR 1783.)

Prior Codifications. — 1981 Ed., § 26-1104. legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

Legislative history of Law 12-111. — For

§ 26-305. Application and license fees.

At the time of filing an application under this chapter, each applicant shall pay to the Superintendent [Commissioner of the Department of Insurance, Securities, and Banking] a non-refundable license fee of \$300, except that an applicant for a license to maintain one or more limited stations shall pay the non-refundable limited station license application fee as provided in § 26-314.

(May 12, 1998, D.C. Law 12-111, § 6, 45 DCR 1784.)

Prior Codifications. — 1981 Ed., § 26-1105. legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.
Legislative history of Law 12-111. — For

§ 26-306. Bond to accompany application for license.

(a) At the time of filing an application under this chapter, each applicant shall file with the Superintendent [Commissioner of Insurance, Securities, and Banking] a bond in the sum of \$5,000 for each location and mobile unit from which the applicant proposes in the application to conduct business. The bond shall be issued by a person authorized to issue such bonds in the District and shall be in a form satisfactory to the Superintendent [Commissioner]. To satisfy the requirements of this section, the bond shall be effective on the date the license is issued by the Superintendent [Commissioner] and run to the Superintendent [Commissioner] for the use of the District. The applicant shall be the obligor of the bond. The bond must be conditioned upon the observance by the applicant of all the provisions of this chapter and of all rules and regulations lawfully made by the Superintendent [Commissioner] hereunder, and must be for the benefit of the District concerning any and all monies that become due or owing to the District from the applicant under this chapter as well as for the benefit of any private claimants against the applicant with respect to the cashing of checks in the District. The surety on the bond shall have the right to cancel such bond upon giving 30 days written notice to the Superintendent [Commissioner] and thereafter shall be relieved of liability for any breach of condition occurring after the effective date of the cancellation. Any license issued pursuant to this chapter shall be revoked, and void, by operation of law during any period when the bond required by this section is not in full force and effect.

(b) If the Superintendent [Commissioner], at any time, reasonably determines that the bond is insecure, deficient in amount, or exhausted in whole or in part, or if the surety on the bond has notified the Superintendent [Commissioner] of its intention to cancel the bond, the Superintendent [Commissioner] may, by written order, require the filing of a new or supplemental bond in order to secure compliance with this chapter. The licensee shall comply with the order within 20 days following service of the order upon the licensee.

(May 12, 1998, D.C. Law 12-111, § 7, 45 DCR 1784.)

Prior Codifications. — 1981 Ed., § 26-1106. legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.
Legislative history of Law 12-111. — For

§ 26-307. Minimum liquid assets required.

Each applicant shall demonstrate, in a form satisfactory to the Superintendent, [Commissioner] the availability of capital of at least \$25,000 for the operation of the business of each location and mobile unit from which the applicant proposes in the application to conduct business. Each licensee shall continuously maintain capital of at least \$5,000 for the operation of the

business of each location and mobile unit from which the licensee conducts business.

(May 12, 1998, D.C. Law 12-111, § 8, 45 DCR 1785.)

Prior Codifications. — 1981 Ed., § 26-1107. legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

Legislative history of Law 12-111. — For

§ 26-308. Granting of license; investigations.

(a) Upon the filing of an application in proper form, including the required fee and accompanying documents, the Superintendent [Commissioner] shall issue to the applicant a license to engage in the cashing of checks in the District of Columbia, unless the Superintendent [Commissioner] finds that the requirements prescribed by subsection (b) of this section and §§ 26-304, 26-305, 26-306, and 26-307 have not been met.

(b) The financial responsibility, conditions, and business experience of the applicant or licensee must be such as to warrant the belief that the applicant's business will be conducted honestly and carefully. The Superintendent [Commissioner] may investigate and consider the qualifications of the applicant or licensee (including the officers and directors of the applicant) in determining whether the requirement has been met.

(May 12, 1998, D.C. Law 12-111, § 9, 45 DCR 1785.)

Prior Codifications. — 1981 Ed., § 26-1108. legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

Legislative history of Law 12-111. — For

§ 26-309. Issuance and form of license.

A license to cash checks shall state:

- (1) The name of the licensee;
- (2) The names of the members of the licensee (if applicable);
- (3) The date of issuance and of expiration of the license;
- (4) The date and state of incorporation of the licensee (if applicable);
- (5) If the business is to be conducted at a specific address, the address at which the business is to be conducted; and
- (6) If the business is to be conducted through the use of a mobile unit or a limited station, the words "Mobile Unit License," or "Limited Station License", the District registration number or other identification of the mobile unit or limited station, and the area in which the applicant is authorized to operate the mobile unit or limited station.

(May 12, 1998, D.C. Law 12-111, § 10, 45 DCR 1785.)

Prior Codifications. — 1981 Ed., § 26-1109. legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

Legislative history of Law 12-111. — For

§ 26-310. Display of license.

A license issued pursuant to this chapter shall be conspicuously displayed in the place of business of the licensee or, in the case of a mobile unit, upon the mobile unit.

(May 12, 1998, D.C. Law 12-111, § 11, 45 DCR 1786.)

Prior Codifications. — 1981 Ed., § 26-1110. legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

Legislative history of Law 12-111. — For

§ 26-311. Time and renewal of license.

(a) A license issued to a check-cashing business shall remain in full force and effect through the 31st day of December following its date of issuance, unless earlier surrendered, suspended, or revoked.

(b) If an application for a renewal license, along with a license renewal fee of \$200, has been filed with the Superintendent [Commissioner] at least 30 days before the expiration of the license in force, such license shall continue in full force and effect either until the issuance by the Superintendent [Commissioner] of the renewal license applied for or until 5 days after the Superintendent [Commissioner] has refused to issue the renewal license and has given notice of such refusal to the applicant. Except for the fee, the requirements for the issuance of a renewal license shall be the same as the requirements for the issuance of the initial license. If the Superintendent [Commissioner] denies the applicant the authority to operate at a particular location, the operation of business at that particular location shall cease 5 days after the Superintendent [Commissioner] has refused to issue a renewal license to cover the location and has given notice of such refusal to the applicant.

(May 12, 1998, D.C. Law 12-111, § 12, 45 DCR 1786.)

Prior Codifications. — 1981 Ed., § 26-1111. legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

Legislative history of Law 12-111. — For

§ 26-311.01. Examinations.

(a) The Commissioner, or his or her designated agent, shall examine the affairs, business, premises, and records of each licensee at least once in every 3-year period and at any other time that the Commissioner considers necessary or provides by regulation.

(b) Each licensee shall be assessed an examination fee of \$100 per examination, plus \$20 per hour for each hour or fraction of each hour in excess of 4 hours if an examination of a licensee exceeds 4 hours.

(May 12, 1998, D.C. Law 12-111, § 12a, as added Oct. 3, 2001, D.C. Law 14-28, § 3102, 48 DCR 6981.)

Emergency legislation. — For temporary (90 day) addition of section, see § 2802 of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

Legislative history of Law 14-28. — For Law 14-28, see notes following § 26-131.10.

§ 26-312. Transferability of license.

A license issued pursuant to this chapter shall not be transferable or assignable.

(May 12, 1998, D.C. Law 12-111, § 13, 45 DCR 1786.)

Prior Codifications. — 1981 Ed., § 26-1112.

legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

Legislative history of Law 12-111. — For

§ 26-313. Limitation of license.

Not more than one location of business or mobile unit shall be maintained under the same license. More than one license may be issued to the same licensee upon compliance with this chapter for each new license.

(May 12, 1998, D.C. Law 12-111, § 14, 45 DCR 1786.)

Prior Codifications. — 1981 Ed., § 26-1113.

legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

Legislative history of Law 12-111. — For

§ 26-314. License for limited station.

Any licensee may open and maintain, within the District, one or more limited stations for the purpose of cashing checks for the particular group or groups specified in the license authorizing each limited station. A separate license shall be issued for each limited station maintained by the same licensee. The stations shall be licensed in accordance with all of the provisions of this chapter applicable to licensees, and the applicant shall pay a non-refundable limited station license application fee of \$150 for each limited station. Such fee may be changed in the rules and regulations promulgated by the Superintendent [Commissioner] as he or she deems necessary.

(May 12, 1998, D.C. Law 12-111, § 15, 45 DCR 1786.)

Prior Codifications. — 1981 Ed., § 26-1114.

legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

Legislative history of Law 12-111. — For

§ 26-315. Change of location of business or area; other miscellaneous activity.

A licensee may make a written application, in the form prescribed by the Superintendent [Commissioner], to the Superintendent [Commissioner] for leave to change the licensee's location of business, or in the case of a mobile unit, the area in which the mobile unit is authorized to be operated, stating the

reasons for the proposed change. If the Superintendent [Commissioner] approves the application, the Superintendent [Commissioner] shall issue a revised license in accordance with this chapter, stating the new location of the licensee or, in the case of a mobile unit, the new area in which the mobile unit may be operated. The revised license shall be for the same term as the original license to which the Superintendent [Commissioner] made the requested change. The fee for a revised license due to a change of location of business or area shall be \$50.

(May 12, 1998, D.C. Law 12-111, § 16, 45 DCR 1786.)

Prior Codifications. — 1981 Ed., § 26-1115. legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

Legislative history of Law 12-111. — For

§ 26-316. Revocation and suspension of license.

(a) The Superintendent [Commissioner] may revoke any license issued pursuant to this chapter if, after notice and a hearing, the Superintendent [Commissioner] finds that the licensee has:

(1) Committed any fraudulent acts, engaged in any dishonest activities, or made any misrepresentation in any business transaction;

(2) Been convicted of a felony under the laws of the District or the laws of any state or the United States;

(3) Violated any provisions of the banking laws of the District or any rules or regulations promulgated thereunder, or has violated any other law in the course of dealings as a licensee;

(4) Made a material misstatement in the application for a license under this chapter;

(5) Demonstrated incompetency or untrustworthiness to act as a licensee;

(6) Violated any provision of this chapter or of any implementing regulation; or

(7) Failed to satisfy any of the criteria for obtaining a license as set out in §§ 26-306, 26-307, or 26-308.

(b) A hearing for the purposes of this section shall be held in accordance with subchapter I of Chapter 5 of Title 2. Pending a hearing for the revocation of any license issued pursuant to this chapter, the Superintendent [Commissioner] may suspend the license for a period not to exceed 30 days if the Superintendent [Commissioner] determines that such a suspension is in the public interest and that one or more grounds for revocation of a license, as set forth in subsection (a) of this section, exist.

(c) Whenever the Superintendent [Commissioner] suspends or revokes a license issued pursuant to this chapter, the Superintendent [Commissioner] shall immediately execute a written order stating the grounds for the suspension or revocation. On the date the order is executed, the Superintendent [Commissioner] shall serve a copy thereof on the licensee either personally or by mailing the same to the last known address of the licensee.

(May 12, 1998, D.C. Law 12-111, § 17, 45 DCR 1787.)

Prior Codifications. — 1981 Ed., § 26-1116.

Legislative history of Law 12-111. — For

legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

§ 26-317. Limitations on fees for cashing checks.

(a)(1) Beginning January 1, 2011, no licensee under this chapter shall directly or indirectly charge any other fee, including late fees or other service fees, for accepting or cashing a payment instrument in excess of the greater of:

(A) Two percent of the face amount of the payment instrument or \$3, if the payment instrument is issued by the federal government or a state or local government;

(B) Ten percent of the face amount of a payment instrument or \$5, if the payment instrument is a personal check or money order; or

(C) Four percent of the face amount of the payment instrument or \$5, for any other type of payment instrument.

(2) A licensee may charge a customer an additional one-time membership fee not to exceed \$5.

(b) The fees for cashing a check shall be evidenced by a receipt. Such receipt shall be presented to the purchaser upon completion of the transaction.

(May 12, 1998, D.C. Law 12-111, § 18, 45 DCR 1787; Nov. 24, 2007, D.C. Law 17-42, § 2(b), 54 DCR 9988; Mar. 12, 2011, D.C. Law 18-315, § 2, 57 DCR 12412.)

Prior Codifications. — 1981 Ed., § 26-1117.

Effect of amendments. — D.C. Law 17-42, in subsec. (a), deleted the sentence: “An additional verification, handling, and documentation processing fee may be charged, pursuant to § 26-319, for a personal check held for deferred deposit.”

D.C. Law 18-315 rewrote subsec. (a), which had read as follows: “(a) No licensee under this chapter shall directly or indirectly charge or collect in fees or charges for cashing a check a sum to exceed 5% of the face value of a government or payroll check, 7% of the face value of an insurance check, 10% of the face value of a personal check or money order, or \$4, whichever is greater. Each licensee shall conspicuously post, in both English and Spanish, and at all times display in every location and upon every mobile unit licensed under this chapter, a schedule of fees and charges permitted hereunder, which schedule shall be approved by the Superintendent prior to posting.”

Legislative history of Law 12-111. — For legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

Legislative history of Law 17-42. — For Law 17-42, see notes following § 26-301.

Legislative history of Law 18-315. — Law 18-315, the “Alternative Money Lending and Services Reform Amendment Act of 2010”, was introduced in Council and assigned Bill No. 18-715, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on November 9, 2010, and November 23, 2010, respectively. Signed by the Mayor on December 9, 2010, it was assigned Act No. 18-636 and transmitted to both Houses of Congress for its review. D.C. Law 18-315 became effective on March 12, 2011.

Effective date. — Section 4 of D.C. Law 17-42 provided: “This act shall take effect following the certification by the Chief Financial Officer, through a revised quarterly revenue estimate for fiscal year 2008, that local funds exceed the annual revenue estimates incorporated in the fiscal year 2008 budget and financial plan in an amount sufficient to account for its fiscal effect. The Chief Financial Officer shall set aside revenue to account for the cost of fully implementing this act.”

§ 26-318. Books, accounts, and other records of licensee.

Each licensee under this chapter shall keep and use such books, accounts, and other records as the Superintendent [Commissioner] shall require to carry

into effect the provisions of this chapter and any rules and regulations issued by the Superintendent [Commissioner] under this chapter. Every licensee shall preserve such books, accounts, and records for at least 3 years.

(May 12, 1998, D.C. Law 12-111, § 19, 45 DCR 1788.)

Prior Codifications. — 1981 Ed., § 26-1118.
Legislative history of Law 12-111. — For

legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

§ 26-319. Limitations on business.

(a) No licensee under this chapter shall engage in the business of discounting of notes, bills of exchange, checks, or other evidences of indebtedness, nor shall such a discounting business be conducted on the same premises where the licensee is conducting business pursuant to this chapter.

(b) No licensee shall at any time cash or advance any monies on a post dated check.

(c) Repealed.

(May 12, 1998, D.C. Law 12-111, § 20, 45 DCR 1788; Nov. 24, 2007, D.C. Law 17-42, § 2(c), 54 DCR 9988.)

Prior Codifications. — 1981 Ed., § 26-1119.

Effect of amendments. — D.C. Law 17-42 repealed subsec. (c).

Legislative history of Law 12-111. — For legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

Legislative history of Law 17-42. — For Law 17-42, see notes following § 26-301.

Effective date. — Section 4 of D.C. Law

17-42 provided: "This act shall take effect following the certification by the Chief Financial Officer, through a revised quarterly revenue estimate for fiscal year 2008, that local funds exceed the annual revenue estimates incorporated in the fiscal year 2008 budget and financial plan in an amount sufficient to account for its fiscal effect. The Chief Financial Officer shall set aside revenue to account for the cost of fully implementing this act."

§ 26-320. Formal investigations.

Whenever it appears that an individual or entity licensed or required to be licensed under this chapter has violated or is violating any law, agreement, order, rule, or regulation or has engaged in an unsafe or unsound practice, the Superintendent [Commissioner] may issue an order to conduct a formal investigation of such person. The Superintendent [Commissioner] may cause any investigation, or portion of such investigation, to be conducted by a District or federal law enforcement agency by making the request for assistance from such agency.

(May 12, 1998, D.C. Law 12-111, § 21, 45 DCR 1789.)

Prior Codifications. — 1981 Ed., § 26-1120.

Legislative history of Law 12-111. — For

legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

§ 26-321. Cease and desist orders.

(a) The Superintendent [Commissioner] may institute an administrative

cease and desist proceeding if the Superintendent [Commissioner] determines that a licensee or person required to have a license under this chapter has violated, is violating, or is about to violate any provision of this chapter or any rule, regulation, order, or condition imposed by the Mayor or Superintendent [Commissioner], or written agreement entered into with the Mayor or Superintendent [Commissioner], pursuant to this chapter.

(b)(1) A cease and desist proceeding shall be initiated by the issuance of a notice of charges which shall contain a statement of facts describing the alleged violation or violations.

(2) The notice of charges shall set a date, time, and place at which a hearing will be held to determine whether a cease and desist order should be issued against a licensee or person required to have a license. The hearing date shall be no earlier than 30 days and no later than 60 days after the date of service of the notice, unless otherwise prescribed by the Superintendent [Commissioner] or the hearing officer.

(c) A cease and desist order may require the person licensed, or required to be licensed, to cease and desist the violation or violations.

(d) The Superintendent [Commissioner] may issue and serve upon the licensee, or person required to be licensed, a final cease and desist order if:

(1) The licensee or person agrees to settle the proceeding by consenting to the order as negotiated by the Superintendent [Commissioner], prior to the commencement of the hearing;

(2) The licensee or person served with the notice of charges fails to appear at the hearing, in which case the licensee or person shall be deemed to have consented to the order as issued; or

(3) Substantial evidence in the hearing record supports the determination of the Superintendent [Commissioner] that the violation or violations specified in the notice of charges has transpired.

(e) A final cease and desist order shall become effective 10 days after the service of the order in accordance with subsection (d) of this section, except that a final cease and desist order which has been issued upon consent shall become effective upon the date specified in the order. In any case, a final cease and desist order shall remain in effect until it is stayed, modified, terminated, or set aside by the Superintendent [Commissioner] or a reviewing court.

(f) A hearing for purposes of this section shall be held in accordance with subchapter I of Chapter 5 of Title 2.

(May 12, 1998, D.C. Law 12-111, § 22, 45 DCR 1789.)

Prior Codifications. — 1981 Ed., § 26-1121. legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

Legislative history of Law 12-111. — For

§ 26-322. Authority of Superintendent to issue rules and regulations.

The Superintendent [Commissioner] may promulgate such rules and regulations as deemed necessary and appropriate to implement the provisions of this chapter.

(May 12, 1998, D.C. Law 12-111, § 23, 45 DCR 1790.)

Prior Codifications. — 1981 Ed., § 26-1122.

legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

Legislative history of Law 12-111. — For

§ 26-323. Penalties.

(a) Any person who violates any provision of this chapter, any rule or regulation adopted pursuant to this chapter, or any order of the Superintendent [Commissioner] directed to that person, shall be liable for a penalty of not more than \$1,000 for each violation.

(b) Any person who cashes any check in the District of Columbia without a license issued pursuant to this chapter shall, in addition to the penalty prescribed in subsection (a) of this section, be liable to the District government in an amount equal to all license fees that would have been paid had the person obtained such a license.

(c) The Corporation Counsel may bring proceedings to recover all amounts due to the District under this section.

(May 12, 1998, D.C. Law 12-111, § 24, 45 DCR 1790.)

Prior Codifications. — 1981 Ed., § 26-1123.

Emergency Amendment Act of 2001 (D.C. Act 13-446, November 7, 2000, 47 DCR 9213).

Emergency legislation. — For temporary (90 day) amendment of section, see § 201 of the Child Support and Welfare Reform Compliance

Legislative history of Law 12-111. — For legislative history of D.C. Law 12-111, see Historical and Statutory Notes following § 26-301.

CHAPTER 4. COMMON TRUST FUNDS.

Sec.

26-401. Establishment.

26-402. Taxability.

Sec.

26-403. Court accountings.

26-404. Uniformity of laws.

§ 26-401. Establishment.

Any bank or trust company qualified to act as fiduciary in the District of Columbia may, subject to such rules and regulations as may be promulgated from time to time by the Board of Governors of the Federal Reserve System under the provisions of § 92a of Title 12, United States Code, as amended, pertaining to the collective investment of trust funds by national banks, establish common trust funds for the purpose of furnishing investments to itself as fiduciary, or to itself and others as cofiduciaries; and may, as such fiduciary or cofiduciary, invest funds which it lawfully holds for investment in interests in such common trust funds, if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship, and if, in the case of cofiduciaries, the bank or trust company procures the written consent of its cofiduciaries to such investment.

(Oct. 27, 1949, 63 Stat. 938, ch. 767, § 1.)

Prior Codifications. — 1981 Ed., § 26-301.
1973 Ed., § 26-701.

tion is based upon § 1 of the Uniform Common Trust Fund Act.

Editor's notes. — Uniform Law: This sec-

§ 26-402. Taxability.

(a) A common trust fund, as herein defined, shall not be subject to any tax imposed by Chapter 18 of Title 47, and for the purpose of said subchapter shall not be deemed to be a corporation.

(b) The net income of a common trust fund shall be computed in the same manner and on the same basis as in the case of an individual. Each participant in a common trust fund shall include, in computing its net income, its proportionate share of the net income of such fund, whether or not distributed to it, and the amount so included in the net income of a participant shall be taxable to such participant, or its beneficiaries, in the manner and to the extent provided in subchapter IX of Chapter 18 of Title 47, as if any amount not distributed to the participant during its taxable year actually had been so distributed.

(c) No gain or loss shall be realized by a common trust fund upon the admission or withdrawal of a participant, or upon the admission or withdrawal of any interest of a participant. The withdrawal of any participating interest by a participant shall be treated as a sale or exchange of such interest by such participant.

(d) Every bank or trust company maintaining a common trust fund shall make a return under oath for the taxable year of such fund.

(e) If the taxable year of a common trust fund is different from that of a participant therein, the proportionate share of the net income of such fund to

be included in computing the net income of such participant for its taxable year shall be based upon the net income of such fund for its taxable year ending within the taxable year of such participant.

(Oct. 27, 1949, 63 Stat. 938, ch. 767, § 2.)

Prior Codifications. — 1981 Ed., § 26-302. 1973 Ed., § 26-702.

§ 26-403. Court accountings.

Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such common trust funds; but it may, by application to the Superior Court of the District of Columbia, secure approval of such accounting on such conditions as the Court may establish.

(Oct. 27, 1949, 63 Stat. 938, ch. 767, § 3; July 29, 1970, 84 Stat. 572, Pub. L. 91-358, title I, § 155(c) (34).)

Prior Codifications. — 1981 Ed., § 26-303. tion is based upon § 2 of the Uniform Common Trust Fund Act.
1973 Ed., § 26-703.

Editor's notes. — Uniform Law: This sec-

§ 26-404. Uniformity of laws.

This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the District of Columbia with the law of those states which enact the Uniform Common Trust Fund Act.

(Oct. 27, 1949, 63 Stat. 939, ch. 767, § 4.)

Prior Codifications. — 1981 Ed., § 26-304. tion is based upon § 3 of the Uniform Common Trust Fund Act.
1973 Ed., § 26-704.

Editor's notes. — Uniform Law: This sec-

CHAPTER 4A. COMMUNITY DEVELOPMENT BY FINANCIAL INSTITUTIONS.

Sec.	Sec.
26-431.01. Short title.	26-431.06. Rating system for community development performance.
26-431.02. Definitions.	26-431.07. Examinations in cooperation with other regulators.
26-431.03. Community needs obligation.	26-431.08. Authority of Commissioner to issue rules and regulations.
26-431.04. Community development plan requirement.	
26-431.05. Monitoring compliance with the community development plan.	

§ 26-431.01. Short title.

This chapter may be cited as the “Community Development Act of 2000”.

(June 9, 2001, D.C. Law 13-308, § 401, 48 DCR 3244.)

Legislative history of Law 13-308. — Law 13-308, the “21st Century Financial Modernization Act of 2000,” was introduced in Council and assigned Bill No. 13-867, which was referred to the Committee on Economic Development. The Bill was adopted on first and second readings on November 8, 2000, and December 5, 2000, respectively. Signed by the Mayor on January 26, 2001, it was assigned Act No. 13-597 and transmitted to both Houses of Congress for its review. D.C. Law 13-308 became effective on June 9, 2001.

§ 26-431.02. Definitions.

For the purposes of this chapter, the term:

(1) “Community development” means:

(A) Affordable housing (including single-family and multi-family rental housing and homeownership) for low-income or moderate-income individuals and families and related retail and community facilities development;

(B) Community services targeted to low-income or moderate-income individuals and families;

(C) Activities that promote economic development by financing businesses that meet the size eligibility standards of the Small Business Administration Certified Development Company Program or the Small Business Administration Small Business Investment Company Program or have gross annual revenues of \$1 million or less;

(D) Activities that revitalize or stabilize low-income or moderate-income areas; or

(E) Activities that seek to prevent defaults or foreclosures on loans made for the purposes described in subparagraphs (A) and (C) of this paragraph.

(2) “Community Reinvestment Act” shall mean the Community Reinvestment Act of 1977, approved October 12, 1977 (91 Stat. 1147; 12 U.S.C. § 2901 et seq.).

(3) “Commissioner” shall have the same meaning as set forth in § 26-551.02(7).

(4) “Department” shall have the same meaning as set forth in § 26-551.02(9).

(5) “Designated development areas” means any of the following located in the District:

(A) A low-income or moderate-income area;

(B) An area designated as underserved or economically disadvantaged by the Commissioner; or

(C) A commercial, industrial, residential, or other economic development project which the Commissioner determines will benefit the District.

(6) "Federal financial supervisory agency" means the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision and any successor to any of the foregoing agencies, as applicable to the specific type of bank.

(7) "Financial institution" shall have the same meaning as in § 26-551.02(18).

(8) "Low-income" shall have the same meaning as set forth in § 26-1401.02(21).

(9) "Low-income area" means a census tract or block numbering area in which the median individual or family income does not exceed 65% of the median income of the Washington, D.C., metropolitan area as determined by the statistics of the United States Department of Housing and Urban Development.

(10) "Moderate-income" shall have the same meaning as set forth in § 26-1401.02(22).

(11) "Moderate-income area" means a census tract or block numbering area in which the median individual or family income does not exceed 80% of the median income for the Washington, D.C. metropolitan area as determined by the statistics of the United States Department of Housing and Urban Development.

(12) "Minority group" means African-Americans, Hispanic-Americans, Latinos, Asian-Americans, Pacific Islander-Americans, American Indians, Native Americans, or Alaskan-Natives.

(13) "Minority-owned business" means a business in which:

(A) At least 51% ownership and control is held by individuals who are members of a minority group;

(B) At least 51% of the individuals that make policy decisions and actively manage day-to-day operations are members of a minority group; and

(C) More than 50% of the net profit or loss accrues to owners who are members of a minority group.

(14) "Mortgage loan" means a loan that is secured by residential real property.

(15) "Small business loan" means a small business loan as defined in Federal Reserve System Regulation BB, 12 C.F.R. Part 228.

(16) "Women-owned business" means a business in which:

(A) At least 51% of the ownership and control is held by a woman or women;

(B) A woman or women constitute at least 51% of the individuals that make policy decisions and actively manage day-to-day operations; and

(C) More than 50% of the net profit or loss accrues to a woman owner or women owners.

(June 9, 2001, D.C. Law 13-308, § 402, 48 DCR 3244; June 11, 2004, D.C. Law 15-166, § 2(k), 51 DCR 2817.)

Effect of amendments. — D.C. Law 15-166 rewrote pars. (3) and (4) which had read as follows:

“(3) ‘Commissioner’ means the Commissioner of the Department of Banking and Financial Institutions.

“(4) ‘Department’ means the Department of Banking and Financial Institutions.”

Emergency legislation. — For temporary

(90 day) amendment of section, see § 2(k) of Consolidation of Financial Services Emergency Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-431.01.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 26-131.02.

§ 26-431.03. Community needs obligation.

A financial institution shall have a continuing and affirmative obligation to meet the credit needs of its local communities, including low-income and moderate-income area, consistent with the safe and sound operation of the financial institution.

(June 9, 2001, D.C. Law 13-308, § 403, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-431.01.

§ 26-431.04. Community development plan requirement.

(a)(1) A financial institution shall submit a community development plan stating the financial institution’s plans for meeting the credit and financial services needs of the residents of the District, particularly in designated development areas. A financial institution shall submit a community development plan annually, when there is a revision to the plan, and at such times as the Commissioner, by rule, may require.

(2) The community development plan submitted under paragraph (1) of this subsection shall commit the financial institution and its subsidiaries to:

(A) Provide monitoring reports on forms designated by, and at intervals specified by, the Commissioner;

(B) Provide additional information as requested by the Commissioner to monitor compliance;

(C) Permit examinations of the records of the financial institution to the extent considered necessary by the Commissioner to monitor and enforce compliance with the community development plan;

(D) Participate in meetings on the community development performance of the financial institution at times designated by the Commissioner; and

(E) Provide that the commitment shall be a binding agreement on the financial institution and the financial institution’s successors and assignees.

(b) The Commissioner shall assess the record of a financial institution, determine whether the financial institution is satisfying its continuing and affirmative obligation to meet the credit needs of its local communities, including low-income and moderate-income areas, consistent with the safe and

sound operation of the financial institution, and shall prepare a report on the assessment and determination:

(1) In connection with an application for a certificate of authority under the District of Columbia Banking Code;

(2) In connection with the acquisition of a bank, savings institution, or holding company located in the District under the Regional Interstate Banking Act of 1985; and

(3) As required under § 26-431.05.

(c) In determining whether the financial institution is satisfying its continuing and affirmative obligation to meet the credit needs of its local communities, including low-income and moderate-income neighborhoods, the Commission shall consider:

(1) The financial institution's Community Reinvestment Act rating and prior evaluations and any community development evaluations from the 3 prior years;

(2) Plans of the financial institution to make mortgage loans in the District and in designated development areas;

(3) Plans of the financial institution to make consumer loans, other than mortgage loans, in the District and in designated development areas;

(4) Plans of the financial institution to:

(A) Open or close branches in the District and in designated development areas;

(B) Provide basic deposit and checking accounts, such as lifeline accounts, and electronic transfer accounts designed for low-income persons; and

(C) Provide check-cashing services to non-account holders;

(5) Plans of the financial institution to:

(A) Procure services or supplies from District businesses, including minority-owned and women-owned District businesses; and

(B) Hire District residents;

(6) Plans of the financial institution to seek and place District residents, including women and members of minority groups, on the board of directors of the financial institution, subsidiaries or affiliates of the financial institution, and the holding company of the financial institution;

(7) Plans of the financial institution to:

(A) Provide seminars and individualized counseling on consumer and commercial lending in the District and in designated development areas; and

(B) Establish and maintain flexible credit terms and underwriting guidelines;

(8) Plans of the financial institution regarding the marketing of, and marketing budget for, the community development plan in the District, including plans to market the community development plan in the designated development areas as well as the types of media to be used;

(9) Plans of the financial institution to:

(A) Enter into partnerships with nonprofit and community groups, for-profit developers, District agencies, and colleges and universities and other proposed activities that promote public/private partnerships and lending programs with community-based development organizations; and

(B) Participate in other community programs that foster community development in the District;

(10) Designation of a senior lending officer responsible for implementing and overseeing the community development plan; and

(11) If the determination is in connection with the acquisition of a bank, savings institution, or holding company:

(A) The status of the prior community development commitments of the financial institution to be acquired; and

(B) Plans of the acquiring entity to continue the prior commitments.

(d) A report prepared under subsection (b) of this section shall include the assessment factors utilized to determine the financial institution's descriptive rating, the financial institution's descriptive rating, and the basis for the Commissioner's determination of the financial institution's descriptive rating.

(e) A report prepared under subsection (b) of this section shall be available to the public upon request.

(June 9, 2001, D.C. Law 13-308, § 404, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-431.01.

§ 26-431.05. Monitoring compliance with the community development plan.

(a) The Commissioner shall monitor whether a financial institution is satisfying its continuing and affirmative obligation to meet the credit needs of its local communities, including low-income and moderate-income areas, consistent with safe and sound operation of the financial institution.

(b) The Commissioner shall issue an annual report to the Mayor and the Council on each financial institution's compliance with its community development plan. In the annual report, the Commissioner shall include an assessment of the community reinvestment performance of each financial institution using the applicable methodology set forth in the Community Reinvestment Act and shall include the rating for each financial institution under the system developed under § 26-431.06.

(June 9, 2001, D.C. Law 13-308, § 405, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-431.01.

§ 26-431.06. Rating system for community development performance.

(a) The Commissioner shall establish, by regulation, a system to rate the community development performance of a financial institution. The system shall include the following rating categories:

(1) Outstanding record of performance in meeting the credit needs of its local communities;

(2) Highly satisfactory record of performance in meeting the credit needs of its local communities;

(3) Satisfactory record of performance in meeting the credit needs of its local communities;

(4) Needs to improve record of performance in meeting the credit needs of its local communities; and

(5) Substantial noncompliance in meeting the credit needs of its local communities.

(b) The Commissioner shall consider the compliance of the financial institution with the community development plan submitted under § 26-431.03 in assessing and rating the community development performance of the financial institution.

(June 9, 2001, D.C. Law 13-308, § 406, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-431.01.

§ 26-431.07. Examinations in cooperation with other regulators.

(a) The Commissioner may enter into cooperative agreements with financial institutions regulators in jurisdictions other than the District, including federal regulators, for the coordination of, or joint participation, in a community performance evaluation and the amount and assessment of fees for the examination or actions related to the examination.

(b) The Commissioner may accept evaluations performed under the agreements described in subsection (a) of this section.

(June 9, 2001, D.C. Law 13-308, § 407, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-431.01.

§ 26-431.08. Authority of Commissioner to issue rules and regulations.

The Commissioner may promulgate rules and regulations to implement the provisions of this chapter pursuant to subchapter I to Chapter 5 of Title 2.

(June 9, 2001, D.C. Law 13-308, § 408, 48 DCR 3244.)

Cross references. — Banking institutions organized under federal statute, application of District law, see § 26-710.

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-431.01.

CHAPTER 5. CREDIT UNIONS.

Sec.	Sec.
26-501. Conversion of District credit unions into federal credit unions — Procedure.	into federal credit unions — Applicability of federal provisions; fees; liquidation of existing loans; by-laws.
26-502. Conversion of District credit unions into federal credit unions — Approval; effect thereof.	26-504. Repeal of District of Columbia Credit Unions Act.
26-503. Conversion of District credit unions	

§ 26-501. Conversion of District credit unions into federal credit unions — Procedure.

Any credit union organized under the District of Columbia Credit Unions Act (47 Stat. 326) [P.L. 72-190], as amended, may apply for conversion into a federal credit union by filing with the Administrator of the National Credit Union Administration (hereinafter referred to as the Administrator), pursuant to a resolution adopted by a majority of its directors, an organization certificate meeting the requirements of § 4 of the Federal Credit Union Act (§ 1753 of Title 12, United States Code), as amended.

(Aug. 1, 1964, 78 Stat. 377, Pub. L. 88-395, § 1.)

Section references. — This section is referred to in §§ 26-503, and 26-710.

Prior Codifications. — 1981 Ed., § 26-601. 1973 Ed., § 26-519.

References in text. — The “Director of the

Bureau of Federal Credit Unions” formerly referred to in this section, was changed to “Administrator of the National Credit Union Administration” by §§ 1 to 3 of the Act of March 10, 1970, 84 Stat. 49.

§ 26-502. Conversion of District credit unions into federal credit unions — Approval; effect thereof.

The Administrator shall approve any such organization certificate meeting such requirements. Upon such approval, the applicant credit union shall become a federal credit union, and shall be vested with all of the assets and shall continue responsible for all of the obligations of such applicant credit union to the same extent as though the conversion had not taken place.

(Aug. 1, 1964, 78 Stat. 377, Pub. L. 88-395, § 2.)

Section references. — This section is referred to in §§ 26-503 and 26-710.

Prior Codifications. — 1981 Ed., § 26-602. 1973 Ed., § 26-520.

§ 26-503. Conversion of District credit unions into federal credit unions — Applicability of federal provisions; fees; liquidation of existing loans; by-laws.

Any District of Columbia credit union converting into a federal credit union in accordance with this chapter shall thereupon be subject to the limitations, vested with the powers, and charged with the liabilities conferred and imposed

by the Federal Credit Union Act (§ 1751 et seq. of Title 12, United States Code) upon credit unions organized thereunder, except that:

(1) No fee shall be imposed upon a credit union converting pursuant to this chapter as an incident to its conversion;

(2) Any loan or investment made by a credit union converting pursuant to this chapter in conformity with the District of Columbia Credit Unions Act prior to its conversion, which does not conform to the requirements of the Federal Credit Union Act and is still outstanding at the time of conversion, shall be liquidated at or before its maturity or, if it has no maturity date, in a prudent manner and within a reasonable period of time; and

(3) A credit union converting pursuant to this chapter shall submit proposed bylaws to the Administrator for his approval after its conversion, but not later than 30 days following its next annual meeting or 6 months after August 1, 1964, whichever is later; provided, that any existing bylaw inconsistent with any other requirements of the Federal Credit Union Act shall be deemed null and void.

(Aug. 1, 1964, 78 Stat. 377, Pub. L. 88-395, § 3.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-603. 1973 Ed., § 26-521.

§ 26-504. Repeal of District of Columbia Credit Unions Act.

Effective 30 days after August 1, 1964, the District of Columbia Credit Unions Act (47 Stat. 326) [P.L. 72-190], as amended, is repealed and all organization certificates issued thereunder and still in force are revoked.

(Aug. 1, 1964, 78 Stat. 377, Pub. L. 88-395, § 4.)

Section references. — This section is referred to in §§ 26-503 and 26-710.

Prior Codifications. — 1981 Ed., § 26-604. 1973 Ed., § 26-522.

CHAPTER 5A. DATA MATCH REQUIREMENTS FOR FINANCIAL INSTITUTION.

Sec.

26-531. Definitions.

26-532. Obligations of financial institutions;
fees; liability; penalties.

Sec.

26-533. Liability of IV-D agency.

§ 26-531. Definitions.

For purposes of this chapter, the term:

(1) "Account" means a demand deposit account, checking or negotiable withdrawal order account, savings account, time deposit account, or money-market mutual fund account.

(2) "Financial institution" means the institution as defined in section 469A(d)(1) of the Social Security Act, approved August 22, 1996 (110 Stat. 2105; 42 U.S.C. § 669A(d)(1)).

(3) "IV-D agency" means the organizational unit of the District government, or any successor organizational unit, that is responsible for administering or supervising the administration of the District's State Plan under title IV, part D of the Social Security Act, approved January 4, 1975 (88 Stat. 2351; 42 U.S.C. § 651 et seq.), pertaining to parent locator services, paternity establishment, and the establishment, modification, and enforcement of support orders.

(Apr. 3, 2001, D.C. Law 13-269, § 202, 48 DCR 1270.)

Temporary Addition of Section. — Section 201 of D.C. Law 13-207 added this section.

Section 401(b) of D.C. Law 13-207 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) addition of section, see § 201 of the Child Support and Welfare Reform Compliance Emergency Amendment Act of 2001 (D.C. Act 13-446, November 7, 2000, 47 DCR 9213).

For temporary (90 day) addition of section, see § 202 of Child Support and Welfare Reform Compliance Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-5, February 13, 2001, 48 DCR 2440).

Legislative history of Law 13-207. — Law 13-207, the "Child Support and Welfare Reform Compliance Temporary Amendment Act of 2000", was introduced in Council and assigned

Bill No. 13-825. The Bill was adopted on first and second readings on September 19, 2000, and October 3, 2000, respectively. Signed by the Mayor on October 24, 2000, it was assigned Act No. 13-449 and transmitted to both Houses of Congress for its review. D.C. Law 13-207 became effective on March 31, 2001.

Legislative history of Law 13-269. — Law 13-269, the "Child Support and Welfare Reform Compliance Amendment Act of 2000", was introduced in Council and assigned Bill No. 13-254, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on November 8, 2000, and December 5, 2000, respectively. Signed by the Mayor on January 8, 2001, it was assigned Act No. 13-559 and transmitted to both Houses of Congress for its review. D.C. Law 13-269 became effective on April 3, 2001.

§ 26-532. Obligations of financial institutions; fees; liability; penalties.

(a) A financial institution doing business in the District shall:

(1) Upon the request of the IV-D agency, enter into agreements with the IV-D agency to develop and operate a data-match system in which the financial institution is required to provide for each calendar quarter the name, record address, social security number or other taxpayer identification number, and

other identifying information (including account number) for each noncustodial parent who maintains an account at the institution, individually or jointly, and who owes past-due child or spousal support that is enforced by the IV-D agency, as identified by the Mayor by name and social security number or other taxpayer identification number; and

(2) Encumber or surrender assets held by the institution on behalf of a noncustodial parent who is subject to a lien pursuant to § 46-224 in response to a notice of lien or levy from the Superior Court or the IV-D agency.

(b) The IV-D agency may pay a reasonable fee to a financial institution for conducting the data match provided for in subsection (a) of this section, not to exceed the actual costs incurred by the financial institution.

(c) A financial institution shall not be liable under any District law for:

(1) Any disclosure of information to the IV-D agency under subsection (a) of this section;

(2) Encumbering or surrendering, in response to a notice of lien or levy issued by the IV-D agency, any assets it holds; or

(3) Any other action taken in good faith to comply with subsection (a) of this section.

(d) A financial institution that intentionally fails to comply with subsection (a) of this section shall be subject to a penalty of \$5,000 for each failure to conduct a data match with data that the IV-D agency submits or attempts to submit to the financial institution. For purposes of this subsection, a single data submission may include data concerning multiple obligors. Penalties pursuant to this subsection shall be enforced in the Superior Court by the Corporation Counsel of the District of Columbia.

(Apr. 3, 2001, D.C. Law 13-269, § 203, 48 DCR 1270.)

Temporary Addition of Section. — Section 201 of D.C. Law 13-207 added this section.

Section 401(b) of D.C. Law 13-207 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) addition of section, see § 201 of the Child Support and Welfare Reform Compliance Emergency Amendment Act of 2001 (D.C. Act 13-446, November 7, 2000, 47 DCR 9213).

For temporary (90 day) addition of section, see § 203 of Child Support and Welfare Reform Compliance Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-5, February 13, 2001, 48 DCR 2440).

Legislative history of Law 13-207. — For Law 13-207, see notes following § 26-531.

Legislative history of Law 13-269. — For Law 13-269, see notes following § 26-531.

§ 26-533. Liability of IV-D agency.

The IV-D agency shall disclose a person's financial records obtained from a financial institution only for the purpose of, and to the extent necessary in, establishing, modifying, or enforcing a support obligation of that person. Unauthorized disclosure may result in the awarding of civil damages pursuant to section 469A(c) of the Social Security Act, approved August 22, 1996 (110 Stat. 2105; 42 U.S.C. § 659A(c)).

(Apr. 3, 2001, D.C. Law 13-269, § 204, 48 DCR 1270.)

Temporary Addition of Section. — Section 201 of D.C. Law 13-207 added this section.

Section 401(b) of D.C. Law 13-207 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) addition of section, see § 201 of the Child Support and Welfare Reform Compliance Emergency Amendment Act of 2001 (D.C. Act 13-446, November 7, 2000, 47 DCR 9213).

For temporary (90 day) addition of section, see § 204 of Child Support and Welfare Reform Compliance Congressional Review Emergency Amendment Act of 2001 (D.C. Act 14-5, February 13, 2001, 48 DCR 2440).

Legislative history of Law 13-207. — For Law 13-207, see notes following § 26-531.

Legislative history of Law 13-269. — For Law 13-269, see notes following § 26-531.

CHAPTER 5B. ADMINISTRATION OF THE BANKING CODE.

Subchapter I. General Provisions

Sec.

26-551.01. Short title.

26-551.02. Definitions.

Subchapter II. Abolishment of Department of Banking and Financial Institutions; Commissioner of the Department of Banking and Financial Institutions

26-551.03. Administration of the District of Columbia Banking Code.

26-551.04. [Repealed].

26-551.05. General powers and responsibilities of the Commissioner.

Subchapter III. Financial Institutions Advisory Board

26-551.06. Establishment of the Financial Institutions Advisory Board.

26-551.07. Members of the Financial Institutions Advisory Board; compensation.

26-551.08. Organization and operation of the Board.

26-551.09. Weight of advice of the Board.

Subchapter IV. Investigation, Examination, and Enforcement Powers of the Commissioner

Sec.

26-551.10. Examinations of financial institutions.

26-551.11. Reports on financial institutions.

26-551.12. Initiation of formal investigation of a financial institution.

26-551.13. Notice of charges; hearing; final order.

26-551.14. Notification of other government agencies.

26-551.15. Modification or rescission of orders.

26-551.16. Cease and desist order.

26-551.17. Temporary cease and desist order.

26-551.18. Confidentiality of information.

26-551.19. Enforcement of Department order, subpoena, or notice of charges.

26-551.20. Judicial review.

26-551.21. Penalty for violation of final order.

Subchapter V. Generally Prohibited Activities

26-551.22. Prohibition of fraud.

Subchapter VI. Miscellaneous Provisions

26-551.23. Rulemaking.

26-551.24. [Reserved].

26-551.25. Validity of prior law.

Subchapter I. General Provisions.

§ 26-551.01. Short title.

This chapter may be cited as the “General Provisions of the 21st Century Financial Modernization Act of 2000”.

(June 9, 2001, D.C. Law 13-308, § 101, 48 DCR 3244.)

Legislative history of Law 13-308. — Law 13-308, the “21st Century Financial Modernization Act of 2000”, was introduced in Council and assigned Bill No. 13-867, which was referred to the Committee on Economic Development. The Bill was adopted on first and second

readings on November 8, 2000, and December 5, 2000, respectively. Signed by the Mayor on January 26, 2001, it was assigned Act No. 13-597 and transmitted to both Houses of Congress for its review. D.C. Law 13-308 became effective on June 9, 2001.

§ 26-551.02. Definitions.

For the purposes of this chapter, the term:

(1) “Affiliate” means a financial institution holding company under federal law or a subsidiary or service corporation of a financial institution holding company.

(2) “Appropriate federal financial institutions agency” means the federal agency with statutory authority over the financial institution activities of a financial institution.

(3) “Bank” means an institution that engages in the business of banking,

including a trust company, savings bank, savings and loan association, and credit union.

(4) "Bank holding company" shall have the same meaning as set forth in section 2(a) of the Bank Holding Company Act of 1956, approved May 9, 1956 (70 Stat. 133; 12 U.S.C. § 1841(a)).

(5) "Business of banking" means activities and transactions involving banking, including: (A) receiving deposits, paying checks, and lending money; (B) activities of a bank which are supervised by the Commissioner; and (C) activities incidental, necessary, or convenient to banking.

(6) "Capital" means capital deposits, surplus, and undivided earnings.

(7) "Commissioner" means the Commissioner of the Department of Insurance, Securities, and Banking.

(7A) "Controlling interest" means:

(A) More than 50% of the total voting power of all classes of stock of a corporation or more than 50% of the total fair market value of all classes of stock of a corporation;

(B) More than 50% of the capital or profits in a partnership, association, or other unincorporated entity; or

(C) More than 50% of the beneficial interests in a trust.

(8) "Credit union" means a financial institution organized as a cooperative association with a limited membership and operating with insurance provided by the National Credit Union Administration.

(9) "Department" means the Department of Insurance, Securities, and Banking.

(10) "Director" means a director or trustee of an organization or a person with functions similar to the functions of a director or trustee.

(11) "District" means the District of Columbia.

(12) "District bank" means a bank chartered or organized under the District of Columbia Banking Code and under the authority and supervision of the Commissioner or a bank authorized to do business under the laws of the District.

(13) "District credit union" means a credit union chartered or organized under the District of Columbia Banking Code and under the authority and supervision of the Commissioner or a credit union authorized to do business under the laws of the District.

(14) "District of Columbia Banking Code" means the statutory provisions concerning banking and financial institutions which are codified in Title 26 of the District of Columbia Official Code, laws administered by the Commissioner, and rules and regulations promulgated under those statutory provisions and laws.

(15) "District savings institution" means a savings institution chartered or organized under the District of Columbia Banking Code and under the authority and supervision of the Commissioner or a savings institution authorized to do business under the laws of the District.

(16) "Executive officer" means a person who participates or has authority to participate, other than in the capacity of a director, in major policymaking functions of a financial institution, whether or not the person has an official

title or receives compensation from the financial institution. The term “executive officer” shall not include a person who may exercise discretion in the performance of duties and functions, including discretion in the making of loans, if the person’s exercise of discretion is limited by policy standards adopted by the board of directors of the financial institution and the person does not participate in major policymaking functions of the financial institution. The chair of the board, the president, chief executive officer, chief operating officer, chief financial officer, every executive vice president of a financial institution, and the senior trust officer of a trust company shall be presumed to be executive officers unless the person is excluded, by resolution of the board of directors or by the bylaws of the financial institution, from participating, other than in the capacity of a director, in major policymaking functions of the financial institution and the person does not actually participate in major policymaking functions of the financial institution.

(17) “Federal agency” means an agency of the United States of America.

(18) “Financial institution” means a bank, savings institution, credit union, foreign bank, trust company, non-depository financial institution, or any other person which is regulated, supervised, examined, or licensed by the Department of Insurance, Securities, and Banking; which has applied to be regulated, supervised, examined, or licensed by the Department of Insurance, Securities, and Banking; which is subject to the regulation, supervision, examination, or licensure by the Department of Insurance, Securities, and Banking; or which is engaged in an activity covered by the District of Columbia Banking Code.

(19) “Non-depository financial institution” means a financial institution that is engaged in a regulated activity and that is not a bank or credit union.

(20) “Order” means an approval, consent, authorization, exemption, denial, prohibition, requirement, or other administrative action.

(21) “Person” means an individual, corporation, trust, joint venture, company, association, firm, partnership, society, joint stock company, pool syndicate, sole proprietorship, unincorporated organization, fiduciary business, or any other similar entity.

(22) “Regulated activity” means an activity authorized and regulated under the District of Columbia Banking Code and under the authority and supervision of the Commissioner.

(23) “Savings institution” means a savings and loan association or savings bank.

(24) “Subsidiary” means a company in which a person owns at least a majority of the shares or equity interest or which the person controls.

(June 9, 2001, D.C. Law 13-308, § 102, 48 DCR 3244; June 11, 2004, D.C. Law 15-166, § 2(a), 51 DCR 2817; June 20, 2012, D.C. Law 19-143, § 201(a), 59 DCR 4069.)

Effect of amendments. — D.C. Law 15-166, in pars. (7), (9), and (18), substituted “Department of Insurance, Securities, and

Banking” for “Department of Banking and Financial Institutions”.
D.C. Law 19-143 added par. (7A).

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(a) of Consolidation of Financial Services Emergency Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 26-131.02.

Legislative history of Law 19-143. — Law 19-143, the “DISB Fingerprint-Based Back-

ground Check Authorization Act of 2012”, was introduced in Council and assigned Bill No. 19-198, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on March 6, 2012, and April 17, 2012, respectively. Signed by the Mayor on April 29, 2012, it was assigned Act No. 19-346 and transmitted to both Houses of Congress for its review. D.C. Law 19-143 became effective on June 20, 2012.

Subchapter II. Abolishment of Department of Banking and Financial Institutions; Commissioner of the Department of Banking and Financial Institutions.

§ 26-551.03. Administration of the District of Columbia Banking Code.

(a) Repealed.

(b) The Department shall administer the provisions of the District of Columbia Banking Code on behalf of the Mayor.

(c) The Department of Banking and Financial Institutions and the position of the Commissioner of the Department of Banking and Financial Institutions are abolished.

(d) Repealed.

(e) Repealed.

(f) Repealed.

(g) References in any statute, regulation, or rule of the District to the Superintendent of the Office of Banking and Financial Institutions or the Office of Banking and Financial Institutions shall mean the Commissioner [of the Department of Insurance, Securities, and Banking] and the Department [of Insurance, Securities, and Banking], respectively.

(h) Repealed.

(June 9, 2001, D.C. Law 13-308, § 103, 48 DCR 3244; Oct. 19, 2002, D.C. Law 14-213, § 18(c), 49 DCR 8140; June 11, 2004, D.C. Law 15-166, § 2(b), 51 DCR 2817.)

Effect of amendments. — D.C. Law 14-213, in subsec. (c), validated a previously made technical correction.

D.C. Law 15-166, in the section name line, substituted “Administration of the District of Columbia Banking Code.” for “Advisory Neighborhood Commissions-Duties and responsibilities; notice; great weight; access to documents; reports; contributions.”; repealed subssecs. (a), (d), (e), (f), and (h); in subsec. (b), deleted “of Banking and Financial Institutions is established and” following “The Department”; re-wrote subsec. (c); and, in subsec. (g), deleted the second sentence which had read “All agreements entered into with, and correspondence,

invoices, certificates of operation, licenses, orders, memoranda, and regulations issued by, the Superintendent of the Office of Banking and Financial Institutions and the Office of Banking and Financial Institutions shall continue in effect as if the agreements entered into with, and correspondence, invoices, certificates of operation, licenses, orders, memoranda, and regulations were issued by, the Commissioner or the Department, respectively.”

Emergency legislation. — For temporary (90 day) amendment of section, see § 802 of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

For temporary (90 day) amendment of section, see § 2(b) of Consolidation of Financial Services Emergency Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

Legislative history of Law 14-213. — For Law 14-213, see notes following § 26-131.02.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 26-131.02.

Delegation of Authority. — Delegation of Authority to Administer the Junior Super Savers Club Program, see Mayor's Order 2001-157, October 12, 2001 (48 DCR 9888); Mayor's Order 2001-158, October 12, 2001 (48 DCR 9890).

Editor's notes. — Section 802 of D.C. Law 14-28 provided: "Sec. 802. (a) All positions, personnel, property, records, and unexpended balances of appropriations, allocations, and other funds available or to be made available to the Department of Consumer and Regulatory Affairs for the operation and implementation of An Act To regulate the business of loaning money on security of any kind by persons, firms, and corporations other than national banks, licensed bankers, trust companies, savings banks, building and loan associations, and real estate brokers in the District of Columbia,

approved February 4, 1913 (37 Stat. 657; D.C. Official Code 26-901 et seq.), Chapter 46 of Title 28 of the District of Columbia Official Code, and Chapter 1 of Title 16 of the District of Columbia Municipal Regulations (16 DCMR 100 et seq.), are hereby transferred to the Department of Banking and Financial Institutions, established by section 103 of the 21st Century Financial Modernization Act of 2000, signed by the Mayor on January 26, 2001 (D.C. Act 13-597; 48 DCR 3244).

"(b) All of the functions assigned and authority delegated to the Department of Consumer and Regulatory Affairs concerning An Act To regulate the business of loaning money on security of any kind by persons, firms, and corporations other than national banks, licensed bankers, trust companies, savings banks, building and loan associations, and real estate brokers in the District of Columbia, approved February 4, 1913 (37 Stat. 657; D.C. Official Code 26-901 et seq.), Chapter 46 of Title 28 of the District of Columbia Official Code, and Chapter 1 of Title 16 of the District of Columbia Municipal Regulations (16 DCMR 100 et seq.), are hereby transferred to the Department of Banking and Financial Institutions, established by section 103 of the 21st Century Financial Modernization Act of 2000, signed by the Mayor on January 26, 2001 (D.C. Act 13-597; 48 DCR 3244)."

§ 26-551.04. Appointment of the Commissioner of the Department of Banking and Financial Institutions. [Repealed].

Repealed.

(June 9, 2001, D.C. Law 13-308, § 104, 48 DCR 3244; June 11, 2004, D.C. Law 15-166, § 2(c), 51 DCR 2817.)

Emergency legislation. — For temporary (90 day) repeal of section, see § 2(c) of Consolidation of Financial Services Emergency Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 26-131.02.

§ 26-551.05. General powers and responsibilities of the Commissioner.

(a) The Commissioner shall:

(1) Administer the District of Columbia Banking Code;

(2) Promote and maintain a climate and regulatory framework that will encourage financial institutions to organize to do business in the District and contribute to the economic development of the District through the increased availability of capital and credit;

(3) Expand advantageous financial services to the public in a nondiscriminatory manner;

(4) Charter, regulate, supervise, and examine banks, savings institutions, credit unions, trust companies, and other financial institutions engaged, or seeking to engage, in the business of banking in the District;

(5) License, regulate, supervise, and examine non-depository financial institutions engaged in regulated activity in the District;

(6) Regulate the opening or closing of branches, agencies, offices, or other facilities by financial institutions under the authority and supervision of the Commissioner;

(7) Approve or disapprove mergers or acquisitions involving District financial institutions or financial institution holding companies;

(8) Monitor community development commitments of financial institutions chartered, organized, or doing business in the District;

(9) Approve or disapprove changes in control of financial institutions chartered or organized in the District;

(10) Approve or disapprove conversions of federally-chartered institutions into District-chartered financial institutions;

(11) Promulgate regulations, rules, policy statements, interpretations, and opinions necessary or appropriate to carry out the purposes of the District of Columbia Banking Code;

(12) Assure that all financial institutions engaged in regulated activity in the District, under the supervision or control of the Commissioner, or seeking to do business into the District of Columbia under the District of Columbia Banking Code provide financial services to the public in a manner that fosters the development and revitalization of housing and commercial corridors in underserved neighborhoods in the District, help meet the credit and deposit service needs of lower income and minority residents of the District, and expand financial and technical support for small, minority, and women-owned businesses;

(13) Investigate possible violations of the District of Columbia Banking Code and take any authorized action upon finding a violation;

(14) Examine or audit a financial institution, bank holding company, affiliate, or subsidiary to assure that the financial institution bank holding company, affiliate, or subsidiary is operating in compliance with the law and in a manner that preserves safety and soundness;

(15) Request or pursue a restraining order, the appointment of a receiver or conservator, the involuntary dissolution of a corporation, or the freezing or seizure of assets of a person associated with a violation or possible violation of the District of Columbia Banking Code;

(16) In all respects permitted by law, act as the District government's regulatory authority for financial institutions operating in the District; and

(17) Recommend to the Mayor annually, or at any other time, any necessary changes to District laws dealing with banking or other areas within the jurisdiction of the Commissioner.

(b) The Commissioner shall be responsible for the performance of all duties, the exercise of all powers and jurisdiction, and the assumption and discharge

of all responsibilities vested by law in the Department or the Commissioner. The Commissioner shall have all powers necessary or convenient for the administration and enforcement of the District of Columbia Banking Code.

(b-1)(1) To determine a financial institution's eligibility to conduct a regulated activity under the District of Columbia Banking Code, the Commissioner may require each organizer, partner, director, officer, and owner with a controlling interest in the financial institution to submit to the Commissioner his or her fingerprints, contact information, and other identifying information, along with written consent to the performance of a criminal history record background check.

(2) The Commissioner may exchange the fingerprints and other information with, and receive criminal history record background information from, the Metropolitan Police Department and the Federal Bureau of Investigation for the purposes of facilitating the Commissioner's determination.

(3) The individual or financial institution associated with the regulated activity requiring the Commissioner's determination shall bear the cost of the criminal history record background check and all costs of administering and processing the background check.

(c) The Commissioner may promulgate rules and regulations necessary or appropriate to the execution of the Commissioner's powers, duties, and responsibilities.

(d) The Commissioner may enter into agreements that the Commissioner considers necessary or appropriate to the exercise of his or her powers, including agreements with agencies or instrumentalities of the District, states and territories of the United States of America, or the federal government, for the examination of banks, savings institutions, credit unions, trust companies, and other financial institutions.

(e) The Commissioner, in the performance of the duties and responsibilities of the Department, may enter into contracts with the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, District agencies, other state or federal banking agencies, or any other entity, for those services necessary to carry out the duties and responsibilities of the Commissioner and the Department.

(f) The Commission may establish and modify fees to implement the District of Columbia Banking Code.

(June 9, 2001, D.C. Law 13-308, § 105, 48 DCR 3244; Apr. 13, 2005, D.C. Law 15-354, § 35(b), 52 DCR 2638; June 20, 2012, D.C. Law 19-143, § 201(b), 59 DCR 4069.)

Effect of amendments. — D.C. Law 15-354, in subsec. (a)(12), substituted "Commissioner" for "Department of Banking and Financial Institutions".

D.C. Law 19-143 added subsec. (b-1).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

Legislative history of Law 15-354. — Law

15-354, the "Technical Amendments Act of 2004", was introduced in Council and assigned Bill No. 15-1130 which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 7, 2004, and December 21, 2004, respectively. Signed by the Mayor on February 9, 2005, it was assigned Act No. 15-770 and transmitted to

both Houses of Congress for its review. D.C. history of Law 19-143, see notes under § 26-
Law 15-354 became effective on April 13, 2005. 551.02.

Legislative history of Law 19-143. — For

Subchapter III. Financial Institutions Advisory Board.

§ 26-551.06. Establishment of the Financial Institutions Advisory Board.

There is established a Financial Institutions Advisory Board (“Board”). The function of the Board is advisory. The Board shall give the Commissioner sound and impartial advice on the following matters:

(1) Applications by financial institutions, including international banking institutions, to become chartered or organized under the District of Columbia Banking Code;

(2) Protection of the interests of depositors and shareholders in financial institutions operating in the District;

(3) Protection of the interests of the general public related to the operation of financial institutions in the District;

(4) Development and maintenance of a modern system of financial institutions in the District; and

(5) Any other financial matter or matter concerning financial institutions operating in, or affecting, the District.

(June 9, 2001, D.C. Law 13-308, § 106, 48 DCR 3244.)

Legislative history of Law 13-308. — For
Law 13-308, see notes following § 26-551.01.

§ 26-551.07. Members of the Financial Institutions Advisory Board; compensation.

(a) The Board shall be comprised of 15 members. The Mayor shall, with the advice and consent of the Council, appoint 13 members to the Board. The Mayor shall appoint to the Board a representative of a general banking industry association for the District; a representative of a general trade or commerce industry association; 2 certified public accountants; and 2 representatives of consumer interests. The Mayor shall appoint members who have a strong interest in the District’s financial institutions industry.

(b) The Commissioner of the Department shall be an ex-officio member of the Board.

(c) The Commissioner shall be the Chair of the Board.

(d) The term of an appointed member of the Board shall be 3 years; provided, that of the first members appointed to the Board, 4 members shall be appointed to an initial term to end one year after June 9, 2001, 4 members shall be appointed to an initial term to end 2 years after June 9, 2001, and 5 members shall be appointed to an initial term to end 3 years after June 9, 2001.

(e) At the end of the term of an appointed member, the appointed member may continue to serve until a successor is confirmed.

(f) An appointed member of the Board shall be eligible for reappointment.

(g) A person appointed to complete the term of a departing member of the Board shall serve for the unexpired term of the original appointment and until a successor is confirmed. A person appointed to complete the term of a departing member of the Board may be reappointed to one or more additional terms.

(h) A member of the Board, before assuming the duties of Board membership, shall take and subscribe an oath to perform the duties of the office faithfully, impartially, and justly to the best of the member's ability. A record of the oath shall be filed in the office of the Special Assistant to the Mayor for Boards and Commissions.

(i) The Mayor may remove a member of the Board for failing to establish or maintain District residency or for misconduct, neglect of duty, or other cause. If a member of the Board is indicted for the commission of a felony, the member shall be automatically suspended from serving on the Board; provided, that upon (1) a final determination of guilt, or (2) a final determination of innocence or other termination of the proceeding without a determination of guilt, the term of the Board member shall be automatically terminated or reinstated, respectively.

(j) A member of the Board shall not receive compensation, but shall be entitled to reimbursement for travel and incidental expenses.

(June 9, 2001, D.C. Law 13-308, § 107, 48 DCR 3244; June 11, 2004, D.C. Law 15-166, § 2(d), 51 DCR 2817; Apr. 13, 2005, D.C. Law 15-354, § 35(c), 52 DCR 2638.)

Effect of amendments. — D.C. Law 15-166, in subsec. (b), deleted "and the Commissioner of the Department of Insurance and Securities Regulation" following "Department".

D.C. Law 15-354, in subsec. (b), substituted "an ex officio member" for "ex officio members".

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(d) of Consolidation of Financial Services Emergency

Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 26-131.02.

Legislative history of Law 15-354. — For Law 15-354, see notes following § 26-551.05.

§ 26-551.08. Organization and operation of the Board.

(a) The Board shall be organized, shall operate, and may establish committees under such rules and bylaws as the Board establishes.

(b) The Board shall meet at least twice a year and at the call of the Commissioner.

(June 9, 2001, D.C. Law 13-308, § 108, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

§ 26-551.09. Weight of advice of the Board.

If the Commissioner does not follow advice of the Board which is part of an official action of the Board, the Commissioner shall send to the Board a written statement of the reason for his or her decision not to follow the advice.

(June 9, 2001, D.C. Law 13-308, § 109, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

Subchapter IV. Investigation, Examination, and Enforcement Powers of the Commissioner.

§ 26-551.10. Examinations of financial institutions.

(a) The Commissioner shall hire and commission examiners who shall have the authority to examine any financial institution doing business in the District.

(b) In cooperation with the appropriate federal financial institutions agency, if any, the Commissioner shall examine, or cause to be examined, each financial institution doing business in the District at least once every 18 months. The examination shall analyze and determine whether the financial institution is in a safe and sound condition and operating in a safe and sound manner and shall monitor and determine the financial institution's compliance with District and federal laws, regulations, and rules.

(c) The Commissioner may initiate a special examination of a financial institution whenever the Commissioner considers it necessary to ensure that the financial institution is being operated in a safe and sound manner and in compliance with District and federal laws, regulations, and rules.

(d) The Commissioner shall assess a fee, to be paid by the financial institution, for the expense of the examination under this section. The fee shall be determined as a percentage of the assets of the examined financial institution.

(June 9, 2001, D.C. Law 13-308, § 110, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

§ 26-551.11. Reports on financial institutions.

(a) Unless otherwise provided by the District of Columbia Banking Code, the Commissioner shall require each financial institution to submit a financial report on a quarterly basis ("quarterly financial report"). The quarterly financial report shall fully describe the financial condition of the reporting financial institution. The Commissioner may accept the most recent quarterly report filed by the financial institution with its appropriate federal financial institutions agency in the place of a quarterly financial report.

(b) A quarterly financial report shall be filed with the Commissioner within 30 days after the end of each calendar quarter.

(c) The Commissioner may require a financial institution to submit a special financial report if the Commissioner determines that a special financial report will assist the Commissioner in ensuring the safe and sound condition and operation of the financial institution.

(d) A special financial report shall be filed with the Commissioner within 30

days of the receipt of a request for the special financial report from the Commissioner.

(e) A quarterly financial report or a special financial report required under this section shall be signed and certified as accurate by the president or chief executive officer of the reporting financial institution.

(f) The Commissioner may accept a report, examination, or other information from a state or federal agency or regulatory body concerning the activities of a financial institution or its affiliate or subsidiary.

(g) The Commissioner shall prescribe forms to be used to comply with this section.

(June 9, 2001, D.C. Law 13-308, § 111, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

§ 26-551.12. Initiation of formal investigation of a financial institution.

(a) If the Commissioner determines that a financial institution is engaging, has engaged, or may engage in an unsafe or unsound practice in the operation of the financial institution (“unsafe or unsound practice”), or that the financial institutions is engaging, has engaged, or may engage in a violation of a law, regulation, rule, condition, order, or request of the Commissioner, or any written agreement entered into with the Commissioner (“violation”), the Commissioner may conduct an investigation of the financial institution and issue and serve upon the institution a notice of charges.

(b) The Commissioner may request that an investigation, or portion of an investigation, be conducted by a District, state, or federal law enforcement agency.

(June 9, 2001, D.C. Law 13-308, § 112, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

§ 26-551.13. Notice of charges; hearing; final order.

(a) The Commissioner shall formally initiate an investigation of a violation or an unsafe or unsound practice by issuing a notice of charges. The notice of charges shall contain a statement of facts describing the alleged violation or unsafe or unsound practice that the financial institution or its subsidiary or affiliate has engaged, or may engage, in.

(b) The notice of charges shall set a date, time, and place at which a hearing shall be held to determine whether the alleged violation or unsafe or unsound practice has occurred, or may occur, and whether a cease and desist order should be issued against the financial institution, or its subsidiary or affiliate. The hearing date shall be no earlier than 30 days, and no later than 60 days, after the date of service of the notice of charges; provided, that the hearing date may be set earlier or later if it is determined under rules issued by the

Commissioner that there are emergency circumstances or that it is impractical to hold the hearing during the prescribed period.

(c) A hearing under this section shall be held in the District, unless otherwise specified by the Commissioner, and shall be held before the Commissioner or a person that the Commissioner appoints.

(d) The Commissioner may issue a subpoena to compel the attendance of a witness at a hearing or to compel the production of any document, paper, book, record, or other evidence for the investigation.

(e) The Commissioner or the Commissioner's appointee may administer an oath and take the testimony of any person under oath in the conduct of the investigation.

(f) A hearing under this section shall be conducted in accordance with Chapter 5 of Title 2.

(g) A hearing conducted under this section shall be open to the public, unless the Commissioner determines that it is necessary or appropriate to hold a private hearing to protect the public interest.

(h) Within 90 days after the conclusion of a hearing under this section, the Commissioner shall issue a final decision and order, in writing, and shall serve the final decision and order on each party to the investigatory proceeding.

(June 9, 2001, D.C. Law 13-308, § 113, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

§ 26-551.14. Notification of other government agencies.

(a) If the Commissioner finds in the Commissioner's final order that a violation of the District of Columbia Banking Code has occurred or is occurring, the Commissioner shall refer the matter to the Corporation Counsel or to the United States Attorney for appropriate action.

(b) If the Commissioner determines that a national bank, federally chartered savings and loan, federally chartered savings bank, or federally chartered credit union has acted in violation of the laws of the District or has engaged in an unsafe or unsound conduct, the Commission shall notify the appropriate federal financial institutions agency and the United States Attorney General.

(June 9, 2001, D.C. Law 13-308, § 114, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

§ 26-551.15. Modification or rescission of orders.

The Commissioner may modify or rescind a final order issued under § 26-551.13 after receiving and considering a request from a financial institution, a financial institution's affiliate or subsidiary, or any other party to the investigatory proceeding, if the Commissioner determines that:

(1) It is in the public interest to modify or rescind the final order; and

(2) It is reasonable to believe that the financial institution, the financial institution's affiliate or subsidiary, or the other party to the investigatory proceeding will engage in safe and sound practices and will comply with the District of Columbia Banking Code.

(June 9, 2001, D.C. Law 13-308, § 115, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

§ 26-551.16. Cease and desist order.

(a) The Commissioner may issue and serve upon the financial institution or its affiliate or subsidiary a final cease and desist order if:

(1) The party served with the notice of charges fails to appear at the hearing called under § 26-551.13; or

(2) The record of the hearing held under § 26-551.13 supports a finding that the violation or unsafe and unsound practice specified in the notice of charges has occurred or reasonably likely to occur.

(b) A final cease and desist order may require that a financial institution or a director, officer, trustee, employee, agent, affiliate, or subsidiary of the financial institution:

(1) Cease and desist from the violation or unsafe or unsound practice or from any activity that will or may result in a violation or unsafe or unsound practice;

(2) Take affirmative action to correct the violation, unsafe or unsound practice, or condition resulting from the violation or unsafe or unsound practice or to avoid a violation or unsafe or unsound practice; or

(3) Provide indemnification, reimbursement, restitution, or any other relief that the Commissioner determines is appropriate.

(c) A final cease and desist order shall become effective 30 days after the service of the order upon the financial institution or its affiliate or subsidiary; provided, that a final cease and desist order which has been issued upon the consent of the Commissioner and a financial institution or other parties shall become effective upon the date specified in the consent order.

(d) A final cease and desist order shall remain in effect until it is stayed, modified, terminated, or set aside by the Commissioner or a court.

(e) In addition to, or instead of, issuing a final cease and desist order, the Commissioner may enter into an informal enforcement action, such as a supervisory agreement or memorandum of understanding, with the financial institution.

(June 9, 2001, D.C. Law 13-308, § 116, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

§ 26-551.17. Temporary cease and desist order.

(a) Along with a notice of charges, or after the issuance of a notice of charges, the Commissioner may issue a temporary cease and desist order.

(b) The Commissioner may issue a temporary cease and desist order if the Commissioner determines that a violation or unsafe or unsound practice is likely to cause:

- (1) Insolvency of the financial institution;
- (2) Substantial dissipation of assets or earnings of the financial institution;
- (3) Serious weakening of the condition of the financial institution;
- (4) Serious prejudice to the interests of the depositors or investors of the financial institution or to the general public; or
- (5) The inability to determine, because of incomplete or inaccurate records, the financial condition of a financial institution or the inability to determine the details or purpose of a transaction that may have a material effect on the financial condition of a financial institution.

(c) The temporary cease and desist order may require a financial institution or its affiliate or subsidiary to immediately cease and desist from a violation or unsafe or unsound practice and to take affirmative action to prevent an occurrence set forth in paragraphs (1) through (5) of subsection (b) of this section pending completion of investigatory proceedings under this chapter. If a notice of charges issued under § 26-551.13 states that the books and records of a financial institution are so incomplete or inaccurate that the Commissioner is unable to determine the financial condition of the institution or to ascertain the details or purpose of a transaction, the Commissioner may issue a temporary cease and desist order that requires the financial institution to cease an activity or practice which caused or contributed to the incomplete or inaccurate state of the books or records or take affirmative action to restore the books or records to a complete and accurate state.

(d) A temporary cease and desist order shall be effective upon service.

(e) A temporary cease and desist order shall remain in effect until:

- (1) Set aside, limited, or suspended by a court;
- (2) The completion of the investigatory proceeding initiated by the notice of charges, if the Commissioner dismisses the notice of charges;
- (3) An order by the Commissioner revoking the temporary cease and desist order; or
- (4) The issuance of a final cease and desist order.

(June 9, 2001, D.C. Law 13-308, § 117, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

§ 26-551.18. Confidentiality of information.

(a) Except as provided in subsection (b) of this section or as otherwise required by law, the Department and the employees, agents, and contractors of the Departments shall not disclose:

(1) The contents of a report or examination of a person by the Department, except as the Commissioner determines is appropriate to disclose in the final order issued under § 26-551.13;

(2) Information furnished to, or obtained by, the Department, the disclosure of which the Commissioner determines could endanger the safety and soundness of a financial institution;

(3) Personal financial information furnished to, or obtained by the Department, except as the Commissioner determines is appropriate to disclose in the final order issued under § 26-551.13.

(b) Notwithstanding subsection (a) of this section, the contents of a report or examination of a person or information, including personal information, furnished to or obtained by the Department may be disclosed:

(1) To employees, agents, and contractors of the Department in the performance of the duties of the employee, agent, or contractor;

(2) To the directors, officers, and other persons authorized by the board of directors of a financial institution or other entity, if the financial institution or other entity furnished the information to the Department;

(3) To authorized and appropriate government agencies; or

(4) In accordance with a court order.

(June 9, 2001, D.C. Law 13-308, § 118, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

§ 26-551.19. Enforcement of Department order, subpoena, or notice of charges.

The Commissioner may, through the Corporation Counsel, apply to the Superior Court of the District of Columbia for the enforcement of an effective and outstanding notice of charges, subpoena, final cease and desist order, or temporary cease and desist order. The Superior Court of the District of Columbia may order compliance with the notice of charges, subpoena, final cease and desist order, or temporary cease and desist order.

(June 9, 2001, D.C. Law 13-308, § 119, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

§ 26-551.20. Judicial review.

(a) Within 10 days after service of a temporary cease and desist order, a financial institution or other party named in the temporary cease and desist order may apply to the Superior Court of the District of Columbia for an injunction to set aside, limit, or suspend the order.

(b) A final order or a final cease and desist order issued under this chapter shall be reviewable by the Superior Court of the District of Columbia. The review of the final order or the final cease and desist order shall be confined to

the record of the hearing conducted under § 26-551.13 and to a determination of whether the Commissioner's order was arbitrary or capricious.

(June 9, 2001, D.C. Law 13-308, § 120, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

§ 26-551.21. Penalty for violation of final order.

A person who violates an outstanding and effective final order shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than \$5,000, imprisoned not more than one year, or both.

(June 9, 2001, D.C. Law 13-308, § 121, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

Subchapter V. Generally Prohibited Activities.

§ 26-551.22. Prohibition of fraud.

A financial institution shall not engage in a fraudulent activity or an act against the public interest.

(June 9, 2001, D.C. Law 13-308, § 122, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

Subchapter VI. Miscellaneous Provisions.

§ 26-551.23. Rulemaking.

The Commissioner may issue rules implementing this chapter, pursuant to subchapter I of Chapter 5 of Title 2.

(June 9, 2001, D.C. Law 13-308, § 123, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

§ 26-551.24. [Reserved].

§ 26-551.25. Validity of prior law.

A decision, order, interpretation, agreement, policy statement, opinion, regulation or rule ("decision") issued and in effect under a law repealed by this chapter or section 124 of the 21st Century Financial Modernization Act of 2000, effective June 9, 2001 (D.C. Law 13-308; 48 DCR 3244), shall continue to be valid until the Commissioner amends or withdraws the decision.

§ 26-551.25

BANKS AND OTHER FINANCIAL INSTITUTIONS

(June 9, 2001, D.C. Law 13-308, § 125, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-551.01.

CHAPTER 6. SPECIAL ACCOUNT FOR OFFICE OF BANKING AND FINANCIAL INSTITUTIONS [REPEALED].

Sec.

26-601 to 26-603. [Repealed].

§ 26-601. Definitions. [Repealed].

Repealed.

(Mar. 20, 1998, D.C. Law 12-60, § 1802, 44 DCR 7378; Mar. 26, 1999, D.C. Law 12-175, § 1902(a), 45 DCR 7193.)

Prior Codifications. — 1981 Ed., § 26-802.2.

Temporary Addition of Section. — D.C. Law 12-59, title XVIII, § 1802 (44 DCR 7356), eff. March 20, 1998, provided for the temporary addition of this section.

Section 2001(b) of D.C. Law 12-59 provided for expiration “after 225 days of its having taken effect.”

Section 2002 of D.C. Law 12-59 provided: “Sec. 2002. This act shall apply as of October 1, 1997.”

Emergency legislation. — For temporary repeal of section, see § 1502(a) of the Fiscal Year 1999 Budget Support Emergency Act of 1998 (D.C. Act 12-401, July 13, 1998, 45 DCR 4794) and § 1502(a) of the Fiscal Year 1999 Budget Support Congressional Review Emergency Act of 1998 (D.C. Act 12-564, January 12, 1999, 46 DCR 669).

For temporary (90-day) amendment of section, see § 1502(a) of the Fiscal Year 1999 Budget Support Congressional Review Emer-

gency Act of 1999 (D.C. Act 13-41, March 31, 1999, 46 DCR 3446).

Legislative history of Law 12-60. — For D.C. Law 12-60, see § 26-602.

Legislative history of Law 12-175. — Law 12-175, the “Fiscal Year 1999 Budget Support Act of 1998,” was introduced in Council and assigned Bill No. 12-618, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on May 5, 1998, and June 2, 1998, respectively. Signed by the Mayor on June 23, 1998, it was assigned Act No. 12-399 and transmitted to both Houses of Congress for its review. D.C. Law 12-175 became effective on March 26, 1999.

Editor’s notes. — D.C. Law 12-60, title XVIII, § 1802 (44 DCR 7378), eff. March 20, 1998, added this section. Section 2002 of D.C. Law 12-60 provided: “Sec. 2002. This act shall apply as of October 1, 1997.”

Application of D.C. Law 12-175: Section 1904 of D.C. Law 12-175 provided that the act shall apply as of October 1, 1998.

§ 26-602. Establishment of special account. [Repealed].

Repealed.

(Mar. 20, 1998, D.C. Law 12-60, § 1803, 44 DCR 7378; Mar. 26, 1999, D.C. Law 12-175, § 1902(b), 45 DCR 7193; Apr. 20, 1999, D.C. Law 12-264, § 25, 46 DCR 2118; Apr. 13, 2005, D.C. Law 15-354, § 36, 52 DCR 2638.)

Prior Codifications. — 1981 Ed., § 26-802.3.

Temporary Addition of Section. — Sections 1802 through 1804 of D.C. Law 12-59 added §§ 26-802.3 and 26-802.4 [1981 Ed.].

Section 2001(b) of D.C. Law 12-59 provided the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary addition of §§ 26-802.3 and 26-802.4 [1981 Ed.], see §§ 1802 to 1804 of the Fiscal Year 1998 Revised Budget Support Emergency Act of 1997 (D.C. Act 12-152, October 17, 1997, 44

DCR 6196) and §§ 1802 to 1804 of the Fiscal Year 1998 Revised Budget Support Congressional Review Emergency Act of 1997 (D.C. Act 12-239, January 13, 1998, 45 DCR 508).

For temporary amendment of section, see § 1502(b) of the Fiscal Year 1999 Budget Support Emergency Act of 1998 (D.C. Act 12-401, July 13, 1998, 45 DCR 4794), and § 1502(b) of the Fiscal Year 1999 Budget Support Congressional Review Emergency Act of 1998 (D.C. Act 12-564, January 12, 1999, 46 DCR 669).

For temporary (90-day) amendment of section, see § 1502(b) of the Fiscal Year 1999

Budget Support Congressional Review Emergency Act of 1999 (D.C. Act 13-41, March 31, 1999, 46 DCR 3446).

For temporary (90-day) amendment of section, see § 1502(c) of the Fiscal Year 1999 Budget Support Congressional Review Emergency Act of 1999 (D.C. Act 13-41, March 31, 1999, 46 DCR 3446).

Legislative history of Law 12-59. — Law 12-59, the “Fiscal Year 1998 Revised Budget Support Temporary Act of 1997,” was introduced in Council and assigned Bill No. 12-350. The Bill was adopted on first and second readings on September 8, 1997, and September 22, 1997, respectively. Signed by the Mayor on October 24, 1997, it was assigned Act No. 12-190 and transmitted to both Houses of Congress for its review. D.C. Law 12-59 became effective on March 20, 1998.

Legislative history of Law 12-60. — Law 12-60, the “Fiscal Year 1998 Revised Budget Support Act of 1998,” was introduced in Council and assigned Bill No. 12-353, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on September 8, 1997, and October 7, 1997, re-

spectively. Signed by the Mayor on October 24, 1997, it was assigned Act No. 12-191 and transmitted to both Houses of Congress for its review. D.C. Law 12-60 became effective on March 20, 1998.

Legislative history of Law 12-175. — For legislative history of D.C. Law 12-175, see Historical and Statutory Notes following § 26-601.

Legislative history of Law 12-264. — Law 12-264, the “Technical Amendments Act of 1998,” was introduced in Council and assigned Bill No. 12-804, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 10, 1998, and December 1, 1998, respectively. Signed by the Mayor on January 7, 1999, it was assigned Act No. 12-626 and transmitted to both Houses of Congress for its review. D.C. Law 12-264 became effective on April 20, 1999.

Legislative history of Law 15-354. — For Law 15-354, see notes following § 26-551.05.

Editor’s notes. — Application of Law 12-60: Section 2002 of D.C. Law 12-60 provided that the act shall apply as of October 1, 1997.

Application of D.C. Law 12-175: See Historical and Statutory Notes following § 26-601.

§ 26-603. Fees credited to the special account. [Repealed].

Repealed.

(Mar. 20, 1998, D.C. Law 12-60, § 1804(1), 44 DCR 7378; Mar. 26, 1999, D.C. Law 12-175, § 1902(c), 45 DCR 7193; Apr. 3, 2001, D.C. Law 13-263, § 1411(a), 48 DCR 991; May 7, 2002, D.C. Law 14-132, §§ 601(b), 602(a), 49 DCR 2551; Apr. 13, 2005, D.C. Law 15-354, § 36, 52 DCR 2638.)

Prior Codifications. — 1981 Ed., § 26-802.4.

Temporary Amendment of Section. — Section 2 of D.C. Law 14-86, the “Protections from Predatory Lending and Mortgage Foreclosure Improvements Temporary Amendment Act of 2001”, effective March 19, 2002, provided that D.C. Law 13-263 shall not apply beginning November 6, 2001, through March 6, 2002.

Section 4(b) of D.C. Law 14-86 provided that the act shall expire after 225 days of its having taken effect.

Temporary Addition of Section. — For temporary addition of sections, see notes following § 26-602.

Emergency legislation. — For temporary amendment of section, see § 1502(c) of the Fiscal Year 1999 Budget Support Emergency Act of 1998 (D.C. Act 12-401, July 13, 1998, 45 DCR 4794) and § 1502(c) of the Fiscal Year 1999 Budget Support Congressional Review Emergency Act of 1999 (D.C. Act 12-564, January 12, 1999, 46 DCR 669).

Section 2 of Act 14-188, the “Protections from Predatory Lending and Mortgage Foreclosure

Improvements Emergency Amendment Act”, deemed approved Nov. 27, 2001, without the signature of the Mayor, provided that D.C. Law 13-263 shall not apply beginning November 6, 2001, through March 6, 2002.

For temporary (90 day) amendment of section, see § 601(b) of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 12-59. — For legislative history of D.C. Law 12-59, see Historical and Statutory Notes following § 26-602.

Legislative history of Law 12-60. — For legislative history of D.C. Law 12-60, see Historical and Statutory Notes following § 26-602.

Legislative history of Law 12-175. — For legislative history of D.C. Law 12-175, see Historical and Statutory Notes following § 26-601.

Legislative history of Law 13-263. — Law 13-263, the “Protections from Predatory Lending and Mortgage Foreclosure Improvements Act of 2000”, was introduced in Council and assigned Bill No. 13-800, which was referred to the Committee on Economic Development. The Bill was adopted on first and second readings

on November 8, 2000, and December 5, 2000, respectively. Signed by the Mayor on December 21, 2000, it was assigned Act No. 13-552 and transmitted to both Houses of Congress for its review. D.C. Law 13-263 became effective on April 3, 2001.

Legislative history of Law 14-86. — Law 14-86, the “Protections from Predatory Lending and Mortgage Foreclosure Improvements Temporary Amendment Act of 2001”, was introduced in Council and assigned Bill No. 14-417, which was referred to the Committee on Public Works and the Environment. The Bill was adopted on first and second readings on November 6, 2001, and December 4, 2001, respectively. Approved without the signature of the Mayor on December 21, 2001, it was assigned Act No. 14-206 and transmitted to both Houses of Congress for its review. D.C. Law 14-86 became effective on March 19, 2002.

Legislative history of Law 14-132. — Law 14-132, the “Home Loan Protection Act of 2002”, was introduced in Council and assigned Bill No. 14-515, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on February 5, 2002, and February 19, 2002, respectively. Signed by the Mayor on March 1, 2002, it was assigned Act No. 14-296 and transmitted to both Houses of Congress for its review. D.C. Law 14-132 became effective on May 7, 2002.

Legislative history of Law 15-354. — For Law 15-354, see notes following § 26-551.05.

Editor’s notes. — Application of Law 12-60: See Historical and Statutory Notes following § 26-602.

Application of D.C. Law 12-175: See Historical and Statutory Notes following § 26-601.

CHAPTER 6A. INTERNATIONAL BANKING.

Sec.	Sec.
26-631. Definitions.	26-637. Registered office and agent.
26-632. Construction of legal and financial terms used in chapter.	26-638. Assets to be held in the District of Columbia.
26-633. Application of the District of Columbia Banking Code.	26-639. Financial certification; restrictions on investments, loans, and acceptances.
26-634. Requirements for international banking corporation activities.	26-640. Reports and records.
26-635. Scope of license; permissible activities of international banking corporations.	26-641. Examinations; enforcement powers; fees and assessments.
26-636. Applications for licenses; approval or disapproval.	26-642. Voluntary dissolutions; involuntary dissolutions and liquidations.
	26-643. Commissioner's powers; regulations.

§ 26-631. Definitions.

For the purposes of this chapter, the term:

(1) "Banking business" means activities and transactions involving banking, including receiving deposits, paying checks, lending money, and any activity which is determined by the Commissioner to be incidental to the business of banking.

(2) "Commissioner" shall have the same meaning as set forth in § 26-551.02(7).

(3) "Department" shall have the same meaning as set forth in § 26-551.02(9).

(4) "District of Columbia Banking Code" means the statutory provisions concerning banking and financial institutions which are codified in Title 26 of the District of Columbia Official Code, any law administered by the Commissioner, and rules and regulations promulgated under those statutory provisions and laws.

(5) "Edge Act" means the Federal Reserve Act, approved December 23, 1913 (38 Stat. 351; 12 U.S.C. § 221 et seq.).

(6) "Federal agency" means an agency of an international banking corporation established and operating under the Federal International Act.

(7) "Federal branch" means a branch of an international banking corporation established and operating under the Federal International Act.

(8) "Federal International Act" means the International Banking Act of 1978, approved September 17, 1978 (92 Stat. 607; 12 U.S.C. § 3101 et seq.).

(9) "Federal international bank office" means a branch or agency of an international banking corporation established and operating under the Federal International Act.

(10) "Foreign country" means a country other than the United States, including a dependency or possession of such country, and any territory of the United States, including Guam, American Samoa, the Virgin Islands, and the Commonwealth of Puerto Rico.

(11) "International agency" means an office located in the District of Columbia, other than a federal international bank office, which exercises powers, as set forth in § 26-635, on behalf of an international banking corporation.

(12) "International banking corporation" means a banking corporation organized and licensed under the laws of a foreign country. The term "international banking corporation" shall include an international commercial bank, foreign merchant bank, foreign mortgage bank, or other foreign institution that engages in banking activities in connection with the business of banking in the country where the foreign institution is organized or operating.

(13) "International banking corporation office" means, unless otherwise specified, an office established in the District of Columbia under this chapter.

(14) "International branch" means an office located in the District of Columbia, other than a federal international bank office, which exercises powers, as set forth in § 26-635, on behalf of an international banking corporation.

(15) "International financing corporation" means a corporation organized under the laws of the District of Columbia for the purpose of engaging in the activities described in § 26-635.

(16) "International representative office" means:

(A) An office of an international banking corporation that is established or maintained in the District of Columbia for the purpose of engaging in the activities described in § 26-635; or

(B) A person whose primary business is to engage in such activities, on behalf of an international banking corporation, from an office located in the District of Columbia.

(17) "Representative" means a person or entity located in an office in the District of Columbia that engages in any activity in the District of Columbia for or on behalf of an international banking corporation, which activity is not otherwise prohibited by law.

(18) "State" means a state of the United States or the District of Columbia.

(Apr. 3, 2001, D.C. Law 13-268, § 2, 48 DCR 1251; June 11, 2004, D.C. Law 15-166, § 4(c), 51 DCR 2817.)

Effect of amendments. — D.C. Law 15-166 rewrote pars. (2) and (3) which had read as follows:

"(2) 'Commissioner' means the Commissioner of the Department of Banking and Financial Institutions.

"(3) 'Department' means the Department of Banking and Financial Institutions."

Emergency legislation. — For temporary (90 day) amendment of section, see § 4(c) of Consolidation of Financial Services Emergency Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 13-268. — Law

13-268, the "International Banking Act of 2000", was introduced in Council and assigned Bill No. 13-866, which was referred to the Committee on Consumer and Regulatory Affairs and the Committee on Government Affairs, Recreation. The Bill was adopted on first and second readings on November 8, 2000, and December 5, 2000, respectively. Signed by the Mayor on January 5, 2001, it was assigned Act No. 13-558 and transmitted to both Houses of Congress for its review. D.C. Law 13-268 became effective on April 3, 2001.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 26-131.02.

§ 26-632. Construction of legal and financial terms used in chapter.

Legal and financial terms used in this chapter refer to equivalent terms used by the country in which the international banking corporation is organized.

(Apr. 3, 2001, D.C. Law 13-268, § 3, 48 DCR 1251.)

Legislative history of Law 13-268. — For Law 13-268, see notes following § 26-631.

§ 26-633. Application of the District of Columbia Banking Code.

(a) An international banking corporation having an office in the District of Columbia shall be subject to all the provisions of the District of Columbia Banking Code as though the international banking corporation is a bank organized under the laws of the District of Columbia, except where it may appear, from the context or otherwise, that such provisions are clearly applicable only to banks or trust companies organized under the laws of the District of Columbia.

(b) An international banking corporation may conduct its banking business in the District of Columbia with the same, but no greater, rights and privileges as a District of Columbia bank, and except as otherwise provided in this chapter, subject to the same duties, restrictions, penalties, and liabilities now or hereafter imposed under the District of Columbia Banking Code upon a District of Columbia bank.

(Apr. 3, 2001, D.C. Law 13-268, § 4, 48 DCR 1251.)

Legislative history of Law 13-268. — For Law 13-268, see notes following § 26-631.

§ 26-634. Requirements for international banking corporation activities.

(a) An international banking corporation may transact a banking business, or maintain in the District of Columbia an office for carrying on such business, or any part thereof, if the corporation has:

(1) Been authorized by its charter to carry on a banking business and has complied with the laws of the jurisdiction in which it is chartered;

(2) Furnished to the Department such proof as to the nature and character of its business and as to its financial condition as the Department may require;

(3) Filed with the Department a certified copy of any information required to be supplied to the District of Columbia by a foreign corporation under § 29-101.99; and

(4) Been licensed by the Department.

(b) An international banking corporation may engage in representational

and other activities in the District of Columbia, other than those specified in § 26-635, only as authorized in § 26-636.

(c) Any person who establishes or maintains an office or transacts business in the District of Columbia in violation of this section shall be subject to the penalties imposed by § 26-103(g).

(Apr. 3, 2001, D.C. Law 13-268, § 5, 48 DCR 1251.)

Legislative history of Law 13-268. — For Law 13-268, see notes following § 26-631.

§ 26-635. Scope of license; permissible activities of international banking corporations.

(a)(1) An international banking corporation licensed by the Commissioner may engage in the business authorized by this chapter only at the office specified in the license. A license issued under this chapter shall not be transferable or assignable; provided, that the location of an international banking corporation office may be changed after notification of the Commissioner as required by regulation. The license shall at all times be conspicuously displayed in the place of business specified in the license.

(2) An international banking corporation licensed under this chapter shall, whenever its articles of incorporation are amended, immediately file with the Commissioner a copy of the amendment duly authenticated by the proper officer of the country under which the international banking corporation was organized. The filing of the amendment shall not:

(A) Enlarge or alter the purpose for which the international banking corporation is authorized to transact banking business or representational activities in the District of Columbia;

(B) Authorize the international banking corporation to transact banking business or representational activities in the District of Columbia in any other name than the name set forth in its license; or

(C) Extend the duration of its corporate existence.

(3) An international banking corporation licensed under this chapter shall apply to the Commissioner to secure an amended license if it changes its corporate name, changes the duration of its corporate existence, or desires to pursue a different or additional purpose which is not set forth in its prior application for a license. The requirements with respect to the form and contents of the application, the manner of its execution, the filing of duplicate originals of the application with the Commissioner, the issuance and effect of an amended license, and the recording of the amended license shall be the same as in the case of an original application for a license.

(4) An international banking corporation desiring to convert an existing international banking corporation office to an international banking corporation office of a different type shall submit to the Commissioner an application on a form that the Commissioner shall prescribe, which application shall be accompanied by all of the information and documents that are required for the license sought.

(5) Nothing in the laws of the District of Columbia shall restrict the right of a District of Columbia-licensed international agency, international branch, or international financing corporation to convert to a federal license or charter upon compliance with the laws of the United States. Upon completion of any such conversion, the District of Columbia license shall be surrendered to the Commissioner.

(6) An international banking corporation desiring to convert a federal international bank office or corporation organized under section 25A of the Edge Act into an international banking corporation office operating under the provisions of this chapter shall meet the minimum criteria of the District of Columbia-chartered form into which it is converting.

(b)(1)(A) An international banking corporation that meets the requirements of § 26-634 may, with the approval of the Commissioner, establish one or more international branches in the District of Columbia. An international branch shall have the same rights and privileges as a bank organized under the District of Columbia Banking Code, including the right to receive deposits and exercise fiduciary powers. The operations of an international branch shall be conducted under regulations determined by the Commissioner as necessary to ensure compliance with the provisions of the District of Columbia Banking Code. The regulations shall include requirements for the maintenance of accounts and records separate from those of the international banking corporation of which it is a branch. An application to establish an international branch shall be made under § 26-636.

(B) An international banking corporation may operate more than one international branch in the District of Columbia, each at a different place of business; provided, that each branch office shall be separately licensed to transact a banking business, or any part of a banking business, under this chapter.

(2)(A) An international agency licensed under this chapter may make any loan, extension of credit, or investment which it could make if chartered and operating as a bank organized under the laws of the District of Columbia.

(B) An international agency shall not receive deposits in the District of Columbia other than:

(i) Deposits of a foreign nation, an agency or instrumentality of a foreign nation, or a person who resides in, is domiciled in, and maintains its, or his or her, principal place of business in, a foreign nation. For purposes of this subparagraph, the term "person" means an individual, proprietorship, joint venture, partnership, trust, business trust, syndicate, association, joint stock company, corporation, limited liability company, or any other organization (or any branch or division thereof);

(ii) Interbank deposits, interbank borrowing, or similar interbank obligations; or

(iii) International banking facility time deposits as defined in § 47-1801.04(31).

(C) An international agency may maintain in the District of Columbia, for the account of others, credit balances necessarily incidental to, or arising out of, the exercise of its authority.

(D) Upon approval of an application by the Commissioner under § 26-636, an international agency may act as a fiduciary and exercise trust powers subject to the same requirements, and in the same manner, as the trust business of a District of Columbia trust company or a District of Columbia bank with trust powers.

(E) An international banking corporation may operate more than one international agency in the District of Columbia, each at a different place of business; provided, that each agency office shall be separately licensed to transact a banking business or any part of a banking business, under this chapter.

(c) Subject to the provisions of this chapter, an international representative office may act in the District of Columbia in a liaison capacity with existing and potential customers of an international banking corporation and its subsidiaries and affiliates. It may, through its employees or agents, solicit loans; assemble credit information; make proprietary inspections and appraisals; assist in completing loan applications and other preliminary paperwork in preparation for making a loan; administer personnel and operations; engage in data processing or recordkeeping activities; provide information to customers concerning their accounts; answer questions; receive applications for extensions of credit and other banking services; transmit documents on behalf of customers; make arrangements for customers to transact business on their accounts; service loans or extensions of credit and investments; solicit, but not accept, deposits; and engage in such other activities as the Commissioner may approve by order or regulation. An international representative office may not conduct any banking business, or part of a banking business, in the District of Columbia.

(d) An international banking corporation may, with the approval of the Commissioner under the District of Columbia Banking Code, acquire control over or organize a bank organized under the laws of the District of Columbia. For the purposes of this section, the term "bank" shall have the same meaning as set forth in section 2(c) of the Bank Holding Company Act of 1956, approved May 9, 1956 (70 Stat. 133; 12 U.S.C. § 1841(c)).

(e) A bank established by an international banking corporation and chartered outside the District of Columbia may establish a branch in the District of Columbia; provided, that the branch shall be subject to the same laws, rules, regulations, and oversight as a bank branch of a domestic financial institution chartered outside the District of Columbia.

(f) An international banking corporation that has established a branch, agency, or representative office outside the District of Columbia may establish and operate, directly or indirectly, an international branch, an international agency, or an international representative office in the District of Columbia in accordance with applicable District of Columbia law.

(g) An international financing corporation established under this chapter shall directly engage only in those activities permissible for corporations organized under the Edge Act. Subject to the prior approval of the Commissioner and to such limitations as the Commissioner shall prescribe by regulation, the fact that an international financing corporation invests in

shares of, and owns or controls, an Edge Act corporation, an international banking corporation, or a company engaged in financial activities outside the United States, or establishes and operates branches, representative offices, and similar banking facilities in foreign countries, shall not prohibit their operation in the District of Columbia.

(h) This chapter shall not be construed to prohibit an international banking corporation which does not maintain an office in the District of Columbia from transacting the following business:

(1)(A) Making loans in the District of Columbia secured by mortgages on real property; or

(B) Contracting in the District of Columbia with a banking institution engaged in the business of banking under the laws of the District of Columbia to acquire from or through such banking institution a part or the entire interest in:

(i) A loan or evidence of debt which such banking institution has made, purchased, or acquired, or will make, purchase, or acquire, for its own account or otherwise; and

(ii) A like interest in any security and any security instrument proposed to be given, or previously or subsequently given, to secure or evidence such loan or evidence of debt;

(2) Enforcing in the District of Columbia obligations previously or subsequently acquired by it in the transaction of business outside the District of Columbia or in the transaction of business authorized by this section; or

(3) Acquiring, holding, leasing, mortgaging, contracting with respect to, or otherwise protecting or conveying property in the District of Columbia previously or subsequently assigned, transferred, mortgaged, or conveyed to it as security for, or in whole or part satisfaction of, a loan made by it or an obligation acquired by it in the transaction of business outside the District of Columbia or in the transaction of business authorized by this section.

(Apr. 3, 2001, D.C. Law 13-268, § 6, 48 DCR 1251; Oct. 19, 2002, D.C. Law 14-213, § 17, 49 DCR 8140.)

Effect of amendments. — D.C. Law 14-213, in subsec. (b)(2)(B)(iii), validated a previously made technical correction.

Legislative history of Law 13-268. — For Law 13-268, see notes following § 26-631.

Legislative history of Law 14-213. — For Law 14-213, see notes following § 26-131.02.

§ 26-636. Applications for licenses; approval or disapproval.

(a)(1) Before being licensed by the Commissioner to transact a banking business in the District of Columbia as an international branch or international agency or before maintaining in the District of Columbia an office to carry on a banking business, or any part of a banking business, an international banking corporation shall submit to the Commissioner a separate application, in duplicate, which shall state:

(A) The name of the corporation and the country under the laws of which it was organized;

(B) The date of its incorporation and the period of its duration;

(C) The address of its principal office in the country under the laws of which it was organized;

(D) The address of its proposed registered office in the District of Columbia and the name of its proposed registered agent in the District of Columbia at such address;

(E) The names of other states and countries in which it is licensed or qualified to transact business;

(F) The names and respective addresses of its directors and principal officers;

(G) Such information as the Commissioner may require indicating that the international banking corporation is authorized to conduct a general banking business under the laws of the country of its organization and the nature of the business of the international banking corporation;

(H) A complete and detailed statement of its financial condition and the actual value of its assets;

(I) A listing of any occasion within the preceding 10-year period in which the international banking corporation or any of its directors, executive officers, or principal shareholders has been convicted of, or pleaded guilty or nolo contendere to, any offense:

(i) With respect to which the penalties include the possibility of imprisonment for one year or more;

(ii) Involving money laundering; or

(iii) Otherwise related to the operation of a financial institution; and

(J) Such additional information as the Commissioner may require as necessary or appropriate to enable the Commissioner to determine whether the international banking corporation is entitled to a license.

(2) The application shall be accompanied by a reasonable fee determined by the Commissioner, made on forms prescribed and furnished by the Commissioner, and duly executed in duplicate by one or more of the principal officers of the international banking corporation.

(3) When the application is submitted to the Commissioner, the international banking corporation shall also:

(A) Submit a duly authenticated copy of its articles of incorporation, or equivalent corporate document, and an authenticated copy of its bylaws, or an equivalent of the bylaws, that is satisfactory to the Commissioner;

(B) Pay an investigation and supervision fee, which shall be established by regulation; and

(C) Submit a statement or certificate issued by the banking or supervisory authority of the country in which the international banking corporation is organized and licensed, stating that the international banking corporation is duly organized, licensed, in good standing, and authorized to conduct a general banking business.

(4) The Commissioner may approve or disapprove the application; provided, that the Commissioner shall not approve the application unless, in the

Commissioner's opinion, (A) the applicant meets every requirement of this chapter and any regulations adopted under this chapter, and (B) federal law permits the appropriate federal regulatory authority to issue a comparable license to the international banking corporation. In acting on an application, the Commissioner shall consider the financial and managerial resources and future prospects of the applicant and the international branch or agency and the convenience and needs of the community to be served. The Commissioner may specify conditions that the Commissioner considers appropriate, considering the public interest, the need to maintain a sound and competitive banking system, and the preservation of an environment conducive to the conduct of an international banking business in the District of Columbia.

(5) A license shall not be issued to an international banking corporation for the purpose of operating an international agency or an international branch in the District of Columbia unless the international banking corporation:

(A) Has been authorized by the bank regulatory authority, in the foreign country in which the international banking corporation is organized or incorporated, to establish the proposed international branch or agency;

(B) Is adequately supervised by the central bank or bank regulatory agency in the foreign country in which it is organized and chartered. The Commissioner shall establish, by regulation, the general principles which shall determine the adequacy of supervision of an international banking corporation's foreign establishments, taking into consideration the standards set forth in the Federal International Act;

(C) Holds capital consistent with minimum capital requirements established by the Commissioner by regulation. In adopting such requirements, the Commissioner shall consider similar rules adopted by other bank regulatory agencies in the United States and the need to provide reasonably consistent regulatory requirements for international banking corporations which will maintain a safe and sound condition of international banking corporations doing business in the District of Columbia; and

(D) As of a date not more than 120 days before the application, has assets with a fair market value of \$1 million greater than its liabilities.

(b)(1) Before being licensed by the Commissioner to transact business in the District of Columbia as an international bank representative office, an international banking corporation shall subscribe and submit to the Commissioner a separate application, in duplicate, which shall contain such corporate organizational, financial, and other information as the Commissioner determines to be appropriate, taking into consideration the information required to be submitted with regard to applications for international branches and agencies as set forth in this chapter.

(2) The application for a license shall be accompanied by a reasonable fee as determined by the Commissioner.

(3) The Commissioner shall issue a license to an international banking corporation to establish and maintain a representative office if the Commissioner determines that:

(A) The international banking corporation is of sound financial standing;

(B) The international banking corporation has been authorized by the bank regulatory authority of the foreign country in which it was organized or incorporated to establish the proposed international bank office or the regulatory authority interposes no objection to the office;

(C) The international banking corporation is adequately supervised by the central bank or bank regulatory agency in the foreign country in which it is organized and chartered;

(D) The management of the international banking corporation and the proposed management of the representative office are adequate; and

(E) The convenience and needs of persons to be served by the proposed representative office will be promoted.

(4) An international banking corporation desiring to convert its existing registered international representative office to a licensed international branch or licensed international agency shall submit an application to the Commissioner which meets the minimum criteria for licensing of an international branch or licensed international agency as required by this chapter.

(c) An application for approval to organize an international financing corporation shall be subject to the provisions of the District of Columbia Banking Code relating to the organization of new financial institutions and to regulations adopted by the Commissioner as necessary to ensure that the proposed international financing corporation will be operated in a safe and lawful manner; provided, that the applicant shall not be required to become a member of the Federal Reserve System or the Federal Deposit Insurance Corporation. An international financing corporation shall be subject to the examination and supervision of the Commissioner and subject to the District of Columbia Banking Code to the same extent as international banking corporations under § 26-633.

(d) An application filed under this section shall be subject to the application review procedures contained in § 26-704(a), (b), and (g) [subsection (g) repealed].

(e) The Commissioner shall submit an annual report to the Council of all actions that the Commissioner takes pursuant to this section.

(Apr. 3, 2001, D.C. Law 13-268, § 7, 48 DCR 1251; Dec. 11, 2007, D.C. Law 17-59, § 2, 54 DCR 10718.)

Effect of amendments. — D.C. Law 17-59 rewrote subsec. (d) and added subsec. (e). Prior to amendment, subsec. (d) read as follows: “(d) An application filed under this section shall be subject to the application review procedures, including Council review, contained in § 26-704(a), (b), and (f) through (i).”

Temporary Amendment of Section. — Section 2 of D.C. Law 17-31 amended subsec. (d) and added subsec. (e) to read as follows:

“(d) An application filed under this section shall be subject to the application review procedures contained in section 5(a), (b), and (g) of the District of Columbia Regional Interstate Banking Act of 1985, effective November 23,

1985 (D.C. Law 6-63; D.C. Official Code § 26-704(a), (b), and (g)).

“(e) The Commissioner shall submit an annual report to the Council of all actions that the Commissioner takes pursuant to this section.”

Section 5(b) of D.C. Law 17-31 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2 of Bank Charter Modernization Emergency Amendment Act of 2007 (D.C. Act 17-66, July 9, 2007, 54 DCR 6819).

Legislative history of Law 13-268. — For Law 13-268, see notes following § 26-631.

Legislative history of Law 17-59. — Law 17-59, the “Bank Charter Modernization Amendment Act of 2007”, was introduced in Council and assigned Bill No. 17-166 which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on

first and second readings on July 10, 2007, and October 2, 2007, respectively. Signed by the Mayor on October 17, 2007, it was assigned Act No. 17-133 and transmitted to both Houses of Congress for its review. D.C. Law 17-59 became effective on December 11, 2007.

§ 26-637. Registered office and agent.

(a) An international banking corporation authorized to establish and maintain a banking office in the District of Columbia shall have and continuously maintain:

(1) A registered office in the District of Columbia which may, but shall not be required to, be the same as its place of business; and

(2) A registered agent, which agent may be either an individual residing in the District of Columbia whose business office is identical with the registered office or a corporation authorized to transact business in the District of Columbia having a business office identical with the registered office.

(b) A registered agent may at any time vacate its office as registered agent by filing with the Commissioner a statement setting forth its resignation and the effective date thereof, which shall not be less than 60 days nor more than 90 days after the date of filing. A copy of the statement shall be served on the international banking corporation by registered or certified mail addressed to the international banking corporation at its principal office, as such is known to the resigning agent, and directed to the attention of the secretary or other comparable officer of the international banking corporation within 5 days after the date of the filing.

(c) An international banking corporation may from time to time change the address of its registered office and shall change its registered agent if the office of the registered agent becomes vacant for any reason, if its registered agent becomes disqualified or incapacitated to act, or if it revokes the appointment of its registered agent. A change of registered office or registered agent may be effected by filing with the Commissioner duplicate originals of a statement setting forth the details with respect to the change and the effective date thereof.

(d) Service of process in a suit, action, or proceeding, or service of a notice or demand required or permitted by law to be served on an international banking corporation, may be made on a licensed international banking corporation by serving the registered agent of the international banking corporation. If a licensed international banking corporation fails to appoint or maintain a registered agent upon whom legal process or a notice or demand may be served, the registered agent cannot with reasonable diligence be found at the registered office of the international banking corporation, or the license of an international banking corporation is revoked, the Commissioner shall be irrevocably authorized as the agent and representative of the international banking corporation to accept service of process or a notice or demand required or permitted by law to be served on the international banking corporation. Service on the Commissioner of any process, notice, or demand for the international banking corporation shall be made by delivering to and leaving

with the Commissioner, or with any official having charge of the Department, duplicate copies of the process, notice, or demand. If any process, notice, or demand is served on the Commissioner, the Commissioner shall immediately forward a copy by registered mail to the international banking corporation at its principal office as the same appears on the Department's records. Nothing in this chapter shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a foreign corporation in any other manner now or hereafter permitted by law. The Commissioner shall keep a record of all process, notices, and demands served upon the Commissioner under this section, setting forth the time of service and the Commissioner's action on the service.

(Apr. 3, 2001, D.C. Law 13-268, § 8, 48 DCR 1251; June 19, 2001, D.C. Law 13-313, § 25, 48 DCR 1873.)

Effect of amendments. — D.C. Law 13-313, in subsec. (d), deleted the former fifth sentence which read: "Service on the Commissioner shall be returnable in not less than 30 days."

Legislative history of Law 13-268. — For Law 13-268, see notes following § 26-631.

Legislative history of Law 13-313. — Law 13-313, the "Technical Amendment Act of

2000", was introduced in Council and assigned Bill No. 13-879, which was referred to the Committee on the Whole. The Bill was adopted on first and second readings on December 5, 2000, and December 19, 2000, respectively. Signed by the Mayor on January 19, 2001, it was assigned Act No. 13-574 and transmitted to both Houses of Congress for its review. D.C. Law 13-313 became effective on June 19, 2001.

§ 26-638. Assets to be held in the District of Columbia.

(a) Upon and after establishing an international branch or international agency in the District of Columbia, and as may be required under regulations adopted by the Commissioner, an international banking corporation licensed under this chapter shall keep on deposit, with such banks as the international banking corporation may designate and the Commissioner may approve, dollar deposits or other assets, including securities. The Commissioner may from time to time require that the assets deposited under this subsection be maintained by the international banking corporation in such amount, and in such form and subject to such conditions as the Commissioner considers necessary or desirable for the maintenance of a sound financial condition, the protection of depositors and the public interest, and the confidence in the business of each branch or agency.

(b) An international banking corporation shall hold in the District of Columbia currency or such other assets as the Commissioner shall, by regulation, permit, in an amount which shall be a percentage, determined by the Commissioner by order or regulation, of the liabilities of the international banking corporation. As used in this subsection, the term "liabilities" means liabilities appearing on the books, accounts, or records of an international banking corporation's international agencies and international branches in the District of Columbia as liabilities, including acceptances and such other items as the Commissioner shall determine, but excluding amounts due, and other liabilities, to other offices, agencies, or branches of, and affiliates of, the international banking corporation. For purposes of this subsection, the Commissioner (1) shall value marketable securities at the lower of their principal

amount or market value, (2) may determine the value of a nonmarketable bond, note, debenture, draft, bill of exchange, other evidence of indebtedness, or of any other asset or obligation held by, or owed to, the international banking corporation or its agencies or branches within the District of Columbia, and (3) in determining the ratio of assets to liabilities, may exclude, in whole or in part, any particular asset. If, by reason of the existence or potential occurrence of unusual and extraordinary circumstances, the Commissioner considers it necessary or desirable for the maintenance of a sound financial condition, the protection of depositors, creditors, and the public interest, and to maintain public confidence in the business of an international agency or international branch of an international banking corporation in the District of Columbia, the Commissioner may, subject to such terms and conditions as the Commissioner may prescribe, require the international banking corporation to deposit the assets required to be held in the District of Columbia under this subsection with such banks as the Commissioner may designate.

(Apr. 3, 2001, D.C. Law 13-268, § 9, 48 DCR 1251.)

Legislative history of Law 13-268. — For Law 13-268, see notes following § 26-631.

§ 26-639. Financial certification; restrictions on investments, loans, and acceptances.

(a) Before opening an office in the District of Columbia, and annually thereafter so long as a banking office is maintained in the District of Columbia, an international banking corporation licensed under this chapter shall certify to the Commissioner the amount of its paid-in capital, its surplus, and its undivided profits, each expressed in the currency of the country of its organization. The dollar equivalent of this amount, as determined by the Commissioner, shall be considered to be the amount of its capital, surplus, and undivided profits.

(b)(1) The Commissioner shall, by regulation, prescribe the limits of drafts or bills of exchange which an international agency or branch may accept relative to the capital account of the international banking corporation. The limits shall take into account all transactions which are included and excluded in computing the lending limit for acceptances of a federal international bank office.

(2) Except to the extent they are inconsistent with this chapter, the provisions of the District of Columbia Banking Code shall apply to the loans and investments made by an international bank agency or international branch of the international banking corporation. With respect to an international banking corporation and its international bank agencies or international branches, a reference in those provisions to capital, capital account, or similar terms shall refer to the capital account of the international banking corporation, and, except when used with reference to the capital account, a reference in those provisions to the term “bank” shall refer to the international agencies and branches of the international banking corporation which are licensed in the District of Columbia.

(3) Any limitation in this chapter based on the capital account of an international banking corporation shall refer, with respect to an international agency or international branch in the District of Columbia, to the dollar equivalent of the capital account of the international banking corporation, as determined by the Commissioner. If the international banking corporation has more than one international agency or international branch in the District of Columbia, the business transacted by all agencies or branches shall be aggregated in determining compliance with a limitation or restriction.

(Apr. 3, 2001, D.C. Law 13-268, § 10, 48 DCR 1251.)

Legislative history of Law 13-268. — For Law 13-268, see notes following § 26-631.

§ 26-640. Reports and records.

(a) An international banking corporation that maintains one or more international banking corporation offices or an international financing corporation under this chapter shall, at the times and in the form prescribed by the Commissioner, file written reports in the English language for such offices or corporation with the Commissioner under the oath of one of its officers, managers, or agents transacting business in the District of Columbia, showing the amount of its assets and liabilities and containing any other matters required by the Commissioner.

(b) An international banking corporation that maintains 2 or more international banking corporation offices may consolidate the information in one report unless the Commissioner requires otherwise for purposes of the Commissioner's supervision of the condition and operations of each office. The late filing of the reports shall be subject to the imposition of an administrative penalty prescribed by regulation. If an international banking corporation shall fail to file a report as directed by the Commissioner, or if a report shall contain any false statement knowingly made, it shall be grounds for revocation of the license of the international banking corporation.

(c) The Commissioner shall, by regulation, prescribe the circumstances under which the Commissioner may require an international banking corporation to use internal or external auditors to address significant supervisory concerns with respect to the operations of an international branch or agency licensed in the District of Columbia.

(d) An international banking corporation which operates an agency or branch licensed under this chapter shall maintain, at a location accepted by the Commissioner:

(1) Correct and complete books and records of account of the business operations transacted by the office, including accounts and records (A) reflecting all transactions effected by, or on behalf of, the branch or agency, (B) reflecting all actions taken in the District of Columbia by employees of the office located in the District of Columbia to effect transactions on behalf of an office of the international banking corporation located outside the District of Columbia, and (C) relating to any other matters concerning the branch or agency that the Commissioner may require. All policies and procedures

governing the operations of the office and any existing general ledger or subsidiary accounts shall be maintained in the English language. The Commissioner may require that any other document not written in the English language which the Commissioner considers necessary for the purposes of its regulatory and supervisory functions be translated into English at the expense of the international banking corporation. The books, accounts, and records shall be preserved for at least 3 years; provided, that preservation by photographic reproduction or records in photographic form shall constitute compliance with the requirements of this section; and

(2) Current copies of the charter and bylaws of the international banking corporation relating to the operations of the office, minutes of the proceedings of its directors, officers, or committees relating to the business of the office, and minutes of the proceedings of its directors, officers, or committees relating to the business of the office. The records shall be kept as required by paragraph (1) of this subsection and shall be made available to the Commissioner, upon request, at any time during regular business hours of the office. The failure to keep records as required or a refusal to produce the records upon request by the Commissioner shall be grounds for suspension or revocation of a license issued under this chapter.

(e) In addition to any other reports it may be required to file, an international banking corporation which maintains an international agency or international branch in the District of Columbia shall file reports with the Commissioner in form and at such times as the Commissioner prescribes, by regulation, concerning the management, asset quality, capital adequacy, and liquidity of the international banking corporation.

(f) An international banking corporation that maintains a representative office in the District of Columbia licensed under this chapter shall make, maintain, and preserve at the office or at such other place as determined by the Commissioner, such books, accounts, and other records relating to the activities conducted at the office as the Commissioner may require. An international banking corporation which is licensed to establish and maintain a representative office shall file the reports accompanied by a reasonable fee, as required and determined by the Commissioner.

(g) The Commissioner may require such regular or special reports as the Commissioner considers necessary for the proper supervision of licensees. The additional reports shall be in the form prescribed by the Commissioner and shall be subscribed and affirmed as true under penalty of perjury.

(h) If an international banking corporation shall fail to make a report as directed by the Commissioner, it shall be subject to the penalties prescribed by regulation. A false statement contained in a report, in any other sworn statement made to the Commissioner by such report, or in any other sworn statement made to the Commissioner by the international banking corporation under the provisions of this chapter shall constitute perjury.

(Apr. 3, 2001, D.C. Law 13-268, § 11, 48 DCR 1251.)

Legislative history of Law 13-268. — For Law 13-268, see notes following § 26-631.

§ 26-641. Examinations; enforcement powers; fees and assessments.

(a)(1) The Commissioner may make such public or private investigations or examinations inside or outside the District of Columbia concerning an international banking corporation licensed to maintain an international branch, international agency, or international representative office in the District of Columbia, as the Commissioner considers necessary to carry out the duties of the Commissioner relating to the international branch, international agency, or international representative office.

(2) For the purpose of an investigation, examination, or proceeding under this section, the Commissioner may administer oaths and affirmations, subpoena witnesses, compel attendance of witnesses, take evidence, require written statements, and require the production of records relating to the activities of the branch, agency, or representative office which the Commissioner considers relevant or material. The Commissioner may require that certified copies of any records be provided to the Commissioner at the Commissioner's office.

(3) The international banking corporation which is the subject of an investigation, examination, or proceeding shall:

(A) Make its records relating to the activities of the branch, agency, or representative office available to the Commissioner in readable form;

(B) Provide necessary personnel and equipment, including assistance in the analysis of computer-generated records;

(C) Provide copies or computer printouts of records when requested;

(D) Furnish unrestricted access to all areas of its principal place of business in the District of Columbia or wherever the applicable records may be located; and

(E) Otherwise cooperate with the Commissioner.

(4) Upon application of the Commissioner, a court of competent jurisdiction may issue to a person refusing to obey a subpoena issued under this section an order requiring that the person appear before the Commissioner, or any officer designated by the Commissioner, to produce the records ordered or to give evidence concerning the matter under investigation or in question. The failure to obey the order of the court may be punished by the court as a contempt of court.

(5) An international banking corporation licensed to maintain an international branch, international agency, or international representative office in the District of Columbia shall pay the Commissioner the actual cost of any examination of the licensee, as such cost is determined by the Commissioner. Failure by the licensee to pay such cost within 30 days of receipt of demand from the Commissioner shall automatically suspend the license until the costs are paid.

(6) For the purposes of this section, the term "records" include, books; papers; correspondence; memoranda; agreements; diaries; logs; notes; ledgers; journals; visual, audio, machine-readable, magnetic, or electronic recordings; computer printouts and software; and any other documents.

(b)(1) Upon a finding that an international banking corporation or its international agency, international branch, or international representative office subject to this chapter may be acting in an unsafe or unsound manner or in violation of a District of Columbia Banking Code law, rule, regulation, or written condition, or is otherwise engaging in conduct that may be grounds for the issuance of a cease and desist order under the District of Columbia Banking Code, the Commissioner may issue a cease and desist order or take any other action authorized under the District of Columbia Banking Code.

(2)(A) The Commissioner may suspend or revoke a license issued to an international banking corporation under this chapter for any reason which would be sufficient grounds for the Commissioner to deny an application for the license. The Commissioner may also suspend or revoke a license if the Commissioner finds that the licensee or any director, officer, partner, controlling shareholder, trustee, employee, agent, or representative of the licensee has: (i) made any material misstatement in the application, or (ii) violated or failed to comply with any of the provisions of this chapter applicable to the licensee or any of the regulations or orders of the Commissioner under this chapter. The Commissioner may prescribe, by regulation, additional conditions or standards under which the license of an international agency, international branch, or international representative office may be suspended or revoked.

(B) The Commissioner may, for good cause shown, suspend a license for a period not exceeding 30 days, pending investigation.

(C) Except as provided in this section, no license shall be revoked or suspended except after notice and a hearing.

(D) A licensee may surrender a license by delivering to the Commissioner written notice that it thereby surrenders the license, but the surrender shall not affect the licensee's civil or criminal liability for acts committed before the surrender.

(E) A license shall remain in force and effect until it shall have been surrendered, revoked, or suspended in accordance with the provisions of this chapter. The Commissioner may reinstate a suspended license or issue a new license to a licensee whose license shall have been revoked if an original application for the license could be approved.

(F) If the Commissioner revokes or suspends a license issued under this chapter, a written order of revocation or suspension shall be immediately executed in duplicate. The Commissioner shall file one copy in his or her office and shall immediately serve the other copy upon the licensee.

(G) If a license is surrendered by an international banking corporation or is suspended or revoked by the Commissioner, all rights and privileges of the international banking corporation under the license shall immediately cease. If the license is suspended or revoked, it shall be surrendered to the Commissioner within 24 hours after the written order has been mailed by the Commissioner to the registered office of the international banking corporation as it appears on the records of the Department, or has been personally delivered to an officer, director, employee, or agent of the international banking corporation who is physically present in the District of Columbia. The Commissioner shall prescribe, by regulation, procedures for the orderly

cessation of business by an international banking corporation in a manner which is not harmful to the interests of its customers or of the public.

(3) The Commissioner may, at his or her discretion, take possession of the business and property in the District of Columbia of an international banking corporation as provided in this chapter.

(c) The Commissioner may establish, by regulation, such fees as the Commissioner determines are appropriate for applications and documents filed with the Commissioner under this chapter. Upon written notice by the Commissioner of the total amount of such assessment, the licensee shall become liable for, and shall pay, the assessment to the Commissioner.

(Apr. 3, 2001, D.C. Law 13-268, § 12, 48 DCR 1251.)

Legislative history of Law 13-268. — For Law 13-268, see notes following § 26-631.

§ 26-642. Voluntary dissolutions; involuntary dissolutions and liquidations.

(a) An international banking corporation that proposes to terminate the operation in the District of Columbia of an international branch, an international agency, or an international representative office in the District of Columbia shall comply with all procedures as the Commissioner may prescribe, by regulation, to ensure an orderly cessation of activities in a manner that is not harmful to the public interest and shall surrender its license to the Commissioner or its right to maintain an office in the District of Columbia, as applicable.

(b)(1) If an international banking corporation licensed to maintain an international branch, an international agency, or an international representative office in the District of Columbia is dissolved or its authority or existence is otherwise terminated or canceled in the jurisdiction of its incorporation, the international banking corporation shall deliver, within 10 days thereafter, to the Commissioner a certificate of the official responsible for records of banking corporations of the jurisdiction of incorporation of the international banking corporation attesting to the occurrence of this event or a certified copy of an order or decree of a court of the jurisdiction directing the dissolution of the international banking corporation, the termination of its existence, or the cancellation of its authority. The filing of the certificate, order, or decree shall have the same effect as the revocation of the license of the international banking corporation as provided in this chapter. The Commissioner shall serve as agent of the international banking corporation upon whom process may be served in an action based upon a liability or obligation incurred by the international banking corporation within the District of Columbia before the filing of the certificate, order, or decree. The Commissioner shall promptly cause a copy of the process to be mailed by registered or certified mail, return receipt requested, to the international banking corporation at its office address as it appears on the records of the Department.

(2)(A) The Commissioner may, at the Commissioner's discretion, take possession of the business and property in the District of Columbia of a

international banking corporation that has been licensed to operate in the District of Columbia upon finding that (i) the corporation's international branch or agency operating in the District of Columbia has violated any law, (ii) has neglected or refused to comply with the terms of a duly issued order of the Commissioner, (iii) is insolvent, will imminently become insolvent, or is transacting business in an unsound, unsafe, or unauthorized manner such that the corporation is threatened with imminent insolvency, or (iv) the corporation is in liquidation at its domicile or elsewhere. Title to the business and property shall vest by operation of law in the Commissioner upon taking possession. Thereafter, the Commissioner shall liquidate or otherwise deal with such business and property in accordance with the provisions of this chapter and any other laws relating to the liquidation of banking corporations within the District of Columbia.

(B)(i) Upon the Commissioner's taking possession of the business and property in the District of Columbia of the banking office of an international banking corporation whose deposit liabilities in the District of Columbia are not insured by the Federal Deposit Insurance Corporation, the amounts deposited under this chapter shall become the property of the Commissioner, free and clear of any and all liens and other claims, and shall be held in trust for the depositors of such banking office. The Commissioner may, without regard to any priorities, preferences, or adverse claims and without obtaining the approval of a court, sell the property and, as soon as practicable, distribute the proceeds to the depositors on a pro rata basis; provided, that no depositor shall receive an amount in excess of his account balance.

(ii) For purposes of this subparagraph, the term "depositor" shall not include any other office or branch of, or a wholly-owned (except for a nominal number of directors' shares) subsidiary of, the international banking corporation, but shall include a person to whom such banking office is indebted by virtue of money or its equivalent received by the banking office for which it has:

(I) Given credit, or is obligated to give credit, to a time or demand deposit or which is evidenced by a check or draft against a deposit account and certified by the banking office;

(II) Issued a letter of credit for cash or a traveler's check on which the banking office is primarily liable; or

(III) Issued an outstanding draft (including advice or authorization to charge the banking office's balance at another bank), cashier's check or money order, or other officer's check.

(Apr. 3, 2001, D.C. Law 13-268, § 13, 48 DCR 1251.)

Legislative history of Law 13-268. — For Law 13-268, see notes following § 26-631.

§ 26-643. Commissioner's powers; regulations.

(a) The Commissioner shall have all of the powers granted to the Commissioner under the District of Columbia Banking Code to the extent appropriate to enable the Commissioner to supervise an international banking corporation

office of an international banking corporation holding a license to maintain the office.

(b) The Commissioner may promulgate, in addition to, and not inconsistent with, this chapter, general rules, regulations, and definitions and specific rulings, demands, and findings as the Commissioner may consider necessary for the proper conduct of the business authorized and licensed under, and for the enforcement of, this chapter.

(Apr. 3, 2001, D.C. Law 13-268, § 14, 48 DCR 1251.)

Cross references. — Banks and other financial institutions, reporting to Superintendent of Banking and Financial Institutions, see § 26-1308.

Legislative history of Law 13-268. — For Law 13-268, see notes following § 26-631.

Editor's notes. — Because of the enactment by D.C. Law 11-142 of subchapter II of Chapter 8 of Title 26 subchapter II of Chapter 7 of Title 26, 2001 Ed., the preexisting text was designated as subchapter I.

CHAPTER 7. INTERSTATE BANKING AND BRANCHING.

Subchapter I. Regional Interstate Banking

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26-701. [Repealed].

26-702. Regional bank holding company acquisitions.

26-702.01. Duties; Council review of rules.

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26-707.01. Insurance.

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Subchapter I. Regional Interstate Banking.

§ 26-701. Definitions. [Repealed].

Repealed.

(Nov. 23, 1985, D.C. Law 6-63, § 2, 32 DCR 5954; Apr. 11, 1986, D.C. Law 6-107, § 2(a), 33 DCR 1168; Apr. 30, 1988, D.C. Law 7-104, § 27(a), 35 DCR 147; Mar. 16, 1989, D.C. Law 7-187, § 2(a), 35 DCR 8648; Aug. 17, 1991, D.C. Law 9-42, § 2(a), 38 DCR 4981; June 9, 2001, D.C. Law 13-308, § 124, 48 DCR 3244.)

Prior Codifications. — 1981 Ed., § 26-801.

Legislative history of Law 6-63. — Law 6-63, the “District of Columbia Regional Interstate Banking Act of 1985,” was introduced in Council and assigned Bill No. 6-126, which was referred to the Committee on Housing and Economic Development. The Bill was adopted on first and second readings on June 25, 1985, and September 10, 1985, respectively. Disapproved by the Mayor and reenacted by Council on October 8, 1985, it was assigned Act No. 6-86 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-107. — Law 6-107, the “District of Columbia Regional Interstate Banking Act of 1985 Amendments Act of

1985,” was introduced in Council and assigned Bill No. 6-276, which was referred to the Committee on Housing and Economic Development. The Bill was adopted on first and second readings on January 14, 1986, and January 28, 1986, respectively. Signed by the Mayor on February 14, 1986, it was assigned Act No. 6-136 and transmitted to both Houses of Congress for its review.

Legislative history of Law 7-104. — Law 7-104, the “Technical Amendments Act of 1987,” was introduced in Council and assigned Bill No. 7-346, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 24, 1987, and December 8, 1987, respectively. Signed by the

Mayor on December 22, 1987, it was assigned Act No. 7-124 and transmitted to both Houses of Congress for its review.

Legislative history of Law 7-187. — Law 7-187, the “District of Columbia Minority Bank Encouragement Amendment Act of 1988,” was introduced in Council and assigned Bill No. 7-471, which was referred to the Committee on Housing and Economic Development. The Bill was adopted on first and second readings on October 25, 1988, and November 15, 1988, respectively. Signed by the Mayor on December 1, 1988, it was assigned Act No. 7-249 and transmitted to both Houses of Congress for its review.

Legislative history of Law 9-42. — For legislative history of D.C. Law 9-42, see Historical and Statutory Notes following § 26-712.

Legislative history of Law 13-308. — For D.C. Law 13-308, see notes following § 26-551.03.

Transfer of Functions. — Pursuant to Reorganization Plan No. 3 of 1992, effective January 20, 1993, unless another date was designated by the Mayor under sec V of the Plan, the D.C. Office of Banking and Financial Institutions (“OBFI”) is hereby transferred from the Deputy Mayor for Economic Development (“DMED”) control center to a separate OBFI control center/responsibility center. OBFI will continue to be administered by the Superintendent and will remain a part of the economic development cluster reporting to the Mayor.

§ 26-702. Regional bank holding company acquisitions.

(a) A regional bank holding company may acquire a District of Columbia bank holding company or a District of Columbia bank (other than a District of Columbia bank holding company or a District of Columbia bank which is acquired either pursuant to section 13 of the Federal Deposit Insurance Act (12 U.S.C. § 1823(f)), or in the regular course of securing or collecting a debt previously contracted in good faith, as provided in section 3(a) of the Bank Holding Company Act of 1956 (12 U.S.C. § 1842(a)), if each of the following requirements is met:

(1) The laws of the state in which the regional bank holding company making the acquisition has its principal place of business permit the regional bank holding company to be acquired by the District of Columbia bank holding company or the District of Columbia bank sought to be acquired.

(2) Either the District of Columbia bank sought to be acquired has been in existence and continuously operating for more than 2 years or all of the bank subsidiaries of the District of Columbia bank holding company sought to be acquired have been in existence and continuously operating for more than 2 years. A regional bank holding company may acquire all or substantially all of the shares of a bank organized solely for the purpose of facilitating the acquisition of a bank that has been in existence and continuously operating as a bank for more than 2 years.

(3) The acquisition complies with any conditions, restrictions, requirements, or other limitations that would apply to the acquisition by the District of Columbia bank holding company or the District of Columbia bank sought to be acquired of a bank or bank holding company located in the state where the regional bank holding company making the acquisition has its principal place of business, but that would not apply to the acquisition of a bank or bank holding company in the state by a bank holding company, all the bank subsidiaries of which are located in that state.

(b) For the purpose of subsection (a)(1) and (3) of this section, a District of Columbia bank shall be treated as if it were a District of Columbia bank holding company.

(Nov. 23, 1985, D.C. Law 6-63, § 3, 32 DCR 5954; Mar. 27, 1993, D.C. Law 9-261, § 2, 40 DCR 1030; Sept. 30, 1993, D.C. Law 10-16, § 2, 40 DCR 5448; May 16, D.C. Law 10-255, § 20, 41 DCR 5193.)

Section references. — This section is referred to in § 26-704.

Prior Codifications. — 1981 Ed., § 26-802.

Legislative history of Law 6-63. — For legislative history of D.C. Law 6-63, see Historical and Statutory Notes following § 26-701.

Legislative history of Law 9-261. — Law 9-261, the “Regional Interstate Banking Act of 1985 Temporary Amendment Act of 1992,” was introduced in Council and assigned Bill No. 9-732. The Bill was adopted on first and second readings on December 15, 1992, and January 5, 1993, respectively. Signed by the Mayor on January 25, 1993, it was assigned Act No. 9-409 and transmitted to both Houses of Congress for its review. D.C. Law 9-261 became effective on March 27, 1993.

Legislative history of Law 10-16. — Law 10-16, the “Regional Interstate Banking Act of 1985 Amendment Act of 1993,” was introduced in Council and assigned Bill No. 10-64, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 1, 1993, and June 29, 1993, respectively. Signed by the Mayor on July 16,

1993, it was assigned Act No. 10-47 and transmitted to both Houses of Congress for its review. D.C. Law 10-16 became effective on September 30, 1993.

Legislative history of Law 10-27. — Law 10-27, the “D.C. Regional Interstate Banking Act of 1985 Clarification Temporary Amendment Act of 1993,” was introduced in Council and assigned Bill No. 10-304. The Bill was adopted on first and second readings on June 15, 1993, and July 29, 1993, respectively. Signed by the Mayor on July 20, 1993, it was assigned Act No. 10-59 and transmitted to both Houses of Congress for its review. D.C. Law 10-27 became effective on October 5, 1993.

Legislative history of Law 10-255. — Law 10-255, the “Technical Amendments Act of 1994,” was introduced in Council and assigned Bill No. 10-673, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 21, 1994, and July 5, 1994, respectively. Signed by the Mayor on July 25, 1994, it was assigned Act No. 10-302 and transmitted to both Houses of Congress for its review. D.C. Law 10-255 became effective May 16, 1995.

§ 26-702.01. Duties; Council review of rules.

(a) Repealed;

(b) The Superintendent [Commissioner of Insurance, Securities, and Banking] shall:

(1) Administer this subchapter;

(2) Promote a climate in which financial institutions will organize to do business in the District and contribute to the economic development of the District through the increased availability of capital and credit;

(3) Expand advantageous financial services to the public in a nondiscriminatory manner;

(4) Charter and regulate banks, savings banks, savings companies, trust companies, or other financial institutions seeking to establish, in accordance with § 26-101, an office or banking house located within the District where deposits or savings are received;

(5) Regulate, to the extent provided in § 26-1301, companies which are formed for the purpose of carrying on any 1 of the following 3 classes of business in the District:

(A) A safe deposit, trust, loan, and mortgage business;

(B) A title insurance, loan, and mortgage business; or

(C) A security, guarantee, indemnity, loan, and mortgage business;

(6) Charter and regulate building associations, building and loan associations, and savings and loan associations which are formed within the District for the purpose of carrying on the activities described in § 26-204;

(7) Regulate the branching or opening of additional offices by financial institutions under the supervision of the Superintendent [Commissioner];

(8) Regulate the institutions described in paragraphs (4), (5), and (6) of this subsection to the same extent that these financial institutions were regulated by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Home Loan Bank Board prior to April 11, 1986, and in a manner that promotes safe and sound financial practices;

(9) Promote and maintain, to the extent possible, an economic climate and regulatory framework that will encourage financial institutions to organize to do business in the District of Columbia;

(10) Upon confirmation, administer, to the extent provided in this subchapter, the provisions of this subchapter concerning interstate banking;

(11) Assure that all financial institutions under the supervision or control of the Office of Banking and Financial Institutions [Department of Insurance, Securities, and Banking] and all banks and bank holding companies seeking entry into the District of Columbia under the interstate banking provisions in this subchapter provide financial services to the public in a manner that fosters the development and revitalization of housing and commercial corridors in underserved neighborhoods in the District, helps meet the credit and deposit service needs of lower income and minority residents of the District, and expands financial and technical support for small, minority, and women-owned businesses;

(12) In all respects permitted by law, act as the District government's regulatory authority for financial institutions operating in the District;

(13) Establish fees not otherwise established by act, and, from time to time, increase the fees established by act;

(14) Issue rules necessary to carry out the purposes of this subchapter;

(15) Receive and investigate complaints or initiate an investigation in regard to a possible violation of this subchapter or § 26-103 ("Banking Business Act");

(16) If an investigation warrants, examine, which may include an audit, a person who may act as a bank to assure that the person acts in compliance with the law or examine, which may include an audit, a District of Columbia ("District") banking corporation chartered by the Superintendent [Commissioner] and the banking corporation's affiliate or subsidiary to assure that the bank, affiliate, or subsidiary operates in compliance with the law and in a manner that preserves the safety and soundness of the bank, affiliate, or subsidiary;

(17) Inform any other District or federal agency with an interest that an investigation is ongoing;

(18) If an investigation warrants, hold a hearing, issue a subpoena to compel the attendance of a witness, administer an oath, and take the testimony of any person under oath in regard to any violation or possible violation of this subchapter or § 26-103;

(19) If an investigation warrants, issue a subpoena to compel the production of any document, paper, book, record, or other evidence in regard to any violation or possible violation of this subchapter or § 26-103;

(20) Issue a cease and desist order related to any violation or possible violation of this subchapter or § 26-103 pursuant to § 26-712;

(21) Pursue, through the Office of the Corporation Counsel, the obtaining of a restraining order, the appointment of a receiver, the involuntary dissolution of a corporation, or the freezing or seizure of assets of a corporation or person related to a violation or possible violation of this subchapter or § 26-103 pursuant to § 26-712; and

(22) Submit an annual report to the Council of all actions that the Commissioner takes pursuant to this section.

(b-1) The Superintendent [Commissioner] shall, upon a finding of a violation of this subchapter or § 26-103, refer the matter to the Corporation Counsel for the District of Columbia or United States Attorney for civil or criminal enforcement, as the case may warrant.

(c) All rules which the Superintendent [Commissioner] issues pursuant to this subchapter shall be transmitted to the Council for a 45-day review period, excluding Saturdays, Sundays, holidays, and days when Council is in recess. The Council may adopt a resolution disapproving the rules, in whole or in part, within the 45-day review period. If the Council, by resolution, does not approve or disapprove the rules before the expiration of the 45-day review period, the rules shall become effective at the expiration of the 45-day review period.

(d)(1) Until a Superintendent [Commissioner] is appointed and confirmed pursuant to this section, all duties and responsibilities of the Superintendent [Commissioner] concerning the chartering of new financial institutions under § 26-704(a) shall be performed by the Mayor, or his or her designee.

(2) During any period the Mayor, or his or her designee, is performing the duties and responsibilities of the Superintendent [Commissioner], the Mayor, or his or her designee, may enter into contracts with the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, or any other entities, for those services necessary to carry out the duties and responsibilities of the Superintendent [Commissioner].

(Nov. 23, 1985, D.C. Law 6-63, § 3a, as added Apr. 11, 1986, D.C. Law 6-107, § 2(b), 33 DCR 1168; Aug. 17, 1991, D.C. Law 9-42, § 2(b), 38 DCR 4981; Feb. 5, 1994, D.C. Law 10-68, § 25(a), 40 DCR 6311; Apr. 13, 2005, D.C. Law 15-354, § 37, 52 DCR 2638; Mar. 2, 2007, D.C. Law 16-191, § 48(b), 53 DCR 6794; Dec. 11, 2007, D.C. Law 17-59, § 3(a), 54 DCR 10718; Mar. 25, 2009, D.C. Law 17-353, § 220, 56 DCR 1117.)

Section references. — This section is referred to in §§ 1-603.1, 26-603, and 26-704.

Prior Codifications. — 1981 Ed., § 26-802.1.

Effect of amendments. — D.C. Law 15-354, in the section heading, substituted “duties” for “Establishment of the Office of Banking and Financial Institutions; Superintendent”; and repealed subsec. (a) which had read as follows:

“(a)(1) The Office of Banking and Financial

Institutions is established and shall be under the direction of the Superintendent of Banking and Financial Institutions.

“(2) The Mayor shall appoint the Superintendent, with the advice and consent of the Council, for a term of 4 years, except that the first term of the Superintendent shall terminate on January 1, 1987.

“(3) No person shall exercise the duties of the Superintendent in an acting capacity for more than 120 days.”

D.C. Law 16-191, in the section heading, validated a previously made technical correction.

D.C. Law 17-59, in subsec. (b), deleted “; and” from the end of par. (20), substituted “; and” for a period at the end of par. (21), and added par. (22).

D.C. Law 17-353 validated a previously made technical correction in subsec. (b).

Temporary Amendment of Section. — Section 3(a) of D.C. Law 17-31, in subsec. (b)(20), substituted a semicolon for “; and” at the end of the paragraph; in subsec. (b)(21), substituted “; and” for a period at the end of the paragraph; and added subsec. (b)(22) to read as follows:

“(22) Submit an annual report to the Council of all actions that the Commissioner takes pursuant to this section.”

Section 5(b) of D.C. Law 17-31 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 3(a) of Bank Charter Modernization Emergency Amendment Act of 2007 (D.C. Act 17-66, July 9, 2007, 54 DCR 6819).

Legislative history of Law 6-107. — Law 6-107, the “District of Columbia Regional Interstate Banking Act of 1985 Amendments Act of 1985,” was introduced in Council and assigned Bill No. 6-276, which was referred to the Committee on Housing and Economic Development. The Bill was adopted on first and second readings on January 14, 1986 and January 28, 1986, respectively. Signed by the Mayor on February 14, 1986, it was assigned Act No. 6-136 and transmitted to both Houses of Congress for its review.

Legislative history of Law 8-260. — Law 8-260, the “District of Columbia Interstate Banking Act of 1985 Amendment Temporary Act of 1990,” was introduced in Council and assigned Bill No. 8-735. The Bill was adopted on first and second readings on December 18, 1990, and February 5, 1991, respectively. Signed by the Mayor on February 22, 1991, it was assigned Act No. 8-345 and transmitted to both Houses of Congress for its review.

Legislative history of Law 9-42. — For legislative history of D.C. Law 9-42, see Historical and Statutory Notes following § 26-712.

Legislative history of Law 10-68. — Law 10-68, the “Technical Amendments Act of 1993,” was introduced in Council and assigned Bill No. 10-166, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 29, 1993, and July 13, 1993, respectively. Signed by the Mayor on August 23, 1993, it was assigned Act No. 10-107 and transmitted to both Houses of Congress for

its review. D.C. Law 10-68 became effective on February 5, 1994.

Legislative history of Law 15-354. — For Law 15-354, see notes following § 26-551.05.

Legislative history of Law 16-191. — Law 16-191, the “Technical Amendments Act of 2006,” was introduced in Council and assigned Bill No. 16-760, which was referred to the Committee of the whole. The Bill was adopted on first and second readings on June 20, 2006, and July 11, 2006, respectively. Signed by the Mayor on July 31, 2006, it was assigned Act No. 16-475 and transmitted to both Houses of Congress for its review. D.C. Law 16-191 became effective on March 2, 2007.

Legislative history of Law 17-59. — For Law 17-59, see notes following § 26-636.

Legislative history of Law 17-353. — Law 17-353, the “Technical Amendments Act of 2008,” was introduced in Council and assigned Bill No. 17-994 which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 2, 2008, and December 16, 2008, respectively. Signed by the Mayor on January 15, 2009, it was assigned Act No. 17-687 and transmitted to both Houses of Congress for its review. D.C. Law 17-353 became effective on March 25, 2009.

References in text. — The “Federal Home Loan Bank Board”, referred to in subsections (b)(8) and (d)(2), has been abolished. For provisions relating to the abolition of the Federal Home Loan Bank Board and the transfer of functions, personnel and property of that agency, see §§ 401 to 406 of Pub. L. 101-73, set out as a note under 12 U.S.C. § 1437.

Transfer of Functions. — Pursuant to Reorganization Plan No. 3 of 1992, effective January 20, 1993, unless another date was designated by the Mayor under sec V of the Plan, the D.C. Office of Banking and Financial Institutions (“OBFI”) is hereby transferred from the Deputy Mayor for Economic Development (“DMED”) control center to a separate OBFI control center/responsibility center. OBFI will continue to be administered by the Superintendent and will remain a part of the economic development cluster reporting to the Mayor.

Editor’s notes. — Because of the codification of D.C. Law 11-142 as subchapter II of Chapter 8 subchapter II of Chapter 7, 2001 Ed., and designation of the preexisting text as subchapter I, “subchapter” has been substituted for “chapter” in (b)(1), (10), (11), (14), (15), and (18) through (21), (b-1) and (c).

Fees credited to the Office of Banking and Financial Institutions Enterprise Fund: Section 1804(2) of D.C. Law 12-60 provided that all fees received pursuant to § 26-802.1(b)(13) 1981 Ed. shall be credited to the Office of Banking and Financial Institutions Enterprise Fund.

§ 26-703. Exceptions.

A District of Columbia bank holding company, a District of Columbia bank, a regional bank holding company, or a regional bank may acquire or control, and shall not cease to be a District of Columbia bank holding company, a District of Columbia bank, a regional bank holding company, or a regional bank, as the case may be, by virtue of its acquisition or control of:

(1) A bank having banking offices in a state not within the region, if the bank has been acquired pursuant to the provisions of 12 U.S.C. § 1730a(m) [repealed] or 12 U.S.C. § 1823(f);

(2) A bank having banking offices in a state not within the region, if the bank has been acquired in the regular course of securing or collecting a debt previously contracted in good faith, as provided in 12 U.S.C. § 1842(a), and if the bank or bank holding company divests the securities or assets acquired within 2 years of the date of acquisition; or

(3) A bank or corporation organized under the laws of the United States or of any state and operating under 12 U.S.C. § 601 or 12 U.S.C. §§ 611-632, or a bank or bank holding company organized under the laws of a foreign country that is principally engaged in business outside the United States and that either has no banking office in the United States or has banking offices in the United States that are engaged only in business activities permissible for a corporation operating under 12 U.S.C. § 601 or 12 U.S.C. §§ 611-632.

(Nov. 23, 1985, D.C. Law 6-63, § 4, 32 DCR 5954; Feb. 5, 1994, D.C. Law 10-68, § 25(b), 40 DCR 6311.)

Section references. — This section is referred to in § 26-701.

Prior Codifications. — 1981 Ed., § 26-803.

Legislative history of Law 6-63. — For legislative history of D.C. Law 6-63, see Historical and Statutory Notes following § 26-701.

Legislative history of Law 10-68. — For

legislative history of D.C. Law 10-68, see Historical and Statutory Notes following § 26-702.01.

References in text. — “12 U.S.C. § 1730a,” referred to in (1), was repealed by Pub. L. 101-73, title IV, § 407, August 9, 1989, 103 Stat. 363.

§ 26-704. Review of applications.

(a) Any person who conducts or seeks to conduct a class of business described in § 26-702.01(b)(4), (5), or (6) in the District shall file an application with the Superintendent [Commissioner] for approval to do business in the District, unless the person is already chartered by the appropriate federal or District agency or organized by virtue of the laws of any of the states of this Union and doing business pursuant to § 26-103(a)(1). Consistent with applicable federal law, all the applications, including any supporting documents, and any other information required to be submitted to the Superintendent [Commissioner] shall be made available to the public. An application filed with the appropriate federal agency for approval to conduct a class of business described in § 26-702.01(b)(4), (5), or (6) and still pending approval or approved prior to April 11, 1986, shall not be subject to this section or the provisions of this subchapter. The Council shall file comments regarding the applications pending April 11, 1986. Any Council comments regarding a

pending application filed prior to April 11, 1986, shall meet the requirements of the preceding sentence.

(b) Upon the filing of a complete application pursuant to subsection (a) of this section, the following procedures shall apply:

(1)(A) The Superintendent [Commissioner] shall prepare a periodic bulletin listing all pending applications. The bulletin shall be published in the District of Columbia Register and shall be mailed without charge to any person upon request.

(B) Prior to deciding whether to grant approval of the application, the Superintendent [Commissioner] shall accept public comment on the application and shall hold a public hearing on the application, according to procedures established by the rules issued by the Superintendent [Commissioner].

(2) The Commissioner shall either approve or disapprove the application and explain the reasons for the decision. An application required by this section shall not be complete unless it is accompanied by an application fee in an amount to be established by the Commissioner and made payable to District of Columbia Treasurer. An entity for which deposit insurance is required shall not commence operations until the applicant has submitted evidence that the deposit insurance has been acquired.

(3) Repealed.

(4) Repealed.

(5) Repealed.

(6) No applicant shall commence business until its application is considered approved.

(c) Any authority granted to acquire any District bank holding company or District bank shall be contingent on the review and approval of the Commissioner as provided in this subsection. Upon the filing of a complete application, the following procedures shall apply:

(1)(A) A regional bank holding company that seeks to acquire a District bank holding company or a District bank, or a nonregional bank holding company that seeks to acquire a District bank holding company or a District bank pursuant to § 26-706.01, shall file a copy of the complete draft of the application required to be filed with the Federal Reserve Board for approval of an acquisition in accordance with 12 U.S.C. § 1842. An applicant may file an application with the Federal Reserve Board at any time subsequent to filing the draft application with the Superintendent [Commissioner]. No application required by this section shall be complete unless it is accompanied by an application fee in the amount of \$4,000.

(B) Repealed.

(2) The Commissioner shall either approve or disapprove the application and explain the reasons for the decision. The Commissioner shall consider:

(A) The financial and managerial resources of the bank holding company;

(B) The future prospects and stability of the subsidiaries of the bank holding company and the bank whose assets or shares the bank holding company seeks to acquire;

(C) The financial history of the bank holding company or its subsidiary"

(D) The adequacy of the bank holding company's community development program; and

(E) Whether the acquisition may result in undue concentration of resources or substantial decrease of competition in the District.

(3) Repealed.

(4) Repealed.

(5) Repealed.

(6) The Commissioner shall submit a copy of the approval or disapproval to the Federal Reserve Board.

(7) Repealed.

(8) The Commissioner shall submit to the Council:

(A) A quarterly report of any applications filed or decisions reached by the Commissioner pursuant to this section; and

(B) An annual report of all actions that the Commissioner takes pursuant to this section.

(d) Where not inconsistent with federal law:

(1) Each application filed pursuant to this section shall, where appropriate, include information applicable to the nature of the application, the applicant's general plan of business, the applicant's proposed capital investment in the District, and a community development program.

(2) The community development program shall set forth the applicant's plan to:

(A) Assist in the development of economically disadvantaged and underserved neighborhoods in the District;

(B) Assist in meeting the credit and deposit service needs of low- and moderate-income and minority District residents;

(C) Assist in expanding support for small, minority, and women-owned businesses; and

(D) Market the community development program and publicize the community development program to the applicant's employees and to individuals and businesses located in areas which the applicant will serve.

(3) To the extent considered appropriate, the Superintendent [Commissioner] shall require that an applicant provide the following information:

(A) A description of the local community, including low- and moderate-income neighborhoods where the applicant intends to provide credit and services and from which the applicant intends to draw deposits or customers, business services which the applicant will offer to low- and moderate-income persons throughout the District, a description of these low- and moderate-income persons, and a description of the banking services which the applicant will offer at a minimum cost to these persons. The applicant shall state its agreement to cash checks issued by the District and the United States governments at bank offices within target banking development areas, even though the bearer of the check does not maintain an account at the bank. According to normal and prudent banking practices, the bank may verify that the individual who presents the check at the bank office is legally entitled to payment;

(B) A description of the applicant's intended dividend policies;

(C) A description of the applicant's intended underwriting policies;

(D) A description of the applicant's loan policy, including the loan rates and the percentage of the total loans which will be made in low- and moderate-income areas. For the purposes of determining compliance with the requirements of this subsection, loans may include permanent mortgage financing for the purchase and rehabilitation of 1 to 4 unit owner-occupied buildings, or multi-family residential buildings, home improvement loans for single-family homes, and interim loans for construction or rehabilitation, or projects qualifying for permanent financing. For the purposes of determining compliance with the requirements of this subsection, the applicant may also offer FHA insured and VA guaranteed mortgage financing, including FHA Title 1 home improvement loans, blanket and share loans for the purchase and rehabilitation of cooperatively owned residential properties, loans made pursuant to programs established under § 47-848, or a similar homesteading program established by the District of Columbia government, participation with nonprofit developers of housing, term loans for small, minority or women-owned businesses for building construction, building improvement, inventory and fixed asset financing, and working capital;

(E) A description of any technical assistance that the applicant will offer to individuals and businesses in low- and moderate-income areas;

(F) A description of the applicant's plans to use District-based minority firms to meet the applicant's procurement needs, including goods and professional services;

(G) A description of the applicant's plans to cooperate with the District of Columbia's Department of Employment Services to identify potential District resident employees for the applicant's District offices, and a description of applicant's plans to assure the retention of existing jobs held by District residents;

(H) A description of the applicant's plans to designate a senior lending officer to review specifically the needs of small, minority, or women-owned businesses and community development organizations;

(I) A description of the applicant's plans to use its best efforts to increase the number of minority and female representatives on the applicant's board of directors and on the board of any of the applicant's District-based subsidiaries, and a description of applicant's plans to establish a training program for employees at all levels of the bank's and bank holding company's operations;

(J) A description of the applicant's plans for branching or opening new offices, and, where appropriate, a description of how those plans will aid the applicant in achieving the objectives of the community development program;

(K) A description of the applicant's plans to sell food coupons, pursuant to 7 U.S.C. § 2011 et seq., in bank offices located in the District;

(L) Any other information that the Superintendent [Commissioner] considers appropriate; and

(M) The applicant's agreement to submit an annual report to the Commissioner and the Council updating any information submitted to the Commissioner with regard to the community development program.

(e)(1) If a bank holding company filing an application for review pursuant to this section has made in connection with that application any express written commitments to the Superintendent [Commissioner] with respect to subjects set forth in subsection (d) of this section, the Superintendent [Commissioner] may, at any time, review the activities of the bank holding company and of its District bank subsidiaries to determine whether the bank holding company has fulfilled the express written commitments. The Superintendent [Commissioner] may require a bank holding company that has made the express written commitments and its District bank subsidiaries to supply the information and to submit the reports the Superintendent [Commissioner] considers necessary in order to make a determination under this subsection.

(2) Upon the determination of the Superintendent [Commissioner] that a bank holding company has failed to fulfill express written commitments that the bank holding company made with respect to subjects set forth in subsection (d) of this section, the Superintendent [Commissioner] may order the bank holding company to take steps to comply with all the commitments within a reasonable period of time.

(3) If the Superintendent [Commissioner] believes at any time that a bank holding company subject to an order issued under paragraph (2) of this subsection has failed to comply with the order within the period specified in the order, the Superintendent [Commissioner] may conduct a hearing in accordance with § 2-509, on the issue of whether the bank holding company has fulfilled any express written commitments that the bank holding company made with respect to subjects set forth in subsection (d) of this section.

(4) If, after a hearing as specified in paragraph (3) of this subsection, the Superintendent [Commissioner] determines that a bank holding company has failed to fulfill express written commitments that the bank holding company made with respect to subjects set forth in subsection (d) of this section, the Superintendent [Commissioner] may order the bank holding company to divest itself of control of all District banks and District bank holding companies within a reasonable period of time. If the Superintendent [Commissioner] orders a bank holding company to divest itself of control of all District banks and bank holding companies pursuant to this subsection, the divestiture shall, in all events, be completed within 1 year after the date on which the Superintendent's [Commissioner's] order becomes final and not pending further review.

(5) The Superintendent's [Commissioner's] decision in a case initiated under paragraph (3) of this subsection shall be subject to judicial review by the District of Columbia Court of Appeals pursuant to § 2-510.

(6) The Superintendent [Commissioner] shall initiate any case under paragraph (3) of this subsection on the issue of whether a bank holding company has failed to fulfill express written commitments that the bank holding company made with respect to subjects set forth in subsection (d) of this section within 4 years of the date of acquisition of the District bank or District bank holding company in connection with which the bank holding company made the express written commitments.

(f) Repealed.

- (g) Repealed.
- (h) Repealed.
- (i) Repealed.

(Nov. 23, 1985, D.C. Law 6-63, § 5, 32 DCR 5954; Apr. 11, 1986, D.C. Law 6-107, § 2(c), 33 DCR 1168; Feb. 24, 1987, D.C. Law 6-192, § 10, 33 DCR 7836; Apr. 30, 1988, D.C. Law 7-104, § 27(b), 35 DCR 147; Mar. 15, 1990, D.C. Law 8-84, § 2, 37 DCR 44; Mar. 15, 1990, D.C. Law 8-91, § 2, 37 DCR 776; Aug. 17, 1991, D.C. Law 9-42, § 2(c), 38 DCR 4981; Dec. 11, 2007, D.C. Law 17-59, § 3(b), 54 DCR 10718.)

Section references. — This section is referred to in §§ 26-701, 26-702.01, 26-603, 26-706.01, 26-707, 47-343, 47-344, and 47-351.10.

Prior Codifications. — 1981 Ed., § 26-804.

Effect of amendments. — D.C. Law 17-59, in subsec. (b), rewrote par. (2) and repealed pars. (3) to (5); in subsec. (c), rewrote the lead-in language, par. (2), and par. (6), and repealed par. (1)(B) and (3) to (5), and added par. (8); rewrote subsec. (d)(3)(M); in subsec. (e)(1), deleted “or the Council” following “Superintendent”; and repealed subssecs. (f) to (i).

Temporary Amendment of Section. — Section 3(b) of D.C. Law 17-31, in subsec. (b), repealed pars. (3) to (5) and amended par. (2) to read as follows:

“(2) The Commissioner shall either approve or disapprove the application and explain the reasons for the decision. No application required by this section shall be complete unless it is accompanied by an application fee in an amount to be established by the Commissioner and made payable to the District of Columbia Treasurer. No entity for which deposit insurance is required shall commence operations until the applicant has submitted evidence that the deposit insurance has been acquired.”; in subsec. (c), amended the lead-in text to read as follows: “Any authority granted to acquire any District bank holding company or District bank shall be contingent on the review and approval of the Commissioner as provided in this subsection. Upon the filing of a complete application, the following procedures shall apply.”; repealed pars. (1)(B), (3) to (5), and (7), and amended pars. (2) and (6) and added par. (8) to read as follows:

“(2) The Commissioner shall either approve or disapprove the application and explain the reasons for the decision. The Commissioner shall consider:

“(A) The financial and managerial resources of the bank holding company;

“(B) The future prospects and stability of the subsidiaries of the bank holding company and the bank whose assets or shares the bank holding company seeks to acquire;

“(C) The financial history of the bank holding company or its subsidiary;

“(D) The adequacy of the bank holding company’s community development program; and

“(E) Whether the acquisition may result in undue concentration of resources or substantial decrease of competition in the District.”

“(6) The Commissioner shall submit a copy of the approval or disapproval to the Federal Reserve Board.”

“(8) The Commissioner shall submit to the Council:

“(A) A quarterly report of any applications filed or decisions reached by the Commissioner pursuant to this section; and

“(B) An annual report of all actions that the Commissioner takes pursuant to this section.”; amended subsec. (d)(3)(M) to read as follows:

“(M) The applicant’s agreement to submit an annual report to the Commissioner and the Council updating any information submitted to the Commissioner with regard to the community development program.”; and, in subsec. (e)(1), deleted “or the Council”; and repealed subssecs. (f) to (i).

Section 5(b) of D.C. Law 17-31 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 3(b) of Bank Charter Modernization Emergency Amendment Act of 2007 (D.C. Act 17-66, July 9, 2007, 54 DCR 6819).

Legislative history of Law 6-63. — For legislative history of D.C. Law 6-63, see Historical and Statutory Notes following § 26-701.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-702.01.

Legislative history of Law 6-192. — Law 6-192, the “Technical Amendments Act of 1986,” was introduced in Council and assigned Bill No. 6-544, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 5, 1986, and November 18, 1986, respectively. Signed by the Mayor on December 10, 1986, it was assigned Act No. 6-246 and transmitted to both Houses of Congress for its review.

Legislative history of Law 7-104. — For legislative history of D.C. Law 7-104, see Historical and Statutory Notes following § 26-701.

Legislative history of Law 8-84. — Law 8-84, the “District of Columbia Regional Interstate Banking Act of 1985 Amendment Temporary Act of 1989,” was introduced in Council and assigned Bill No. 8-473. The Bill was adopted on first and second readings on November 21, 1989, and December 5, 1989, respectively. Signed by the Mayor on December 21, 1989, it was assigned Act No. 8-134 and transmitted to both Houses of Congress for its review.

Legislative history of Law 8-91. — Law 8-91, the “District of Columbia Regional Interstate Banking Act of 1985 Amendment Act of 1989,” was introduced in Council and assigned Bill No. 8-456, which was referred to the Committee on Housing and Economic Development. The Bill was adopted on first and second readings on December 19, 1989, and January 20, 1990, respectively. Signed by the Mayor on January 11, 1990, it was assigned Act No. 8-142 and transmitted to both Houses of Congress for its review.

Legislative history of Law 8-260. — For legislative history of D.C. Law 8-260, see Historical and Statutory Notes following § 26-702.01.

Legislative history of Law 9-42. — For legislative history of D.C. Law 9-42, see Historical and Statutory Notes following § 26-712.

Legislative history of Law 10-27. — For legislative history of D.C. Law 10-27, see Historical and Statutory Notes following § 26-702.

Legislative history of Law 10-255. — For legislative history of D.C. Law 10-255, see Historical and Statutory Notes following § 26-702.

Legislative history of Law 17-59. — For Law 17-59, see notes following § 26-636.

References in text. — The District of Columbia Regional Interstate Banking Act of 1985 Amendments Act of 1985, referred to in subparagraph (c)(1)(B), is D.C. Law 6-107.

Resolutions. — Resolution 16-114, the “Bank of Georgetown Approval Resolution of 2005”, was approved effective April 5, 2005.

Editor’s notes. — Because of the codification of D.C. Law 11-142 as subchapter II of Chapter 8 subchapter II of Chapter 7, 2001 Ed., and designation of the preexisting text as subchapter I, “subchapter” has been substituted for “chapter” in (a), (c)(1)(B), and (i).

Fees credited to the Office of Banking and Financial Institutions Enterprise Fund: Section 1804(1) of D.C. Law 12-60 provided that all fees received pursuant to §§ 26-804(b)(2) and 26-804(c)(1)(A) 1981 Ed. shall be credited to the Office of Banking and Financial Institutions Enterprise Fund. BB&T Corporation Acquisition of Franklin Bancorporation, Inc., Approval Resolution of 1998: Pursuant to Resolution 12-519, effective June 2, 1998, the Council approved the recommendation of the Superintendent of the Office of Banking and Financial Institutions that the acquisition of Franklin Bancorporation, a District bank holding company, by BB&T Corporation, a regional bank holding company be approved.

§ 26-705. Prohibited acts.

(a) Except as otherwise expressly permitted by applicable federal or District law, a bank holding company that is neither a District bank holding company nor a regional bank holding company shall not acquire a District bank holding company or a District bank.

(b) Except as otherwise required by applicable federal law, a District bank holding company or a regional bank holding company that ceases to be a District bank holding company or a regional bank holding company shall, as soon as practicable, and, in all events, within 1 year after the event, divest itself of control of all District bank holding companies and all District banks. Divestiture shall not be required if (1) the District bank holding company or the regional bank holding company ceases to be a District bank holding company or a regional bank holding company, as the case may be, because of an increase in the deposits held by bank subsidiaries not located within the region and if the increase is not the result of an acquisition of a bank holding company or bank, or (2) a District bank or District bank holding company ceases to be a District bank or District bank holding company because of an acquisition authorized by this subchapter.

(Nov. 23, 1985, D.C. Law 6-63, § 6, 32 DCR 5954; Apr. 11, 1986, D.C. Law 6-107, § 2(d), 33 DCR 1168.)

Prior Codifications. — 1981 Ed., § 26-805.

Legislative history of Law 6-63. — For legislative history of D.C. Law 6-63, see Historical and Statutory Notes following § 26-701.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-702.01.

Editor's notes. — Because of the codification of D.C. Law 11-142 as subchapter II of Chapter 8 subchapter II of Chapter 7, 2001 Ed., and designation of the preexisting text as subchapter I, "subchapter" has been substituted for "chapter" in (b).

§ 26-706. Applicable laws, rules, and regulations.

Any District of Columbia bank that is controlled by a bank holding company that is not a District of Columbia bank holding company shall be subject to all laws of the District of Columbia and all rules and regulations under those laws that are applicable to District of Columbia banks that are controlled by bank holding companies all the bank subsidiaries of which are District of Columbia banks.

(Nov. 23, 1985, D.C. Law 6-63, § 7, 32 DCR 5954.)

Prior Codifications. — 1981 Ed., § 26-806.

Legislative history of Law 6-63. — For

legislative history of D.C. Law 6-63, see Historical and Statutory Notes following § 26-701.

§ 26-706.01. Alternative entry by acquisition.

(a) Notwithstanding any other provisions of this subchapter, 90 days after April 11, 1986, any nonregional bank holding company may make application to the Superintendent [Commissioner] for approval to acquire:

(1) Any District bank that was in existence on December 18, 1985, and continuously operating for at least 2 years prior to that date; or

(2) Any District bank holding company all of the District bank subsidiaries of which were in existence on December 18, 1985, and that had been in existence and continuously operating for at least 2 years prior to that date. The Superintendent [Commissioner] shall list applications for acquisition among the pending applications in the Superintendent's [Commissioner's] periodic bulletin, published in the District of Columbia Register, and mailed without charge to any person upon request. Prior to deciding whether to grant approval of the application, the Superintendent [Commissioner] shall accept public comment on the application and shall hold a public hearing on the application, according to procedures established by the rules issued by the Superintendent [Commissioner]. The Superintendent [Commissioner] shall not approve the acquisitions unless it is found that the application satisfies the requirements of § 26-704, including the \$4,000 application fee, and subsection (b) of this section.

(b) An applicant under this section shall be required to demonstrate to the Superintendent [Commissioner] that:

(1) The applicant will make loans and extend credit in a target economic development project in the District for an amount equal to or greater than

.0625% of the applicant's total assets 3 years following the date of acquisition of a District bank holding company or District bank. In no event shall the amount of loans and extension of credit be less than \$50,000,000 or required to be made more than \$100,000,000, though an applicant may agree to make loans and extend credit in target economic development projects in excess of \$100,000,000, and the loans shall not include temporary financing, general obligation bonds issued by the District government, or the purchase of an interest in a pool of mortgage loans, such as mortgage participation certificates issued or guaranteed by the Federal Home Loan Mortgage Corporation, the Government National Mortgage Association, or the Farmers Home Administration;

(2) The applicant will establish at least 2 bank offices in target banking development areas, in addition to any acquired bank offices, within 3 years following the date of acquisition of a District bank or District bank holding company;

(3) The applicant will cash checks issued by the District and the United States governments at bank offices within target banking development areas, even though the bearer of the check does not maintain an account at the bank. According to normal and prudent banking practices, the bank may verify that the individual who presents the check at the bank office is legally entitled to payment;

(4) The applicant will sell food coupons pursuant to 7 U.S.C. § 2011 et seq.;

(5) The applicant will employ at least 200 District residents, or a lesser number according to a sliding scale based upon total assets to be developed by the Superintendent [Commissioner], but in no event less than 50, in positions located in the District that were not located in the District prior to approval of the application, within 3 years following the date of acquisition of a District bank holding company or District bank; and

(6) The applicant will promote international trade and finance within the District.

(c)(1) With its application, an applicant shall submit an irrevocable and confirmed letter of credit for \$10,000,000 from an acceptable bank, as determined by the Superintendent [Commissioner]. The letter of credit shall name the District of Columbia as the beneficiary and shall provide that the District of Columbia Treasurer shall receive up to \$10,000,000 upon presentation to the issuer by the Superintendent [Commissioner] of a decision and order which is reached pursuant to the procedures in subsection (f) of this section and which is a final order because all administrative and judicial appeals of the decision and order are exhausted or untimely. The letter of credit shall be established as of the date when the applicant submits its application to the Superintendent.

(2) In place of an irrevocable and confirmed letter of credit, the Superintendent [Commissioner] may authorize the use of any other financial instrument which would assure payment of fines assessed pursuant to subsection (f) of this section.

(d) The Superintendent [Commissioner] may reduce or extend the time within which a bank holding company shall satisfy any commitment made in

connection with an application filed pursuant to this section, if the Superintendent [Commissioner] finds that the commitment was contingent upon certain action to be taken by the District and the District does not take the action, or, upon good cause shown, the economic or financial conditions of the bank holding company justifies the action.

(e) Any District bank holding company or District bank may choose not to be acquired pursuant to this section by having a resolution to that effect passed by its board of directors and shareholders. The resolution shall be forwarded to the Superintendent [Commissioner] within 60 days after its adoption. No acquisition of a bank or bank holding company which has timely filed such a resolution shall be allowed by the Superintendent [Commissioner] unless notice is given to the Superintendent [Commissioner], at the time an application is filed, that the resolution has been withdrawn or reversed by vote of the board of directors and shareholders.

(f)(1) The Superintendent [Commissioner] may, at any time, review the activities of a nonregional bank holding company making an acquisition under this section and of its District bank subsidiaries to determine whether the nonregional bank holding company is fulfilling the commitments set forth in subsection (b) of this section. In all events, at the end of 3 years following the acquisition of a District bank or a District bank holding company under this section, the Superintendent [Commissioner] shall review the activities of the nonregional bank holding company making the acquisition, and of its District bank subsidiaries, and shall determine whether the nonregional bank holding company has fulfilled, and is continuing to fulfill, the commitments set forth in subsection (b) of this section. The Superintendent [Commissioner] shall complete the review and make the determination no later than 3 years and 3 months after the acquisition of a District bank or bank holding company by the nonregional bank holding company. The Superintendent [Commissioner] may require a nonregional bank holding company making an acquisition under this section, and its District bank subsidiaries, to supply the information and to submit the reports the Superintendent [Commissioner] considers necessary in order to make a determination under this subsection.

(2) Upon the determination of the Superintendent [Commissioner] that a bank holding company has failed to comply with any commitment made in connection with an application filed pursuant to this section, the Superintendent [Commissioner] shall order the company to take steps to comply with the commitment within a specified reasonable period of time. The Superintendent [Commissioner] may extend this specified reasonable period of time.

(3) If, 30 days after the date specified for compliance by an order issued pursuant to this subsection, including any extension, the Superintendent [Commissioner] believes that the bank holding company has not complied with the order, the Superintendent [Commissioner] shall hold a hearing pursuant to § 2-509, to determine whether the bank holding company has failed to comply with the order. The hearing shall be subject to judicial review by the District of Columbia Court of Appeals pursuant to § 2-510.

(4) If, after the hearing and final order issued upon the completion of all appeals, the Superintendent [Commissioner] concludes that the bank holding

company has not complied with the Superintendent's [Commissioner's] order within the specified period of time, including any extension, the bank holding company has not undertaken a good faith effort to comply with the Superintendent's [Commissioner's] order, and the applicant has not substantially completed its commitment pursuant to this section, the Superintendent [Commissioner] shall either:

(A) Order the bank holding company to divest itself of control of all District banks and bank holding companies within a reasonable period of time. If, the Superintendent [Commissioner] orders a bank holding company to divest itself of control of all District banks and bank holding companies pursuant to this paragraph, the divestiture shall, in all events, be completed within 1 year after the date on which the Superintendent's [Commissioner's] order becomes final and not pending further judicial review; or

(B) Fine the bank holding company \$10,000,000 and present the decision and order, including a showing that all administrative and judicial appeals of that decision and order are exhausted or untimely, to the issuer of the \$10,000,000 letter of credit or other financial assurance required in subsection (c) of this section, and shall call upon the issuer to honor the letter of credit or other financial assurance for the full amount of \$10,000,000.

(5) If, after the hearing and final order issued upon the completion of all appeals, the Superintendent [Commissioner] concludes that the bank holding company has not complied with the Superintendent's [Commissioner's] order within the specified period of time, including any extension, the bank holding company has not undertaken a good faith effort to comply with the Superintendent's [Commissioner's] order, and the bank holding company has substantially completed its commitment pursuant to this section, the Superintendent [Commissioner] may fine the bank holding company up to \$10,000,000, and, if the Superintendent [Commissioner] does fine the bank holding company, the Superintendent [Commissioner] shall present the decision and order, including a showing that all administrative and judicial appeals of that decision and order are exhausted or untimely, to the issuer of the \$10,000,000 letter of credit or other financial assurance required in subsection (c) of this section, and shall call upon the issuer to honor the letter of credit or other financial assurance for payments equal to the amount of the fines assessed pursuant to this paragraph.

(6) If, after the hearing and final order issued upon the completion of all appeals, the Superintendent [Commissioner] concludes that the bank holding company has not complied with the Superintendent's [Commissioner's] order within the specified period of time, including any extension, the bank holding company has undertaken a good faith effort to comply with the Superintendent's [Commissioner's] order, and the bank holding company has not substantially completed its commitment pursuant to this section, the Superintendent [Commissioner] may fine the bank holding company up to \$10,000,000, and, if the Superintendent [Commissioner] does fine the bank holding company, the Superintendent [Commissioner] shall present the decision and order, including a showing that all administrative and judicial appeals of that decision and order are exhausted or untimely, to the issuer of the \$10,000,000 letter of credit

or other financial assurance required in subsection (c) of this section, and shall call upon the issuer to honor the letter of credit or other financial assurance for payment equal to the amount of the fines assessed pursuant to this paragraph.

(7) If, after the hearing and final order issued upon the completion of all appeals, the Superintendent [Commissioner] concludes that the bank holding company has not complied with the Superintendent's [Commissioner's] order within the specified period of time, including any extension, the bank holding company has undertaken a good faith effort to comply with the Superintendent's [Commissioner's] order and the bank holding company has substantially completed its commitment pursuant to this section, the Superintendent [Commissioner] may fine the bank holding company up to \$5,000,000, and, if the Superintendent [Commissioner] does fine the bank holding company, the Superintendent [Commissioner] shall present the decision and order, including a showing that all administrative and judicial appeals of that decision and order are exhausted or untimely to the issuer of the \$10,000,000 letter of credit or other financial assurance required in subsection (c) of this section, and shall call upon the issuer to honor the letter of credit or other financial assurance for payment equal to the amount of the fines assessed pursuant to this paragraph, but the payment shall not be greater than \$5,000,000.

(8) The Superintendent [Commissioner] shall exercise the Superintendent's [Commissioner's] authority under paragraphs (3), (4), (5), and (6) of this subsection within 4 years of the date of the acquisition of a District bank holding company or District bank, plus any extensions and any period during which a hearing and its appeals, if any, are pending pursuant to this subsection.

(9) The Superintendent [Commissioner] shall submit a written report of any actions that the Superintendent [Commissioner] takes pursuant to this subsection to the Council and to the Federal Reserve Board.

(Nov. 23, 1985, D.C. Law 6-63, § 7a, as added Apr. 11, 1986, D.C. Law 6-107, § 2(e), 33 DCR 1168; Dec. 11, 2007, D.C. Law 17-59, § 3(c), 54 DCR 10718.)

Section references. — This section is referred to in §§ 26-603, 26-704, and 26-707.

Prior Codifications. — 1981 Ed., § 26-806.1.

Effect of amendments. — D.C. Law 17-59, in subsec. (d), deleted “and the Council approves, by resolution, the reduction or extension” following “justifies the action”.

Temporary Amendment of Section. — Section 3(c) of D.C. Law 17-31, in subsec. (d), deleted “and the Council approves, by resolution, the reduction or extension”.

Section 5(b) of D.C. Law 17-31 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 3(c) of Bank Charter Modernization Emergency Amendment Act of 2007 (D.C. Act 17-66, July 9, 2007, 54 DCR 6819).

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-702.01.

Legislative history of Law 17-59. — For Law 17-59, see notes following § 26-636.

Editor's notes. — Because of the codification of D.C. Law 11-142 as subchapter II of Chapter 8 subchapter II of Chapter 7, 2001 Ed., and designation of the preexisting text as subchapter I, “subchapter” has been substituted for “chapter” in the introductory language of (a).

Fees credited to the Office of Banking and Financial Institutions Enterprise Fund: Section 1804(2) of D.C. Law 12-60 provided that all fees received pursuant to § 26-806.1(a)(2) 1981 Ed. shall be credited to the Office of Banking and Financial Institutions Enterprise Fund.

§ 26-707. **Enforcement.**

(a) An action for equitable or any other appropriate relief to enforce the provisions of this subchapter may be brought in any court of competent jurisdiction by:

(1) Any District of Columbia bank holding company or District of Columbia bank;

(2) Any regional bank holding company that has a District of Columbia bank subsidiary (other than a District of Columbia bank subsidiary that was acquired either pursuant to 12 U.S.C. § 1730a(m) [repealed] or 12 U.S.C. § 1823(f), or in the regular course of securing or collecting a debt previously contracted in good faith, as provided in 12 U.S.C. § 1842(a)); or

(3) The Corporation Counsel of the District of Columbia in the name of the District of Columbia.

(b) Each bank holding company making the submission to the Superintendent [Commissioner] required by § 26-704 or § 26-706.01 shall include in that submission a statement identifying a registered agent and registered office for the bank holding company. The registered agent shall be an agent of the bank holding company upon whom process of law against the company may be served. All notices or demands required or permitted by law may be served upon the registered agent. The registered agent and office may be the same as that used by the District bank holding company or District bank sought to be acquired or established. The appointment of a registered agent for purposes of this section must meet the requirements imposed on a foreign corporation's appointment of a registered agent and office by § 29-101.106. If the bank holding company fails to properly appoint or maintain a registered agent and office in the District, the Mayor shall be an agent of the bank holding company upon whom any process of law, notice, or demand against the bank holding company may be served. All matters served upon the Mayor pursuant to this section shall be handled in the same manner as matters served upon the Mayor on behalf of foreign corporations pursuant to § 29-101.108(b) and (d). The appointment of a registered agent pursuant to this section may not be revoked or modified, except that a new registered agent may be substituted, so long as any liability for the fines imposed by this subchapter remains outstanding against the bank holding company. Upon satisfaction of any liability, the appointment may be revoked or otherwise modified, unless the bank holding company is otherwise required by law to maintain the registered agent and office.

(Nov. 23, 1985, D.C. Law 6-63, § 8, 32 DCR 5954; Apr. 11, 1986, D.C. Law 6-107, § 2(f), 33 DCR 1168.)

Prior Codifications. — 1981 Ed., § 26-807.

Legislative history of Law 6-63. — For legislative history of D.C. Law 6-63, see Historical and Statutory Notes following § 26-701.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-702.01.

References in text. — “12 U.S.C. § 1730a,” referred to in (a)(2), was repealed by Pub. L. 101-73, title IV, § 407, August 9, 1989, 103 Stat. 363.

Editor's notes. — Because of the codification of D.C. Law 11-142 as subchapter II of Chapter 8 [subchapter II of Chapter 7, 2001 Ed.] and the designation of the preexisting text

as subchapter I, "subchapter" has been substituted for "chapter" in the introductory language of (a) and in (b).

§ 26-707.01. Insurance.

(a) Any bank or trust company established or created pursuant to this subchapter shall be required to be insured with the Federal Deposit Insurance Corporation pursuant to 12 U.S.C. § 1811 et seq.

(b) Any savings and loan association established or created pursuant to this subchapter shall be required to be insured with the Federal Savings and Loan Insurance Corporation pursuant to 12 U.S.C. § 1724 et seq. [repealed].

(Nov. 23, 1985, D.C. Law 6-63, § 8a, as added Apr. 11, 1986, D.C. Law 6-107, § 2(g), 33 DCR 1168.)

Prior Codifications. — 1981 Ed., § 26-807.1.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-702.01.

References in text. — "12 U.S.C. § 1724 et seq.," referred to in (b), was repealed by Pub. L. 101-73, title IV, § 407, August 9, 1989, 103 Stat. 363.

The "Federal Savings and Loan Insurance Corporation", referred to in (b), has been abol-

ished. For provisions relating to the abolition of the Federal Savings and Loan Insurance Corporation and the transfer of functions, personnel and property of that agency, see §§ 401 to 406 of Pub. L. 101-73, set out as a note under 12 U.S.C. § 1437.

Editor's notes. — Because of the codification of D.C. Law 11-142 as subchapter II of Chapter 8 subchapter II of Chapter 7, 2001 Ed., and designation of the preexisting text as subchapter I, "subchapter" has been substituted for "chapter" in (a) and (b).

§ 26-707.02. Penalties.

(a) Any company violating any provision of this subchapter or any rule issued pursuant to it shall be subject to a penalty of not more than \$100 per day for each day the violation continues unless a different penalty is specified in this subchapter for the violation, in which case the specified penalty shall apply. Any penalty imposed shall be recovered in a civil action in the name of the District of Columbia.

(b) Any company wilfully violating this subchapter or any rule or regulation issued pursuant to this subchapter shall be subject to a penalty of not more than \$1,000 a day for each day the violation continues unless a different penalty is specified in this subchapter for the violation, in which case the specified penalty shall apply.

(c) The Superintendent [Commissioner of the Department of Insurance, Securities, and Banking] shall report violations to the Corporation Counsel who may institute a civil action therefor on behalf of the District of Columbia.

(d) Any applicant that fails to comply with requirements concerning filing with the Superintendent [Commissioner] and the Council prior to filing with the Federal Reserve Board shall be fined \$500 per day for each day the violation continues, but in no event shall the fine imposed by this subsection exceed \$5,000, except that no fine or penalty under this subsection shall be assessed for failure to comply with this section if the application concerns an acquisition under circumstances constituting an emergency, pursuant to 12

U.S.C. § 1842(b), or where the applicant believes, in good faith, that the application concerns such an acquisition, so long as the applicant, as soon as practicable before or after filing with the Federal Reserve Board, files a copy of the application and any notice of approval or disapproval by the Federal Reserve Board with the Superintendent [Commissioner].

(Nov. 23, 1985, D.C. Law 6-63, § 8b, as added Apr. 11, 1986, D.C. Law 6-107, § 2(h), 33 DCR 1168.)

Prior Codifications. — 1981 Ed., § 26-807.2.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-702.01.

Editor's notes. — Because of the codification of D.C. Law 11-142 as subchapter II of Chapter 8 subchapter II of Chapter 7, 2001 Ed., and designation of the preexisting text as subchapter I, "subchapter" has been substituted for "chapter" throughout (a) and (b).

§ 26-708. Nonseverability. [Repealed].

Repealed.

(Apr. 11, 1986, D.C. Law 6-107, § 2(i), 33 DCR 1168.)

Prior Codifications. — 1981 Ed., § 26-808.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see His-

torical and Statutory Notes following § 26-702.01.

§ 26-709. Review of impact.

(a) Three years after November 23, 1985, the committee of the Council which has oversight of banking regulations shall convene a public hearing to receive testimony that will aid the committee in determining whether passage of this subchapter:

(1) Has led to the creation of an increased number of jobs for District residents;

(2) Has increased the availability of commercial banking services for District residents and businesses, including minority and women-owned businesses;

(3) Has increased, or otherwise altered, local lending and investment by District of Columbia banks that have been acquired by District of Columbia or regional bank holding companies;

(4) Has led to a strengthening of the local commercial banking market; or

(5) Has otherwise benefited the residents of the District of Columbia.

(b) The committee shall use the information acquired at the hearing required by subsection (a) of this section to determine whether the District should continue to participate in the regional reciprocal interstate banking arrangement provided for in this subchapter and if so, for what period and to what extent. The committee may also determine whether a limit should be imposed on the number of banks or on the percentage of District deposits controlled by a single company; whether specific capitalization, employment, and location requirements should be imposed on out-of-state bank holding companies wishing to acquire District banks or bank holding companies; and whether specific plans detailing how the acquiror and acquiree intend to serve

deposit and credit needs of District residents should be required. As soon as practicable after conclusion of the hearing, but no later than 6 months after the hearing, the committee shall file with the Office of the Secretary a recommendation or recommendations for Council action to alter the provisions of this subchapter, if necessary.

(Nov. 23, 1985, D.C. Law 6-63, § 10, 32 DCR 5954.)

Prior Codifications. — 1981 Ed., § 26-809.

Legislative history of Law 6-63. — For legislative history of D.C. Law 6-63, see Historical and Statutory Notes following § 26-701.

Editor's notes. — Because of the codification of D.C. Law 11-142 as subchapter II of

Chapter 8 subchapter II of Chapter 7, 2001 Ed., and the designation of the preexisting text as subchapter I, "subchapter" has been substituted for "chapter" in the introductory language of (a) and in (b).

§ 26-710. Applicability.

(a) Except as expressly provided, the following laws shall not apply to national banks organized pursuant to 12 U.S.C. §§ 21 to 95, members of Federal Home Loan Banks as defined in 12 U.S.C. §§ 1422 to 1424, and Federal Credit Unions as defined in 12 U.S.C. § 1752, but shall apply to all banks, savings companies, trust companies, related holding companies, or other banking institutions in the District of Columbia:

(1) Sections 26-101, 26-102, 26-1301 through 26-1352, and 26-201 through 26-232;

(2) Sections 26-901 through 26-912;

(3) Section 26-103;

(4) Sections 26-801 and 26-802;

(5) Sections 26-104, 26-107, 26-108 [repealed], and 26-109;

(6) Sections 26-105 and 26-106;

(7) Sections 26-110, 26-803, and 26-804;

(8) Chapter 4 of this title;

(9) Section 26-251; and

(10) Sections 26-501 through 26-504.

(b) The Superintendent [Commissioner of the Department of Insurance, Securities, and Banking] shall not have the power to regulate the authority or activities of a bank holding company or bank in a manner which, directly or indirectly, cause it to operate its national banking subsidiary in a manner which violates federal requirements.

(Nov. 23, 1985, D.C. Law 6-63, § 10a, as added Apr. 11, 1986, D.C. Law 6-107, § 2(j), 33 DCR 1168.)

Prior Codifications. — 1981 Ed., § 26-809.1.

Legislative history of Law 6-107. — For

legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-702.01.

§ 26-711. Use of women-owned banks.

(a) Recipients of District of Columbia government contracts are encouraged to use women-owned banks and federally or District chartered minority-owned

banks certified by the Small and Local Business Opportunity Commission in accordance with subchapter IX-A of Chapter 2 of Title 2.

(b) The Mayor shall, pursuant to subchapter I of Chapter 5 of Title 2, issue rules to implement the provisions of this section within 90 days of March 16, 1989. All rules issued pursuant to this subsection shall be transmitted to the Council for review.

(Nov. 23, 1985, D.C. Law 6-63, § 10b as added Mar. 16, 1989, D.C. Law 7-187, § 2(b), 35 DCR 8648; October 4, 2000, D.C. Law 13-169, § 6, 47 DCR 5846; Oct. 20, 2005, D.C. Law 16-33, § 2381(a), 52 DCR 7503.)

Prior Codifications. — 1981 Ed., § 26-810.

Effect of amendments. — D.C. Law 13-169 in subsec. (a) substituted for “Minority Business Opportunity Commission in accordance with the District of Columbia Minority Contracting Act of 1976, § 1-1141 et seq.” the phrase “District of Columbia Local Business Opportunity Commission in accordance with subchapter II-B of Chapter 11 of Title 1-1”.

D.C. Law 16-33, in subsec. (a), substituted “Small and Local Business Opportunity Commission in accordance with subchapter IX-A of Chapter 2 of Title 2” for “District of Columbia Local Business Opportunity Commission in accordance with subchapter IX of Chapter 2 of Title 2”.

Temporary Amendment of Section. — Section 6 of D.C. Law 13-216, in subsec. (a), substituted “District of Columbia Local Business Opportunity Commission in accordance with the Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises Act of 1998” for “Minority Business Opportunity Commission in accordance with the District of Columbia Minority Contracting Act of 1976”.

Section 11(b) of D.C. Law 13-216 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90-day) amendment of section, see § 6 of the Equal Opportunity for Local, Small, or Disadvantaged Business Enterprises Emergency Amendment Act of 2000 (D.C. Act 13-415, August 14, 2000, 47 DCR 7296).

For temporary (90 day) amendment of section, see § 2381(a) of Fiscal Year 2006 Budget Support Emergency Act of 2005 (D.C. Act 16-168, July 26, 2005, 52 DCR 7667).

Legislative history of Law 7-187. — Law 7-187, the “District of Columbia Minority Bank Encouragement Amendment Act of 1988,” was introduced in Council and assigned Bill No. 7-471, which was referred to the Committee on Housing and Economic Development. The Bill was adopted on first and second readings on

October 25, 1988 and November 15, 1988, respectively. Signed by the Mayor on December 1, 1988, it was assigned Act No. 7-249 and transmitted to both Houses of Congress for its review.

Legislative history of Law 8-260. — For legislative history of D.C. Law 8-260, see Historical and Statutory Notes following § 26-702.01.

Legislative history of Law 13-169. — Law 13-169, the “Equal Opportunity for Local, Small, or Disadvantaged Business Enterprises Amendment Act of 2000,” was introduced in Council and assigned Bill No. 13-241, which was referred to the Committee on Economic Development. The Bill was adopted on first and second readings on April 4, 2000, and June 6, 2000, respectively. Signed by the Mayor on June 26, 2000, it was assigned Act No. 13-373 and transmitted to both Houses of Congress for its review. D.C. Law 13-169 became effective on October 4, 2000.

Legislative history of Law 13-216. — Law 13-216, the “Equal Opportunity for Local, Small, or Disadvantaged Business Enterprises Temporary Amendment Act of 2000”, was introduced in Council and assigned Bill No. 13-789. The Bill was adopted on first and second readings on July 11, 2000, and October 3, 2000, respectively. Signed by the Mayor on October 30, 2000, it was assigned Act No. 13-468 and transmitted to both Houses of Congress for its review. D.C. Law 13-216 became effective on April 3, 2001.

Legislative history of Law 16-33. — Law 16-33, the “Fiscal Year 2006 Budget Support Act of 2005”, was introduced in Council and assigned Bill No. 16-200 which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on May 10, 2005, and June 21, 2005, respectively. Signed by the Mayor on July 26, 2005, it was assigned Act No. 16-166 and transmitted to both Houses of Congress for its review. D.C. Law 16-33 became effective on October 20, 2005.

§ 26-712. Administrative procedure; cease and desist orders.

(a)(1) If, in the opinion of the Superintendent [Commissioner of the Department of Insurance, Securities, and Banking], a District banking corporation or a director, officer, employee, agent, or other person who participates in the conduct of the affairs of the banking corporation, engages in an unsafe or unsound practice in conducting the business of the bank or violates or is about to violate a law, rule, regulation, written condition imposed by the Superintendent [Commissioner] in connection with the grant of any application or request, or any written agreement entered into with the Superintendent [Commissioner], the Superintendent [Commissioner] may institute an administrative action against the bank or person by the issuance of a Notice of Charges.

(2) If, in the opinion of the Superintendent [Commissioner], a person or a director, officer, employee, agent, or other person who participates in the conduct of the affairs of the person violates or is about to violate a law, rule, regulation, written condition imposed by the Superintendent [Commissioner] in connection with the grant of any application or request, or any written agreement entered into with the Superintendent [Commissioner], the Superintendent [Commissioner] may institute an administrative action against the person by the issuance of a Notice of Charges.

(b) The Notice of Charges shall set forth the basis for the administrative action and shall set a time and place for a hearing to determine whether a cease and desist order shall issue based on the Notice of Charges. The hearing shall be held within 60 days after the service of the Notice of Charges unless another date is set by the hearing officer at the request of 1 of the parties.

(c) In the event of a consent or default or if, upon the record at the hearing, the Superintendent [Commissioner] finds that any violation or practice alleged in the Notice of Charges is established by a preponderance of the evidence, the Superintendent [Commissioner] may issue an order to cease and desist from the violation or practice. The order may require the bank or person or director, officer, employee, agent, or other person who participates in the conduct of the affairs of the bank or person to cease and desist from the violation or practice, and take affirmative action to correct the violation or practice or any condition that results from the violation or practice. The affirmative action may include indemnification, reimbursement, restitution, or any other relief that the Superintendent [Commissioner] deems appropriate.

(d) The cease and desist order shall become effective 30 days after service or, in the case of consent, shall become effective immediately. The order shall remain effective and enforceable unless the order is stayed, modified, terminated, or set aside by the Superintendent [Commissioner] or a reviewing court.

(e) If, in the opinion of the Superintendent [Commissioner], a violation or practice or threatened violation or practice of this subchapter or § 26-103 is likely to cause insolvency, substantial dissipation of the assets or earnings of the bank or person, or serious prejudice to the interests of the depositors or customers of the bank or person, the Superintendent [Commissioner], through the Office of the Corporation Counsel, may:

(1) Petition the court to issue a restraining order to prevent the continuance of the violation or practice or threatened violation or practice, pending completion of the Superintendent's [Commissioner's] administrative proceeding;

(2) Petition the court to appoint a receiver with any power or duty that the court may direct to preserve the assets of the corporation or person in accordance with part B of subchapter XII of Chapter 3 of Title 29. Notwithstanding part B of subchapter XII of Chapter 3 of Title 29, a court may appoint a receiver to preserve the assets of a person and shall not be required to liquidate the assets of a corporation or person unless warranted;

(3) Petition the court to freeze or seize the assets of the bank or person consistent with applicable law; or

(4) Petition the court for an order for the involuntary dissolution of a corporation pursuant to part B of subchapter XII of Chapter 3 of Title 29 if the corporation exceeded or abused the authority conferred upon the corporation by Chapter 1, 2, or 3 of Title 29.

(Nov. 23, 1985, D.C. Law 6-63, § 10c, as added Aug. 17, 1991, D.C. Law 9-42, § 2(d), 38 DCR 4981; July 2, 2011, D.C. Law 18-378, § 3(g), 58 DCR 1720.)

Prior Codifications. — 1981 Ed., § 26-811.

Effect of amendments. — D.C. Law 18-378, in subsec. (e)(2), substituted "part B of subchapter XII of Chapter 3 of Title 29" for "§§ 29-391 and 29-392 ('Business Corporation Act') and 'the provisions of §§ 29-391 and 29-392'; and, in subsec. (e)(4), substituted "part B of subchapter XII of Chapter 3 of Title 29 if the corporation exceeded or abused the authority conferred upon the corporation by Chapter 1, 2, or 3 of Title 29" for "§ 29-101.189 if the corporation exceeded or abused the authority conferred upon the corporation by Chapter 1 of Title 29".

Legislative history of Law 9-42. — Law 9-42, the "District of Columbia Interstate Banking Act of 1985 Amendment Act of 1991," was introduced in Council and assigned Bill

No. 9-37, which was referred to the Committee on Economic Development. The Bill was adopted on first and second readings on June 4, 1991, and July 2, 1991, respectively. Signed by the Mayor on July 24, 1991, it was assigned Act No. 9-79 and transmitted to both Houses of Congress for its review.

Legislative history of Law 18-378. — For history of Law 18-378, see notes under § 26-201.

Editor's notes. — Because of the codification of D.C. Law 11-142 as subchapter II of Chapter 8 subchapter II of Chapter 7, 2001 Ed., and designation of the preexisting text as subchapter I, "subchapter" has been substituted for "chapter" in the introductory language of (e).

§ 26-713. Hearings.

Any administrative hearing held in accordance with this subchapter shall be held pursuant to Chapter 5 of Title 2, unless the Superintendent [Commissioner of the Department of Insurance, Securities, and Banking] determines that a public proceeding would jeopardize or adversely affect the safety and soundness of the bank or the public interest. If the Superintendent [Commissioner] makes the determination, the hearing may be held in private session.

(Nov. 23, 1985, D.C. Law 6-63, § 10d, as added Aug. 17, 1991, D.C. Law 9-42, § 2(d), 38 DCR 4981.)

Prior Codifications. — 1981 Ed., § 26-812.

Legislative history of Law 9-42. — For

legislative history of D.C. Law 9-42, see Historical and Statutory Notes following § 26-712.

Editor's notes. — Because of the codification of D.C. Law 11-142 as subchapter II of Chapter 8 subchapter II of Chapter 7, 2001 Ed.,

and designation of the preexisting text as subchapter I, "subchapter" has been substituted for "chapter" in this section.

§ 26-714. Enforcement.

Any order issued pursuant to this subchapter may be enforced in the Superior Court of the District of Columbia.

(Nov. 23, 1985, D.C. Law 6-63, § 10e, as added Aug. 17, 1991, D.C. Law 9-42, § 2(d), 38 DCR 4981.)

Prior Codifications. — 1981 Ed., § 26-813.

Legislative history of Law 9-42. — For legislative history of D.C. Law 9-42, see Historical and Statutory Notes following § 26-712.

Editor's notes. — Because of the codifica-

tion of D.C. Law 11-142 as subchapter II of Chapter 8 [subchapter II of Chapter 7, 2001 Ed.] and the designation of the preexisting text as subchapter I, "subchapter" has been substituted for "chapter" in this section.

Subchapter II. Interstate Banking and Branching.

§ 26-731. Findings.

The Council of the District of Columbia hereby finds and declares that:

(1) On September 29, 1994, the federal Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("federal legislation") became law.

(2) Sections 102 and 103 of the federal legislation permit states to enact early opt in legislation to enable a state to appropriately regulate interstate banking, branching, and bank mergers and acquisitions prior to June 1997 when all provisions of the federal legislation will become fully effective.

(3) It is the intent of the District of Columbia to exercise its statutory option under the federal legislation by opting in to its interstate branching schemata thus permitting the District's Office of Banking and Financial Institutions to regulate, pursuant to the federal legislation, interstate branching, acquisition of branches, bank mergers, and consolidations of existing banking entities within the District of Columbia among other things.

(June 13, 1996, D.C. Law 11-142, § 2, 43 DCR 2159.)

Prior Codifications. — 1981 Ed., § 26-851.

Legislative history of Law 11-142. — Law 11-142, the "Banking and Branching Act of 1996," was introduced in Council and assigned Bill No. 11-321, which was referred to the Committee on Economic Development. The Bill

was adopted on first and second readings on March 5, 1996, and April 2, 1996, respectively. Signed by the Mayor on April 16, 1996, it was assigned Act No. 11-258 and transmitted to both Houses of Congress for its review. D. C. Law 11-142 became effective on June 13, 1996.

§ 26-732. Definitions.

For the purposes of this subchapter, the term:

(1) "Acquire" means:

(A) To merge or consolidate;

(B) To have direct or indirect ownership or control of voting shares, if, after the acquisition, the acquiror directly or indirectly owns or controls more than 5% of any class of voting shares of the acquired; or

(C) Any action that would result in direct or indirect control of the acquired, including a direct or indirect ownership of all or of substantially all of the assets of the acquired.

(2) "Acquisition of a branch" means the acquisition of a branch located in a host state without acquiring the bank of such branch.

(3) "Bank" means any insured bank as defined in 12 U.S.C. § 1813(h), or any institution eligible to become an insured bank as defined therein, which accepts demand deposits and makes commercial loans.

(4) "Branch" means any branch bank or branch bank office or other bank facility where deposits are received, checks are paid, or money is lent.

(5) "De novo branch" means a branch of a bank located in a host state which:

(A) Is originally established by a bank as a branch; and

(B) Does not become a branch of a bank as the result of the acquisition of another bank or the acquisition of a branch of another bank.

(6) "Depository institution affiliate" means any depository institution that controls, is controlled by, or is under common control of or with another depository institution.

(7) "District" means the District of Columbia.

(8) "District bank" means a bank whose home state is the District of Columbia and whose primary regulator is the District's Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] or the Comptroller of the Currency.

(9) "District state bank" means a bank whose home state is the District and that is chartered under the laws of the District.

(10) "Home state" means:

(A) The state of the main office for a national bank; or

(B) The state of chartering for a state bank.

(11) "Host state" means a state, other than the home state of a bank, in which a bank maintains or seeks to maintain a branch.

(12) "Interstate merger transaction" means:

(A) The merger or consolidation of banks with different home states pursuant to the authority of this subchapter, and the conversion of branches of any bank involved in such a merger or consolidation to branches of the resulting bank; or

(B) The purchase of all, or substantially all, of the assets of a bank whose home state is not the home state of the acquiring bank pursuant to the authority of this subchapter.

(13) "Out-of-state bank" means a bank whose home state is not the District.

(14) "Out-of-state national bank" means a nationally-chartered bank whose home state is not the District of Columbia.

(15) "Out-of-state state bank" means a state chartered bank whose home state is not the District of Columbia.

(16) "Resulting bank" means a bank that has resulted from an interstate merger transaction.

(17) "State" means any state of the United States, the District of Columbia, or any territory of the United States, or any legally incorporated jurisdic-

tion deemed to be a state by the District's Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking].

(18) "Superintendent" means the District's Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking].

(June 13, 1996, D.C. Law 11-142, § 3, 43 DCR 2159.)

Prior Codifications. — 1981 Ed., § 26-852. legislative history of D.C. Law 11-142, see Historical and Statutory Notes following § 26-731.
Legislative history of Law 11-142. — For

§ 26-733. De novo branching or acquisition of a branch into a state other than the District.

(a) With the approval of the Superintendent [Commissioner of the Department of Insurance, Securities, and Banking], a District state bank may establish and maintain a de novo branch or acquire a branch in a state other than the District.

(b) A District state bank ("applicant") desiring to branch into a state other than the District under this section shall file an application on a form provided by the Superintendent [Commissioner] and pay a branching fee of \$500 to the Superintendent [Commissioner]. If, within 30 days after receipt of the application, the Superintendent [Commissioner] determines that the applicant possesses sufficient resources to branch into a state other than the District, the Superintendent [Commissioner] shall approve the application.

(c) In reviewing the application, the Superintendent [Commissioner] shall consider the views of the state bank supervisor of the host state where the branch is proposed to be located.

(d) If the Superintendent [Commissioner] fails to approve or disapprove an application within 30 days of receipt, the application shall be deemed approved. The Superintendent [Commissioner] may extend this 30-day review period for an additional 30 days upon a showing of good cause.

(e) A District state bank that branches into a state other than the District may exercise, at that branch, all rights and powers permitted to banks chartered by that state unless the Superintendent [Commissioner] determines that the exercise of such rights or powers would threaten the safety and soundness of the District bank.

(June 13, 1996, D.C. Law 11-142, § 4, 43 DCR 2159.)

Section references. — This section is referred to in § 26-603.

Prior Codifications. — 1981 Ed., § 26-853.

Temporary Amendment of Section. — Section 2(a) of D.C. Law 11-257 amended (a) to read as follows.

"(a) No person shall engage in business as a mortgage lender or mortgage broker, or both, or hold himself or herself out to the public to be a mortgage lender or mortgage broker for 150 days after the effective date of this chapter,

unless such person has first obtained a license under this chapter."

Section 4(b) of D.C. Law 11-257 provided that the act shall expire after 225 days of its having taken effect.

Legislative history of Law 11-142. — For legislative history of D.C. Law 11-142, see Historical and Statutory Notes following § 26-731.

Legislative history of Law 11-257. — Law 11-257, the "Mortgage Lender and Broker Act of 1996 Time Extension Temporary Amendment

Act of 1996," was introduced in Council and assigned Bill No. 11-922, which was retained by Council. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. It was assigned Act No. 11-507 and transmitted to both Houses of Congress for its review. D.C. Law 11-257 became effective on April 9, 1997.

Editor's notes. — Fees credited to the Office of Banking and Financial Institutions Enterprise Fund: Section 1804(3) of D.C. Law 12-60 provided that all fees received pursuant to § 26-853(b) 1981 Ed. shall be credited to the Office of Banking and Financial Institutions Enterprise Fund.

§ 26-734. Interstate branching by de novo entry or acquisition into the District.

(a) An out-of-state bank ("applicant") that does not maintain a branch within the District may establish and maintain a de novo branch or may acquire a branch within the District provided the applicant meets the following requirements:

(1) Submits to the Superintendent [Commissioner] a copy of the application it files with its home state supervisor or with the appropriate federal agency in order to establish such branch within the District;

(2) Pays a branching fee to be determined by the Superintendent [Commissioner]; and

(3)(A) In the case of a de novo branch to be established prior to June 1, 1997, the laws of the home state of the applicant permit District banks to establish and maintain de novo branches in that state under terms similar to those set forth in this subchapter; or

(B) In the case of a branch to be established through acquisition of a branch prior to June 1, 1997, the laws of the home state of the applicant permit District banks to establish and maintain branches in that state through the acquisition of branches under terms similar to those set forth in this subchapter.

(b) An out-of-state state bank that establishes and maintains a branch in the District may exercise, at such branch, all rights and powers permitted to be exercised by District state banks unless the out-of-state state bank's home state determines that the exercise of such rights or powers would threaten the safety and soundness of the out-of-state state bank.

(June 13, 1996, D.C. Law 11-142, § 5, 43 DCR 2159.)

Prior Codifications. — 1981 Ed., § 26-854.

Temporary Amendment of Section. — Section 2(b) of D.C. Law 11-247 amends (b) to read as follows:

"(b) The Superintendent shall approve or deny each application for a license within 60 days after the date from when the application and bond are filed and the fees are paid. The Superintendent may issue a provisional license to an applicant who has filed the application and bond and paid all required fees if the Superintendent determines that he is unable to

complete the application review process within 60 days."

Section 4(b) of D.C. Law 11-247 provided that the act shall expire after 225 days of its having taken effect.

Legislative history of Law 11-142. — For legislative history of D.C. Law 11-142, see Historical and Statutory Notes following § 26-731.

Legislative history of Law 11-247. — For legislative history of D.C. Law 11-247, see Historical and Statutory Notes following § 26-733.

§ 26-735. Additional authority of Superintendent [Commissioner] regarding establishment and maintenance of branches.

(a) The Superintendent [Commissioner] may conduct examinations of any branch of an out-of-state state bank established or maintained within the District pursuant to § 26-734 to ensure that such branch is operating in a safe and sound manner and to ensure that such branch is in compliance with the laws of the District.

(b) The Superintendent [Commissioner] may require periodic reports from any out-of-state bank that establishes or maintains a branch in the District pursuant to § 26-734, including reports regarding any agency agreements entered into between a branch and a depository institution affiliate as authorized and established by § 26-739, provided that the reports:

(1) Are similar to reports required from District banks by the Superintendent; and

(2) Are not preempted by federal law.

(c) The Superintendent [Commissioner] may enter into cooperative agreements with any other state bank regulators for any legal purpose, including agreements for sharing of examination fees and other regulatory fees, in order to prevent duplication of regulatory functions and for the convenience and needs of the public.

(d) An out-of-state bank that has established and maintained a branch in the District may establish and maintain additional branches in the District to the same extent as a District state bank or to the extent otherwise permitted by federal law.

(June 13, 1996, D.C. Law 11-142, § 6, 43 DCR 2159.)

Prior Codifications. — 1981 Ed., § 26-855. **Legislative history of Law 11-142.** — For legislative history of D.C. Law 11-142, see Historical and Statutory Notes following § 26-731.

§ 26-736. Interstate merger transactions by a District state bank.

(a) With the permission of the Superintendent [Commissioner], a District state bank may maintain and operate a branch in a state other than the District pursuant to an interstate merger transaction with an out-of-state bank in which the District state bank is the resulting bank.

(b) A District state bank ("applicant") desiring to establish and maintain a branch in another state under this section shall file an application on a form provided by the Superintendent [Commissioner] and pay a merger fee to be determined by the Superintendent [Commissioner]. If, within 30 days of receipt of the application, the Superintendent [Commissioner] determines that the applicant possesses sufficient financial resources, sufficient managerial and professional experience, and that the proposed merger is in the public interest, the Superintendent [Commissioner] shall approve the application for an interstate merger transaction and for the operation of branches in a state other than the District by the District state bank.

(c) In reviewing the application, the Superintendent [Commissioner] shall consider the views of the state bank supervisor of the host state where the interstate merger transaction is to be consummated.

(d) If the Superintendent [Commissioner] fails to approve or disapprove an application within 30 days of receipt, the application shall be deemed approved. The Superintendent [Commissioner] may extend this 30-day review period for an additional 30 days upon a showing of good cause.

(e) A District state bank that establishes and maintains a branch in a state other than the District pursuant to an interstate merger transaction may exercise, at such branch, all rights and powers permitted to banks chartered by that state unless the Superintendent [Commissioner] determines that the exercise of such rights or powers would threaten the safety and soundness of the District state bank.

(June 13, 1996, D.C. Law 11-142, § 7, 43 DCR 2159.)

Section references. — This section is referred to in § 26-603.

Prior Codifications. — 1981 Ed., § 26-856.

Legislative history of Law 11-142. — For legislative history of D.C. Law 11-142, see Historical and Statutory Notes following § 26-731.

Editor's notes. — Fees credited to the Office

of Banking and Financial Institutions Enterprise Fund: Section 1804(3) of D.C. Law 12-60 provided that all fees received pursuant to § 26-856(b) 1981 Ed. shall be credited to the Office of Banking and Financial Institutions Enterprise Fund.

§ 26-737. Interstate merger transactions by an out-of-state bank with a District bank; retention of branches by resulting bank.

(a) A District bank may engage with an out-of-state bank ("applicant") in an interstate merger transaction where the resulting bank is not a District state bank. The resulting bank from such an interstate merger transaction may maintain and operate the branches in the District of the merged District bank, provided the applicant meets the following requirements:

(1) Submits to the Superintendent [Commissioner] a copy of the application it files with its home state regulator or with the federal banking agency in order to consummate such merger within the District;

(2) Pays a merger fee to be determined by the Superintendent [Commissioner]. This fee may be waived by the Superintendent [Commissioner] if the Superintendent [Commissioner] determines that the fee paid by the applicant in its home state is sufficient;

(3) Prior to consummation of such merger, obtains a certificate of authority to transact business in the District in accordance with § 29-101.99. The applicant shall be entitled to do so notwithstanding the exclusion of the business of banking under the terms of § 29-101.99(a); and

(4) In the case of an interstate merger transaction to be consummated prior to June 1, 1997, the laws of the home state of the applicant permit District banks to consummate interstate merger transactions in the home state under terms similar to those set forth in this subchapter.

(b) An out-of-state state bank that engages in an interstate merger transaction with a District bank and is the resulting bank may exercise at its

branches in the District all rights and powers to be exercised by District state banks, unless the out-of-state state bank's home state determines that the exercise of such rights or powers would threaten the safety and soundness of the out-of-state state bank.

(June 13, 1996, D.C. Law 11-142, § 8, 43 DCR 2159.)

Section references. — This section is referred to in § 26-603.

Prior Codifications. — 1981 Ed., § 26-857.

Legislative history of Law 11-142. — For legislative history of D.C. Law 11-142, see Historical and Statutory Notes following § 26-731.

Editor's notes. — Fees credited to the Office

of Banking and Financial Institutions Enterprise Fund: Section 1804(3) of D.C. Law 12-60 provided that all fees received pursuant to § 26-857(a)(2) 1981 Ed. shall be credited to the Office of Banking and Financial Institutions Enterprise Fund.

§ 26-738. Additional authority of Superintendent [Commissioner] regarding interstate merger transactions.

(a) The Superintendent [Commissioner] may conduct examinations of any branch of an out-of-state state bank established within the District pursuant to an interstate merger transaction to ensure that such branch is operating in a safe and sound manner and to ensure that such branch is in compliance with the laws of the District.

(b) The Superintendent [Commissioner] may require periodic reports from any branch of an out-of-state bank established within the District pursuant to an interstate merger transaction, including reports regarding any agency agreements entered into between a branch and a depository institution affiliate authorized and established pursuant to § 26-739, provided that the reports:

(1) Are similar to reports required from District banks by the Superintendent [Commissioner]; and

(2) Are not preempted by federal law.

(c) The Superintendent [Commissioner] may enter into cooperative agreements with any other state bank regulators for any legal purpose, including agreements for sharing of examination fees and other regulatory fees, in order to prevent duplication of regulatory functions and for the convenience and needs of the public.

(d) An out-of-state bank that has acquired a branch in the District pursuant to an interstate merger transaction may establish and maintain additional branches in the District to the same extent as a District state bank or to the extent otherwise permitted by federal law.

(June 13, 1996, D.C. Law 11-142, § 9, 43 DCR 2159.)

Prior Codifications. — 1981 Ed., § 26-858.

Legislative history of Law 11-142. — For

legislative history of D.C. Law 11-142, see Historical and Statutory Notes following § 26-731.

§ 26-739. Establishment of agency agreements between affiliated depository institutions.

A District state bank that is a subsidiary of a bank holding company may agree to receive deposits, renew time deposits, close loans, service loans, receive payments on loans and other obligations, and perform such other services as the Superintendent [Commissioner] may determine are appropriate, as an agent for a depository institution affiliate.

(June 13, 1996, D.C. Law 11-142, § 10, 43 DCR 2159.)

Section references. — This section is referred to in §§ 26-736 and 26-738.

Prior Codifications. — 1981 Ed., § 26-859.

Legislative history of Law 11-142. — For legislative history of D.C. Law 11-142, see Historical and Statutory Notes following § 26-731.

§ 26-740. Enforcement.

If the Superintendent [Commissioner] determines that any law of the District has been violated in the operation of a branch in the District of an out-of-state state bank, or that such branch is being operated in an unsafe or unsound manner pursuant to this subchapter, the Superintendent [Commissioner] shall have the authority to undertake such enforcement actions as it would be permitted to take if the branch were a District state bank.

(June 13, 1996, D.C. Law 11-142, § 11, 43 DCR 2159.)

Prior Codifications. — 1981 Ed., § 26-860.

Legislative history of Law 11-142. — For

legislative history of D.C. Law 11-142, see Historical and Statutory Notes following § 26-731.

§ 26-741. Rules.

(a) The Superintendent [Commissioner], pursuant to subchapter I of Chapter 5 of Title 2, shall issue rules to implement the provisions of this subchapter.

(b) The proposed rules shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution within this 45-day review period, the proposed rules shall be deemed approved.

(June 13, 1996, D.C. Law 11-142, § 12, 43 DCR 2159.)

Cross references. — Banks organized under federal law, application of District law, see § 26-710.

Prior Codifications. — 1981 Ed., § 26-861.

Legislative history of Law 11-142. — For legislative history of D.C. Law 11-142, see Historical and Statutory Notes following § 26-731.

CHAPTER 8. JOINT ACCOUNTS; ADVERSE CLAIMANTS; TRUST ACCOUNTS.

Sec.	Sec.
26-801. Deposits or shares of stock in names of 2 or more persons; payments or deliveries; liability of bank.	right of access or delivery; liability of bank.
26-802. Property in boxes, vaults or held for safekeeping for 2 or more persons;	26-803. Notice of adverse claim to deposit.
	26-804. Payment of trust accounts on death of trustee.

§ 26-801. Deposits or shares of stock in names of 2 or more persons; payments or deliveries; liability of bank.

Except as provided in §§ 19-602.21 to 19-602.26, when a deposit shall have been made in, or shall after May 15, 1928, be made in, or any collection item shall have been placed or shall after May 15, 1928, be placed with any bank, trust company, savings bank, building association, or other banking institution, including national banks, transacting business in the District of Columbia, or when any shares of stock shall have been issued or shall after May 15, 1928, be issued by any building association, transacting business in the District of Columbia, in the names of 2 or more persons, including spouses or domestic partners, payable to either, or payable to either or the survivor or survivors, such deposit, or in any part thereof, or any interest or dividend thereon, and such collection item or its proceeds, or any interest or dividend thereon, or such shares of stock issued by a building association or any interest or dividend thereon, may be paid or delivered to either of said persons whether the other or others be living or not; and the receipt or acquittance of the person to whom such payment or delivery is made shall be a valid, sufficient, and complete release and discharge of the bank, trust company, savings bank, building association, or other banking institution, including national banks, for any payment or delivery so made. For the purposes of this section, the term "domestic partner" shall have the same meaning as provided in § 32-701(3).

(May 15, 1928, 45 Stat. 533, ch. 568, § 1; Apr. 27, 2001, D.C. Law 13-292, § 303, 48 DCR 2087; Sept. 12, 2008, D.C. Law 17-231, § 25(a), 55 DCR 6758.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-201. 1973 Ed., § 26-201.

Effect of amendments. — D.C. Law 13-292 substituted "Except as provided in §§ 19-602.21 to 19-602.26, when" for "When".

D.C. Law 17-231 substituted "spouses or domestic partners" for "husband and wife"; and added "For the purposes of this section, the term 'domestic partner' shall have the same meaning as provided in § 32-701(3)."

Legislative history of Law 13-292. — Law 13-292, the "Omnibus Trusts and Estates Amendment Act of 2000", was introduced in Council and assigned Bill No. 13-298, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second read-

ings on December 5, 2000, and December 19, 2000, respectively. Signed by the Mayor on January 26, 2001, it was assigned Act No. 13-599 and transmitted to both Houses of Congress for its review. D.C. Law 13-292 became effective on April 27, 2001.

Legislative history of Law 17-231. — Law 17-231, the "Omnibus Domestic Partnership Equality Amendment Act of 2008", was introduced in Council and assigned Bill No. 17-135, which was referred to the Committee on Public Safety and the Judiciary. The Bill was adopted on first and second readings on April 1, 2008, and May 6, 2008, respectively. Signed by the Mayor on June 6, 2008, it was assigned Act No. 17-403 and transmitted to both Houses of Congress for its review. D.C. Law 17-231 became effective on September 12, 2008.

CASE NOTES

ANALYSIS

Liability for withdrawals.
Retention of exclusive control.
Right of survivorship.
Set-off by bank.
Validity of conveyances.

Liability for withdrawals.

Where substantial sums earned by minor wife were allegedly turned over by her to husband and were deposited with building and loan association in joint account in names of husband and wife, and on estrangement of husband and wife, husband withdrew balance in joint account and deposited it in new joint account in names of himself and his mother, association was not liable to wife on ground that association could not permit funds to be withdrawn by husband due to status of wife as minor. D.C. Code 1961, §§ 26-201, 30-201. Williams v. Williams, 346 F.2d 808, 1965 U.S. App. LEXIS 5893 (C.A.D.C. 1965).

Retention of exclusive control.

Evidence that depositor had brother's name appended to bank account so that brother could obtain money if depositor died supported finding that depositor had no intention of giving brother present interest in account, and intended to retain exclusive control thereof so long as depositor lived. D.C. Code 1940, § 26-201. Gibson v. Industrial Bank of Washington, 36 A.2d 62, 1944 D.C. App. LEXIS 149 (Cr.App. 1944).

Where depositor had brother's name appended to bank account but passed no present interest thereto and retained control of account and passbook, there was no "gift inter vivos" to brother. D.C. Code 1940, § 26-201. Gibson v. Industrial Bank of Washington, 36 A.2d 62, 1944 D.C. App. LEXIS 149 (Cr.App. 1944).

Where depositor, not in contemplation of impending death, had brother's name added to bank account, but did not pass a present interest therein to brother, and retained control of account, there was no "gift causa mortis". D.C. Code 1940, § 26-201. Gibson v. Industrial Bank of Washington, 36 A.2d 62, 1944 D.C. App. LEXIS 149 (Cr.App. 1944).

Right of survivorship.

In action by husband's executors against widow to impress constructive trust on proceeds of bank account, for which printed bank cards which recited a right of survivorship had been signed by both husband and widow, and from which widow, after husband's death, withdrew all the funds for deposit elsewhere in her own name, evidence failed to rebut presumption, based on fact that funds for such account had been provided only by husband, that widow

did not have a survivorship interest. D.C. Code 1951, §§ 14-302, 26-201. Imirie v. Imirie, 246 F.2d 652, 1957 U.S. App. LEXIS 3606 (C.A.D.C. 1957).

A showing that name of depositor's brother was merely appended to bank account, without more, is insufficient to establish intention of depositor to establish a joint account with right of survivorship. D.C. Code 1940, § 26-201. Gibson v. Industrial Bank of Washington, 36 A.2d 62, 1944 D.C. App. LEXIS 149 (Cr.App. 1944).

Set-off by bank.

Bank could exercise right of setoff under joint tenancy certificate of deposit agreement even after depositor delivered letter to bank attempting to change ownership of account to joint tenancy with her two grandchildren instead of her son; certificate by its own terms did not mature for another three months, and rights in the certificate could not be transferred nor funds withdrawn before maturity, without bank's consent. Isaac v. First Nat'l Bank, 647 A.2d 1159, 1994 D.C. App. LEXIS 167 (1994).

Bank could exercise right of setoff under joint tenancy certificate of deposit agreement, notwithstanding that loan to joint tenant was not specifically secured by the certificate of deposit. Isaac v. First Nat'l Bank, 647 A.2d 1159, 1994 D.C. App. LEXIS 167 (1994).

Despite depositor's contention that provision in joint tenancy certificate of deposit agreement allowing bank to set off any debt owed by either joint tenant did not accurately express parties' intent, provision was unambiguous and enforceable, absent claim of fraud, duress or mutual mistake. Isaac v. First Nat'l Bank, 647 A.2d 1159, 1994 D.C. App. LEXIS 167 (1994).

Provision in joint tenancy certificate of deposit agreement allowing bank to set off any debt owed by either joint tenant was not unconscionable, as would bar bank from setting off debt owed by joint tenant who had no actual beneficiary interest in the account. Isaac v. First Nat'l Bank, 647 A.2d 1159, 1994 D.C. App. LEXIS 167 (1994).

Validity of conveyances.

Statute providing that no disposition of realty or personalty of married woman under 21 years of age or any portions thereof, by deed, mortgage, bill of sale, or other conveyance shall be valid if made by married woman under 21 years of age is modified by statute dealing with joint account of husband and wife in bank or other institutions such as building and loan association. D.C. Code 1961, §§ 26-201, 30-201. Williams v. Williams, 346 F.2d 808, 1965 U.S. App. LEXIS 5893 (C.A.D.C. 1965).

§ 26-802. Property in boxes, vaults or held for safekeeping for 2 or more persons; right of access or delivery; liability of bank.

When a safety deposit box or vault shall have been hired from any bank, trust company, savings bank, building association, or other banking institution, including national banks, or any other corporation, transacting business in the District of Columbia, in the names of 2 or more persons, including spouses or domestic partners, with the right of access being given to either, or with access to either or the survivor or survivors of said persons, or property is held for safekeeping by any such bank, trust company, savings bank, building association, or other corporation or banking institution, including national banks, for 2 or more persons, including spouses or domestic partners, with the right of delivery being given to either, or with the right of delivery to either or the survivor or survivors of said persons, any one or more of such persons, whether the other or others be living or not, shall have the right of access to such safety deposit box or vault and to remove the contents thereof, or any part of such contents, or to have delivered to him or them, the property so held for safekeeping, or any part thereof, and in case of such removal or delivery the said bank, trust company, savings bank, building association, or other corporation or banking institution, including national banks, shall be exempt from any liability for permitting such access or removal or for the delivery to such person or persons. For the purposes of this section, the term "domestic partner" shall have the same meaning as provided in § 32-701(3).

(May 15, 1928, 45 Stat. 534, ch. 568, § 2; Sept. 12, 2008, D.C. Law 17-231, § 25(b), 55 DCR 6758.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-202. 1973 Ed., § 26-202.

Effect of amendments. — D.C. Law 17-231 substituted "spouses or domestic partners" for

"husband and wife"; and added "For the purposes of this section, the term 'domestic partner' shall have the same meaning as provided in § 32-701(3)."

Legislative history of Law 17-231. — For Law 17-231, see notes following § 26-801.

§ 26-803. Notice of adverse claim to deposit.

Notice to any bank or trust company doing business in the District of Columbia of an adverse claim to a deposit standing on its books to the credit of any person shall not be effectual to cause said bank or trust company to recognize said adverse claimant unless said adverse claimant shall also either: (1) procure a restraining order, injunction, or other appropriate process against said bank or trust company from a court of competent jurisdiction in a cause therein instituted by him wherein the person to whose credit the deposit stands is made a party and served with summons; or (2) execute to such bank or trust company, in form and with sureties acceptable to it, a bond indemnifying said bank or trust company from any and all liability, loss, damage, costs, and expenses, for and on account of the payment of such adverse claim or the dishonor of the check or other order of the person to whose credit the deposit stands on the books of said bank or trust company; provided, that this section

shall not apply to any instance where the person to whose credit the deposit stands is a fiduciary for such adverse claimant, and the facts constituting such relationship, together with the facts showing reasonable cause of belief on the part of the said claimant that the said fiduciary is about to misappropriate said deposit, are made to appear by the affidavit of such claimant.

(Apr. 5, 1939, 53 Stat. 566, ch. 37, § 2.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-203. 1973 Ed., § 26-203.

CASE NOTES

ANALYSIS

Actual knowledge.
Construction and application.
Paying out contested accounts.
Refusal of checks.

Actual knowledge.

Notice from adverse claimant asserting by affidavit that depositor is trustee and that claimant believes such trustee is about to misappropriate the funds in account constitutes "actual knowledge" by the bank under the Uniform Fiduciary Act with respect to breach of obligation by the fiduciary. D.C. Code §§ 21-1701 et seq., 26-203. *Goldstein v. Riggs Nat'l Bank*, 459 F.2d 1161, 1972 U.S. App. LEXIS 11343 (C.A.D.C. 1972).

Construction and application.

Statute designed to protect banks where adverse claims are made to account is to be broadly construed. D.C. Code § 26-203. *Goldstein v. Riggs Nat'l Bank*, 459 F.2d 1161, 1972 U.S. App. LEXIS 11343 (C.A.D.C. 1972).

Statute providing that bank shall recognize adverse claim to deposit "where the person to whose credit a deposit stands is a fiduciary for such adverse claimant" and where facts constituting such relation and showing reasonable cause for belief that fiduciary is about to misappropriate the deposit are made to appear by affidavit of the claimant is applicable regardless of whether account appears on its face as a fiduciary account. D.C. Code §§ 26-203, 26-204. *Goldstein v. Riggs Nat'l Bank*, 459 F.2d 1161, 1972 U.S. App. LEXIS 11343 (C.A.D.C. 1972).

District of Columbia statute concerning situation of bank which finds itself in position of stakeholder between two claimants is not by its terms applicable to savings and loan associations, but common-law rule is applicable, and when savings and loan association, credit union or similar banking institution receives notice of adverse claim to deposit, such institution may freeze such deposit for brief, reasonable period of time so as to permit filing of litigation, either by interpleader or other appropriate civil liti-

gation, to resolve the adverse claims. D.C. Code § 26-203. *Stevenson v. First Nat'l Bank*, 395 A.2d 21, 1978 D.C. App. LEXIS 351 (1978).

Paying out contested accounts.

When bank has notice of adverse claim to money in one of its depositor's accounts, it attempts at its own peril to determine which party has superior right, for it will be held liable if it pays out account erroneously. D.C. Code § 26-203. *Stevenson v. First Nat'l Bank*, 395 A.2d 21, 1978 D.C. App. LEXIS 351 (1978).

Bank finding itself in position of stakeholder between two claimants can either implead claimants or can freeze depositor's account briefly to permit adverse claimant to file suit, but, upon notice of claim, bank can delay in paying out of contested account for only reasonable and brief period. D.C. Code § 26-203. *Stevenson v. First Nat'l Bank*, 395 A.2d 21, 1978 D.C. App. LEXIS 351 (1978).

Since innocent bank may incur liability by paying out erroneously on what appears to be a justified claim, and cannot avoid liability by honoring deposit contract, it ought not to have to risk liability when it preserves situation long enough for judicial resolution of primary dispute to be initiated, and in such regard it is no different whether parties file suit or bank interpleads them. D.C. Code § 26-203. *Stevenson v. First Nat'l Bank*, 395 A.2d 21, 1978 D.C. App. LEXIS 351 (1978).

Refusal of checks.

Where bank received notice from corporation that money in account belonged to the corporation, that individual in whose name account appeared was trustee of such funds, and that corporation believed the money would be misappropriated, and where bank took prompt action to secure adjudication of the conflicting claims by filing interpleader action, bank was not liable for refusing to honor checks drawn by the depositor on the account. D.C. Code § 26-203. *Goldstein v. Riggs Nat'l Bank*, 459 F.2d 1161, 1972 U.S. App. LEXIS 11343 (C.A.D.C. 1972).

§ 26-804. Payment of trust accounts on death of trustee.

Whenever a deposit, savings account, or share account, which is in form in trust for another, shall be made or held by any person in any bank, trust company, savings and loan association, building association, building and loan association, or federal savings and loan association, doing business in the District of Columbia, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to such bank, trust company, or other association, such deposit, savings account, or share account, or any part thereof, together with the dividends, or interest thereon, may, in the event of the death of the trustee, be paid to the person for whom such deposit, savings account, or share account was made or held, or to his legal representative.

(Apr. 5, 1939, 53 Stat. 567, ch. 37, § 4; July 19, 1954, 68 Stat. 494, ch. 545, § 1.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-204.
1973 Ed., § 26-204.

CHAPTER 8A. MERCHANT BANKS.

Subchapter I. General Provisions

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26-831.01. Short title.

26-831.02. Definitions.

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Subchapter I. General Provisions.

§ 26-831.01. Short title.

This chapter may be cited as the "Merchant Bank Act of 2000".

(June 9, 2001, D.C. Law 13-308, § 301, 48 DCR 3244.)

Legislative history of Law 13-308. — Law 13-308, the "21st Century Financial Modernization Act of 2000", was introduced in Council and assigned Bill No. 13-867, which was referred to the Committee on Economic Development. The Bill was adopted on first and second

readings on November 8, 2000, and December 5, 2000, respectively. Signed by the Mayor on January 26, 2001, it was assigned Act No. 13-597 and transmitted to both Houses of Congress for its review. D.C. Law 13-308 became effective on June 9, 2001.

§ 26-831.02. Definitions.

For the purposes of this chapter, the term:

(1) "Affiliate" shall have the same meaning as set forth in § 26-551.02(1).

(2) "Appropriate financial institutions agency" means the federal or state agency with statutory authority over the financial institution activities of a financial institution.

(3) "Capital" shall have the same meaning as set forth in § 26-551.02(6).

(4) “Commissioner” shall have the same meaning as set forth in § 26-551.02(7).

(5) “Department” shall have the same meaning as set forth in § 26-551.02(9).

(6) “Deposit” means a demand, time, or savings deposit, savings share account, withdrawable or repurchasable share, investment certificate, or other savings account or savings deposit account made by an individual, corporation, partnership, state or federal government unit, or any other government organization, without regard to the location of the depositor.

(7) “District” means the District of Columbia.

(8) “District of Columbia Banking Code” shall have the same meaning as set forth in § 26-551.02(14).

(9) “Financial institution” shall have the same meaning as set forth in § 26-551.02(18).

(10) “Merchant bank” means a financial institution that is chartered or organized under the District of Columbia Banking Code as a merchant bank and is under the authority and supervision of the Commissioner.

(11) “Subsidiary” shall have the same meaning as set forth in § 26-551.02(24).

(12) “Superior Court” means Superior Court of the District of Columbia.

(13) “Universal bank” shall have the same meaning as set forth in § 26-1401.02(28).

(June 9, 2001, D.C. Law 13-308, § 302, 48 DCR 3244; June 11, 2004, D.C. Law 15-166, § 2(i), 51 DCR 2817.)

Effect of amendments. — D.C. Law 15-166 rewrote pars. (4) and (5) which had read as follows: (4) “Commissioner” means the Commissioner of the Department of Banking and Financial Institutions. “(5) ‘Department’ means the Department of Banking and Financial Institutions.”

Emergency legislation. — For temporary

(90 day) amendment of section, see § 2(i) of Consolidation of Financial Services Emergency Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 26-131.02.

Subchapter II. Application and Certification as a Merchant Bank.

§ 26-831.03. Application for merchant bank charter; review and approval or disapproval of application.

(a) A person described in § 26-833.09(a) may apply for a merchant bank charter by filing a written application with the Commissioner. The application shall include such information as the Commissioner may require by regulation and shall be on such forms and in accordance with such procedures as the Commissioner may prescribe by regulation.

(b) An application submitted under subsection (a) of this section shall be approved or disapproved in writing by the Commissioner within 60 days after a complete application is submitted to the Commissioner. The Commissioner

and the applicant may agree to extend the review period for an additional 60 days.

(c) The Commissioner shall not issue a merchant bank charter to the applicant unless:

(1) The applicant is authorized under its articles of incorporation or other organizational documents to act as a financial institution;

(2) The applicant is in good standing with the Department and there is no investigatory or enforcement action pending against the applicant by the Department;

(3) The applicant is in good standing with appropriate financial institutions agencies and there is no investigatory or enforcement action pending against the applicant by an appropriate financial institutions agency;

(4) The applicant is well capitalized and will maintain a capital level as required by this chapter and as the Commissioner may require as appropriate for the purposes of safety and soundness;

(5) The applicant does not exhibit a combination of financial, managerial, operational, and compliance weaknesses that are moderately severe or unsatisfactory, as determined by the Commissioner, based upon the Commissioner's assessment of the applicant's capital adequacy of liquidity, and sensitivity to market risk;

(6) The most recent examination that the applicant has received from its federal appropriate financial institutions agency, if any, indicates that the applicant is in compliance with applicable federal law and regulation;

(7) The applicant agrees to comply with applicable regulations and rules promulgated by the Commissioner;

(8) The applicant agrees to comply with any lawful order of the Commissioner and with any conditions imposed by the Commissioner in connection with the approval of an application, including additional requirements imposed on the applicant that the Commissioner determines are necessary for the protection of the shareholders or creditors of the applicant or of the general public;

(9) The applicant agrees to comply with any written agreement entered into with the Commissioner in connection with the approval of an application;

(10) The Commissioner determines that it is reasonable to believe that the applicant will act in a safe and sound manner and maintain a safe and sound condition; and

(11) The Commissioner determines that issuing a merchant bank charter to the applicant will serve the public interest.

(June 9, 2001, D.C. Law 13-308, § 303, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

§ 26-831.04. Issuance of certificate of authority.

If the Commissioner approves the application of an applicant to be a merchant bank, the Commissioner shall issue to the applicant a charter

stating that the applicant is authorized to conduct business as a merchant bank under this chapter.

(June 9, 2001, D.C. Law 13-308, § 304, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

§ 26-831.05. Revocation or subsequent limitation of certificate of authority.

If a merchant bank fails to maintain the standards and requirements of this chapter, the Commissioner shall, by order, revoke or limit the exercise of the powers of the merchant bank's authority.

(June 9, 2001, D.C. Law 13-308, § 305, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

§ 26-831.06. Voluntary termination of certification of authority.

An applicant that is chartered as a merchant bank under this chapter may elect to terminate its charter by giving 60 days prior written notice of the termination to the Commissioner. A termination under this section shall be effective only with the written approval of the Commissioner. An applicant shall, as a condition to a termination under this section, terminate its exercise of all powers granted under this chapter before the termination of the certification. The Commissioner's written approval of a applicant's termination under this section shall be void if the applicant fails to satisfy the condition to termination under this section.

(June 9, 2001, D.C. Law 13-308, § 306, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

Subchapter III. Powers and Authority of a Merchant Bank.

§ 26-831.07. Powers of merchant banks; limits on powers.

(a) Except as provided in this chapter, a merchant bank shall have all the powers and authority of a District-chartered bank or District-chartered savings and loan, including powers and authority with respect to investments, loans, fiduciary and trust functions, and transactions; provided, that a merchant bank shall obtain certification as a universal bank before exercising those powers of a universal bank.

(b) A merchant bank shall not solicit, receive, or accept money, or its equivalent, on deposit, or engage in deposit-like activity, as a regular business activity.

(c) A merchant bank may issue a draft drawn on the merchant bank in the form of a treasurer's check or cashier's check.

(d) A merchant bank may deposit cash, whether constituting principal or income, in any financial institution inside or outside the District of Columbia.

(e) A merchant bank shall notify the Commissioner at least 30 days before the merchant bank establishes an office or branch office where the merchant bank intends to transact the business of the merchant bank.

(f) A merchant bank may apply to the Commissioner for certification, chartering, or organization as any other type of financial institution authorized under the District of Columbia Banking Code.

(June 9, 2001, D.C. Law 13-308, § 307, 48 DCR 3244; Oct. 19, 2002, D.C. Law 14-213, § 18(d), 49 DCR 8140.)

Effect of amendments. — D.C. Law 14-213, in subsec. (a), substituted “provided, that a merchant bank shall obtain certification as a universal bank before exercising those powers of a universal bank” for “provided, that a universal bank shall obtain certification as a universal bank before exercising those powers of a

universal bank that a District-chartered bank or District-chartered savings and loan is not authorized to exercise”.

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

Legislative history of Law 14-213. — For Law 14-213, see notes following § 26-131.02.

Subchapter IV. Structure and Organization of a Merchant Bank; Capital Requirements.

§ 26-831.08. Capital requirements of a merchant bank.

(a) The minimum amount of initial capital for a merchant bank shall be \$20 million, of which at least \$10 million shall be common stock or an equity interest. The balance may be composed of qualifying subordinated or similar debt as determined under regulations promulgated by the Commissioner. The Commissioner may modify the required minimum amount of initial capital if an applicant files with the Commissioner a written request and application, which application shall include a capital plan and any other documentation required by the Commissioner by regulation or order.

(b) A merchant bank shall maintain minimum capital in at least the same amount as the minimum initial capital required under subsection (a) of this section or in such other amount as the Commissioner may establish by rule or by order, after the filing of a request and application by a merchant bank; provided, the Commissioner shall not establish a minimum capital requirement for a merchant bank that is less than 150% of the tier 1 risk-based capital or 150% of the total risk-based capital established by the Board of Governors of the Federal Reserve System for a well-capitalized bank.

(June 9, 2001, D.C. Law 13-308, § 308, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

§ 26-831.09. Structure and organization of merchant banks.

(a) A merchant bank may be organized as a corporation, limited liability company, limited partnership, or limited liability partnership.

(b) The articles of incorporation or other organizational documents of a merchant bank shall contain the following statement: "This [corporation/limited liability company/limited partnership/limited liability partnership] is subject to the requirements of the District of Columbia Banking Code and does not have the power to solicit, receive or accept money or its equivalent on deposit." The appropriate business form listed in the bracketed text in the statement shall be included in the statement. The statement shall not otherwise be amended.

(c) A merchant bank may use as a part of its name the word "bank," "banker", "banking", or any abbreviations of those words.

(June 9, 2001, D.C. Law 13-308, § 309, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

§ 26-831.10. Policies of merchant bank's business activities.

(a) The board of directors of a merchant bank, if the merchant bank is a corporation, or its equivalent governing body, if the merchant bank is another type of business entity, shall establish a written policy under which the merchant bank's business activities shall be conducted. The written policy shall include the merchant bank's business plan, operating procedures, investment policies, and lending policies. The written policy shall also address conflicts of interest and shall preclude a merchant bank from making an investment in a small business if the effect is to create the potential of a conflict of interest with a person having an ownership interest in the merchant bank.

(b) The written policy under subsection (a) of this section for business activities shall be reviewed and approved or disapproved by the Commissioner. If the Commissioner finds that the policy does not adequately regulate the business activities of the merchant bank, the Commissioner may require the board of directors, or equivalent governing body, to take corrective action.

(June 9, 2001, D.C. Law 13-308, § 310, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

Subchapter V. Commissioner Possession, Receivership, Conservatorship, and Liquidation of Merchant Banks.

§ 26-831.11. Liquidation of merchant banks in general.

A merchant bank shall not be liquidated except as provided by this chapter or in accordance with the order of a court of competent jurisdiction.

(June 9, 2001, D.C. Law 13-308, § 311, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

§ 26-831.12. Commissioner taking possession of merchant banks.

(a) Subject to § 26-1401.15 as it relates to the functional regulatory authority of the Commissioner for the liquidation or rehabilitation of an insurance subsidiary or holding company affiliate, the Commissioner may take possession of the business and property of a merchant bank if the Commissioner has determined that one or more of the events described in subsection (b) of this section has occurred.

(b) The Commissioner may take possession of the properties or business of a merchant bank under subsection (a) of this section if the merchant bank:

(1) Has violated a law, rule, regulation, a condition imposed by the Commissioner in connection with the approval of an application, an order or authorized request by the Commissioner, or a term or condition of a written agreement entered into with the Commissioner, and such violation affects the safe and sound condition and operation of the bank or the severity of the violation calls into question the competency of management or the quality of the operation of the bank;

(2) Is conducting its business in an unauthorized or unsafe or unsound manner;

(3) Is in an unsafe and unsound condition to transact its business;

(4) Has an impairment of its capital;

(5) Has suspended payment of its obligations;

(6) Has neglected or refused to comply with the terms of a duly issued order of the Commissioner;

(7) Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the Department;

(8) Has refused to be examined upon oath regarding its affairs; or

(9) Has neglected, refused or failed to take or continue proceedings for voluntary liquidation in accordance with any of the provisions of this chapter.

(c) If the Commissioner takes possession of the property or business of a merchant bank under this section, the Commissioner shall inform the merchant bank of the merchant bank's right to seek review of the Commissioner's action under subsection (e) of this section.

(d) The Commissioner may maintain possession of the property or business of a merchant bank until:

- (1) The affairs of the merchant bank are finally liquidated;
- (2) The merchant bank voluntarily winds up its affairs; or
- (3) The Commissioner authorizes the merchant bank to resume business under § 26-833.13.

(e) Within 10 days after the Commissioner takes possession of the property or business of a merchant bank under this section, the merchant bank may apply to the Superior Court for an order requiring the Commissioner to show cause why the Commissioner should not be enjoined from continuing his or her possession of the property or business. The Superior Court may, upon good cause shown, direct the Commissioner to surrender possession or some or all of the business or property of the merchant bank or direct the Commissioner to take, or refrain from taking, any action.

(f) In addition to the authority granted under this section, the Commissioner may request the appointment of a receiver or conservator for the merchant bank under this chapter.

(June 9, 2001, D.C. Law 13-308, § 312, 48 DCR 3244; June 11, 2004, D.C. Law 15-166, § 2(j), 51 DCR 2817.)

Effect of amendments. — D.C. Law 15-166, in subsec. (a), deleted “of the Department of Insurance and Securities Regulation” following “authority of the Commissioner”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(j) of Consolidation of Financial Services Emergency

Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 26-131.02.

§ 26-831.13. Resumption of business by a merchant bank.

A merchant bank of which the Commissioner takes possession or which is operating under restrictions imposed by the Commissioner may be permitted by the Commissioner to resume business in accordance with the provisions of this chapter and subject to such conditions as may be imposed by the Commissioner.

(June 9, 2001, D.C. Law 13-308, § 313, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

§ 26-831.14. Appointment of a receiver for a merchant bank.

(a) The Commissioner may petition the Superior Court to appoint a receiver for a merchant bank if there is a reasonable basis to believe that the merchant bank:

- (1) Has violated a law, rule, regulation, a condition imposed by the Commissioner in connection with the approval of an application, an order or authorized request by the Commissioner, or a term or condition of a written agreement entered into with the Commissioner, and such violation affects the safe and sound condition and operation of the bank or the severity of the

violation calls into question the competency of management or the quality of the operation of the bank;

(2) Has violated a condition imposed by the Commissioner in connection with the approval of an application, an order or authorized request of the Commissioner, or a written agreement entered into with the Commissioner;

(3) Is conducting its business in an unauthorized, unsafe, or unsound manner;

(4) Is in an unsafe and unsound condition;

(5) Has an impairment of its capital;

(6) Has suspended payment of its obligations;

(7) Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the Department;

(8) Has refused to be examined upon oath regarding its affairs; or

(9) Has neglected, refused, or failed to take or continue proceedings for voluntary liquidation in accordance with any of the provisions of this chapter.

(b) The Superior Court may act upon a petition by the Commissioner for the appointment of a receiver immediately and without notice to any person. The Superior Court may appoint a receiver if the Superior Court determines that a condition set forth in subsection (a) of this section exists and that the bank is operating, or may operate, in an unsafe or unsound manner. The Superior Court may also issue an injunction to require a universal bank to correct any condition set forth in subsection (a) of this section, whether or not the bank is operating, or may operate, in an unsafe or unsound manner. If the Superior Court appoints a receiver and, after the appointment of the receiver, it appears to the court that reasons for receivership do not, or no longer, exist, the Superior Court shall dissolve the receivership and terminate any pending proceedings.

(c) Unless otherwise provided by law, a receiver, other than a receiver who is an employee of the Department and acting in his or her official capacity, shall post a bond in an amount to be determined by the Superior Court.

(d) The receiver shall, on a regular basis, report to the Commissioner regarding all matters involving the receivership.

(June 9, 2001, D.C. Law 13-308, § 314, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

§ 26-831.15. Receiver duties and powers.

(a) Subject to Superior Court approval, a receiver shall:

(1) Take possession of the books, records, and assets of the merchant bank and collect all debts, dues, and claims belonging to the merchant bank;

(2) Sue, defend, compromise, arbitrate, or otherwise settle all claims involving the merchant bank;

(3) Sell all real and personal property;

(4) Exercise all fiduciary functions of the merchant bank;

(5) Pay all administrative expenses of the receivership, which expenses shall be a first charge upon the assets of the merchant bank and shall be fully

paid before a final distribution or payment of dividends to creditors or shareholders;

(6) Pay, ratably, all debts of the merchant bank; provided, that debts not exceeding \$500 may be paid in full but the holders of such debt shall not be entitled to interest on the debt;

(7) Repay, ratably, any amount paid in by a shareholder by reason of an assessment made upon the stock of the merchant bank by the Department in accordance with this chapter;

(8) Pay, ratably, to the shareholders of the merchant bank, in proportion to the number of shares held and owned by each, the balance of the net assets of the merchant bank after payment or provision for payments as provided in this section;

(9) Have all the powers of the directors, officers, and shareholders of the merchant bank as necessary to support an action taken on behalf of the merchant bank; and

(10) Hold title to all the bank's property, contracts, and rights of action

(b) Subject to Superior Court approval, a receiver may:

(1) Borrow money as necessary or expedient in aiding the liquidation of the merchant bank and secure the borrowed money by the pledge, hypothecation, or mortgage of the assets of the bank;

(2) Employ agents, legal counsel, accountants, appraisers, consultants, and other personnel, including, with the prior written approval of the Commissioner, personnel of the Department, that the receiver considers necessary or expedient to assist in the performance of the receiver's duties; provided, that the expense of employing Department personnel shall be an administrative expense of the liquidation that shall be payable to the Department; or

(3) Exercise any other power and duty authorized by the Superior Court.

(June 9, 2001, D.C. Law 13-308, § 315, 48 DCR 3244; Oct. 19, 2002, D.C. Law 14-213, § 18(e), 49 DCR 8140.)

Effect of amendments. — D.C. Law 14-213, in subsec. (a)(7), validated a previously made technical correction.

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

Legislative history of Law 14-213. — For Law 14-213, see notes following § 26-131.02.

§ 26-831.16. Lien on property or assets; voidable transfer.

(a) Except as provided in subsection (c) of this section, the transfer of, or a lien on, the property or assets of the merchant bank shall be voidable by the receiver if the transfer or lien was:

(1) Made or created within one year before the date the Commissioner takes possession of the merchant bank or the date the merchant bank is ordered into receivership if the receiving transferee or lien holder was at the time an affiliate, officer, director, employee, or principal shareholder of the merchant bank or an affiliate of the merchant bank;

(2) Made or created within 90 days before the date the Commissioner takes possession of the merchant bank or the date the merchant bank is ordered into receivership, with the intent of giving to a creditor or depositor, or

enabling a creditor or depositor to obtain, a greater percentage of the creditor's or depositor's debt than is given or obtained by another creditor or depositor of the same class;

(3) Accepted after the date the Commissioner takes possession of the merchant bank or the date the merchant bank is ordered into receivership by a creditor or depositor having reasonable cause to believe that a preference, as described in subsection (b) of this section, will occur; or

(4) Voidable by the merchant bank and the merchant bank may recover the property transferred, or its value, from the person to whom it was transferred or from a person who has received it, unless the transferee or recipient was a bona fide holder for value before the date the Commissioner takes possession of the merchant bank or the date the merchant bank is ordered into receivership or conservatorship.

(b) A preference in a transfer or grant of an interest in the property or assets of a merchant bank shall be deemed to occur when:

(1) There is an intent to hinder, delay, or defraud an entity to which, on or after the date that the transfer or grant of interest was made, the merchant bank was or became indebted; or

(2) Less than a reasonably equivalent value is obtained by the merchant bank in exchange for the transfer or grant of interest if the merchant bank was insolvent when the transfer or grant of interest was made or if the merchant bank became insolvent as a result of the transfer or grant of interest.

(c) Notwithstanding any other provision of this chapter, the Commissioner or the receiver shall not void an otherwise voidable transfer under this section if:

(1) The transfer or lien does not exceed \$1,000 in value;

(2) The transfer or lien was received in good faith by a person who is not a [sic] described in subsection (a)(1) of this section and who gave value in exchange for the transfer or lien; or

(3) The transfer or lien was intended by the merchant bank and the transferee or lien holder to be, and in fact substantially was, a contemporaneous exchange for new value given to the merchant bank.

(d) A person acting on behalf of the merchant bank who knowingly participated in making or implementing a voidable transfer or lien, and each person receiving property or assets, or the benefit of property or assets, of the merchant bank as a result of a voidable transfer or lien, shall be personally liable for the property, assets, or benefit received and shall account to the receiver for the benefit of the merchant bank.

(June 9, 2001, D.C. Law 13-308, § 316, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

§ 26-831.17. Maintenance and disposal of records by receiver.

(a) With the approval of the Superior Court, a receiver may dispose of

records of the merchant bank in receivership that are obsolete and unnecessary to the continued administration of the receivership.

(b) The receiver may retain the records of the merchant bank and the receivership for a period of time that the receiver considers appropriate or for a period of time as ordered by the Superior Court.

(c) The receiver may devise a method for the effective, efficient, and economical maintenance of the records of the merchant bank and of the receiver's office, including maintaining the records on any medium approved by the Superior Court.

(d) The receiver may use assets of a merchant bank to:

(1) Procure services to maintain the records of a liquidated merchant bank; or

(2) Pay fees, as established by the Commissioner, to the Commissioner necessary for the Commissioner to procure services to maintain the records of a liquidated merchant bank.

(June 9, 2001, D.C. Law 13-308, § 317, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

§ 26-831.18. Conservator; appointment; bond and security; qualifications; expenses.

(a) If any of the grounds under § 26-833.12 authorizing the request for the appointment of a receiver exist or if the Commissioner determines that it is necessary to conserve the assets of a merchant bank for the benefit of the depositors, investors, or other creditors of the bank or for the benefit of the general public, the Commissioner may petition the Superior Court to appoint a conservator for a merchant bank.

(b) The Department shall be reimbursed out of the assets of the conservatorship, for all sums expended by the Department in connection with the conservatorship.

(c) All expenses of a conservatorship shall be paid out of the assets of the merchant bank upon the approval of the Commissioner, shall be a first charge upon the assets of the merchant bank, and shall be paid in full before a final distribution or payment of dividends to creditors or shareholders of the merchant bank.

(June 9, 2001, D.C. Law 13-308, § 318, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

§ 26-831.19. Conservator; rights, powers, and privileges.

(a) Under the supervision of the Commissioner, the conservator shall take possession of the books, records, and assets of the bank and shall take any action necessary to conserve the assets of the merchant bank pending further disposition of the business of the merchant bank as provided by law.

(b) Subject to Superior Court approval and under the supervision of the Commissioner, a conservator shall:

(1) Take possession of the books, records, and assets of the merchant bank and collect all debts, dues, and claims belonging to the merchant bank;

(2) Sue, defend, compromise, arbitrate, or otherwise settle all claims involving the merchant bank;

(3) Sell real and personal property if necessary to conserve the assets of the merchant bank;

(4) Exercise all fiduciary functions of the merchant bank;

(5) Pay all administrative expenses of the conservatorship, which expenses shall be a first charge upon the assets of the merchant bank and shall be fully paid before a final distribution or payment of dividends to creditors or shareholders;

(6) Pay the debts of the merchant bank if the conservator determines that payment of the debts is in the best interests of the merchant bank;

(7) Have all the powers of the directors, officers, and shareholders of the merchant bank as necessary to support an action taken on behalf of the merchant bank; and

(8) Hold title to all the bank's property, contracts, and rights of action.

(c) Subject to Superior Court approval and under the supervision of the Commissioner, a conservator may:

(1) Employ agents, legal counsel, accountants, appraisers, consultants, and other personnel, including, with the prior written approval of the Commissioner, personnel of the Department, that the conservator considers necessary or expedient to assist in the performance of the conservator's duties; provided, that the expense of employing Department personnel shall be an administrative expense of the liquidation that shall be payable to the Department; or

(2) Exercise any other power and duty authorized by the Superior Court.

(d) Unless otherwise provided by law, a conservator, other than a conservator who is an employee of the Department and acting in his or her official capacity, may be required to post a bond in an amount to be determined by the Superior Court.

(e) The conservator shall, on a regular basis, report to the Commissioner regarding all matters involving the conservatorship.

(June 9, 2001, D.C. Law 13-308, § 319, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

§ 26-831.20. Authority of conservator to borrow money; purpose.

(a) With the prior approval of the Commissioner, the conservator of a merchant bank may borrow money to aid in the operation, reorganization, or liquidation of the bank, including the payment of liquidating dividends.

(b) With the prior approval of the Commissioner, the conservator may

secure money borrowed under subsection (a) of this section by the pledge, hypothecation, or mortgage of the assets of the merchant bank.

(June 9, 2001, D.C. Law 13-308, § 320, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

§ 26-831.21. Termination of conservatorship.

(a) If the Commissioner determines that termination of the conservatorship and resumption of the transaction of the merchant bank's business by the merchant bank can be achieved and maintained in a safe and sound manner and is otherwise in the public interest, the Commissioner may petition the Superior Court to terminate a conservatorship and permit the merchant bank to resume the transaction of its business, subject to terms, conditions, restrictions, and limitations as the Commissioner determines are appropriate.

(b) If the Superior Court determines that reasons for the conservatorship no longer exist, the Superior Court may dissolve the conservatorship and terminate any pending proceedings.

(c) If the Commissioner determines that it would be in the public interest, the Commissioner may petition the Superior Court for termination of a conservatorship and appointment of a receiver for the merchant bank under § 26-833.12.

(June 9, 2001, D.C. Law 13-308, § 321, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

Subchapter VI. Miscellaneous Provisions.

§ 26-831.22. Rules.

The Commissioner may prescribe rules governing the activities of merchant banks and implementing this chapter pursuant to subchapter I of Chapter 5 of Title 2. The rules shall take into account the objective of merchant banks to provide needed capital to businesses and the nondepository nature of merchant banks.

(June 9, 2001, D.C. Law 13-308, § 322, 48 DCR 3244.)

Cross references. — Financial institutions organized under federal law, application of District law, see § 26-710.

Secured transactions, sales of accounts and chattel paper, security interest, attachment

and enforceability, transactions remain subject to this chapter, see § 28:9-203.

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-833.01.

CHAPTER 9. MONEY LENDERS; LICENSES.

Sec.	Sec.
26-901. Businesses required to procure license and pay tax; appointment of resident agent; service of process or notice.	and receipts furnished borrower; amount of loans; violations.
26-902. Applications for license — Contents; grant; notice of filing; protest and hearing; power to reject.	26-906. Complaints; investigation; suspension, revocation, or denial of license.
26-903. Applications for license — Bond; actions thereon; use of certified copy; renewal and refiling.	26-907. Violations.
26-904. Register to be kept; contents; inspection; annual statements.	26-908. Fees allowed on foreclosure.
26-905. Maximum rate of interest; fees and charges covered; deduction from principal prohibited; statement	26-909. Penalty provisions in contracts prohibited.
	26-910. Exemption of certain persons and businesses; service of process thereupon.
	26-911. Enforcement; rules and regulations.
	26-912. Exemption of certain loans; severability.

§ 26-901. Businesses required to procure license and pay tax; appointment of resident agent; service of process or notice.

(a) It shall be unlawful and illegal to engage in the District of Columbia in the business of loaning money upon which a rate of interest greater than 6% per annum is charged on any security of any kind, direct or collateral, tangible or intangible, without procuring license; and all persons, firms, voluntary associations, joint-stock companies, incorporated societies, and corporations engaged in said business shall pay a license tax of \$500 per annum to the District of Columbia. No license shall be granted to any person, firm, or voluntary association unless such person and the members of any such firm or voluntary association shall be bona fide residents of the District of Columbia, and no license shall be granted for a period longer than 1 year, and no license shall be granted to any joint-stock company, incorporated society, or corporation unless and until such company, society, or corporation shall, in writing and in due form, to be first approved by and filed with the Mayor of the District of Columbia, appoint an agent, resident in the District of Columbia, upon whom all judicial and other process or legal notice directed to such company, society, or corporation may be served. And in the case of death, removal from the District, or any legal disability or disqualification of any such agent, service of such process or notice may be made upon the Director of the Department of Licenses, Investigation and Inspections of the District of Columbia.

(b) Any license issued pursuant to this section shall be issued as a Financial Services endorsement to a basic business license under the basic business license system as set forth in subchapter I-A of Chapter 28 of Title 47 of the District of Columbia Official Code.

(Feb. 4, 1913, 37 Stat. 657, ch. 26, § 1; Mar. 3, 1917, 39 Stat. 1006, ch. 160; Apr. 20, 1999, D.C. Law 12-261, § 2003(r), 46 DCR 3142; Oct. 28, 2003, D.C. Law 15-38, § 3(q), 50 DCR 6913.)

Section references. — This section is referred to in §§ 26-710 and 28-3303.

Prior Codifications. — 1981 Ed., § 26-701. 1973 Ed., § 26-601.

Effect of amendments. — D.C. Law 15-38, in subsec. (b), substituted “Financial Services endorsement to a basic business license under the basic” for “Class A Financial Services endorsement to a master business license under the master”.

Emergency legislation. — For temporary (90 day) amendment of section, see § 3(q) of Streamlining Regulation Emergency Act of 2003 (D.C. Act 15-145, August 11, 2003, 50 DCR 6896).

Legislative history of Law 12-261. — Law 12-261, the “Second Omnibus Regulatory Reform Amendment Act of 1998,” was introduced in Council and assigned Bill No. 12-845, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 1, 1998, and December 15, 1998, respectively. Signed by the Mayor on December 31, 1998, it was assigned Act No. 12-615 and transmitted to both Houses of Congress for its review. D.C. Law 12-261 became effective on April 20, 1999.

Legislative history of Law 15-38. — Law 15-38, the “Streamlining Regulation Act of 2003,” was introduced in Council and assigned Bill No. 15-19, which was referred to Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on June 3, 2003, and July 8, 2003, respectively. Signed by the Mayor on August 11, 2003, it was assigned Act No. 15-146 and transmitted to both Houses of Congress for its review. D.C.

Law 15-38 became effective on October 28, 2003.

Transfer of Functions. — All functions of the Superintendent of Licenses were transferred to the Director of the Department of Economic Development by Commissioner’s Order No. 69-96, dated March 7, 1969. The Department of Economic Development was replaced by the Department of Licenses, Investigation and Inspection by Mayor’s Order No. 78-42, dated February 17, 1978.

The functions of the Department of Licenses, Investigations, and Inspections were transferred to the Department of Consumer and Regulatory Affairs by Reorganization Plan No. 1 of 1983, effective March 31, 1983.

Change in Government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

CASE NOTES

ANALYSIS

Avoidance of illegal loans.
Charges and commissions.
Construction and application.
Defenses.
Evidence.
Foreclosure.
Holder in due course status.
Insurance companies as lenders.
Law governing.
Protected persons.
Public policy considerations.
Reformation of unlawful note.
Remedies.
Summary judgment.
Time for commencing actions.

Avoidance of illegal loans.

Defense in violation of District of Columbia Loan Shark Act can be used only against those unlicensed, nonexempt lenders who actually

contract for or receive interest in excess of 6%. D.C. Code § 26-601 et seq. In re Parkwood, Inc., 461 F.2d 158, 1971 U.S. App. LEXIS 7189 (C.A.D.C. 1971).

Borrowing corporation which entered into allegedly usurious loan contract, illegal in that lender failed to comply with license requirement could recover damages sustained because of illegal contract unless lender could establish an adequate affirmative defense. D.C. Code 1961, §§ 26-601 to 26-611, 26-605. Indian Lake Estates, Inc. v. Ten Individual Defendants, 350 F.2d 435, 1965 U.S. App. LEXIS 4726 (C.A.D.C. 1965), writ of certiorari denied by 383 U.S. 947, 86 S. Ct. 1199, 16 L. Ed. 2d 209, 1966 U.S. LEXIS 2056 (1966).

Under Loan Shark Law requiring license of persons engaged in business of loaning money at interest rate greater than 6% per annum, borrower is not in pari delicto with lender and his participation with him in making loan does

not bar borrower from asserting illegality of loan. D.C. Code 1951, § 26-601. *Royall v. Yudelevit*, 268 F.2d 577, 1959 U.S. App. LEXIS 3744 (C.A.D.C. 1959).

Defense that contract violates Loan Shark Law is available, not only against the nominal maker of the loan, but against the principal for whom he acts and against the holder of an instrument given to secure payment of loan, if the holder knew of its illegality. D.C. Code 1940, § 26-601 et seq. *Hartman v. Lubar*, 133 F.2d 44, 1942 U.S. App. LEXIS 2457 (1942).

Where buyer bought automobile from dealer under conditional sales contract reserving title in dealer "or assigns", and gave a note for unpaid balance of purchase price, and note and contract were transferred to finance company, and company then delivered them to bank with a "without recourse" endorsement on note, and buyer defaulted in payments on note and abandoned automobile which was sold at a metropolitan police auction of abandoned property, and bank brought suit against the District of Columbia to reach proceeds of sale, it was incumbent on the District of Columbia to prove that claim was barred on ground that transaction was in violation of the Loan Shark Law. D.C. Code 1940, § 26-601. *District of Columbia v. Hamilton Nat. Bank of Wash.*, 76 A.2d 60, 1950 D.C. App. LEXIS 176 (Cr.App. 1950).

Where buyer bought automobile from dealer under conditional sales contract reserving title in dealer "or assigns", and gave a note for unpaid balance of purchase price, and note and contract were transferred to finance company, and company then delivered them to bank with a "without recourse" endorsement on note, and buyer defaulted in payments on note and abandoned automobile which was sold at a metropolitan police auction of abandoned property, and bank brought suit against the District of Columbia to reach the proceeds of the sale, defense of the District of Columbia that claim was barred on ground that the transaction violated the Loan Shark Law was ineffectual, in absence of proof that bank had knowledge of any usurious taint to original transaction. D.C. Code 1940, § 26-601. *District of Columbia v. Hamilton Nat. Bank of Wash.*, 76 A.2d 60, 1950 D.C. App. LEXIS 176 (Cr.App. 1950).

Where there was evidence that indorsee finance company for which trustee brought replevin suit to recover chattels named in chattel trust deed securing a note was in the business of lending money rather than solely that of discounting notes in the sense of buying from a creditor an existing obligation at less than face value, proffered evidence consisting of court trials of five municipal court cases in which finance company sued to recover on notes assigned to it was material to defendant's defense that finance company was in business of lending money at rate of interest greater than 6 per

cent. without required license and should have been admitted. D.C. Code 1940, §§ 26-601 to 26-611. *Hartman v. Lubar*, 49 A.2d 553, 1946 D.C. App. LEXIS 172 (Cr.App. 1946).

Charges and commissions.

Where no legal insurance was obtained on automobile by lending agency when contract was executed under which charge was exacted which made the total more than 6 percent annually on amount loaned, even though part of the charge was called an "insurance premium", the charge was for "interest", and lending agency violated statute making it unlawful to engage in business of loaning money at rate greater than 6 percent per annum on any security without procuring a license. D.C. Code 1940, § 26-601 et seq. *Columbia Auto Loan v. District of Columbia*, 193 F.2d 34, 1951 U.S. App. LEXIS 2856 (C.A.D.C. 1951).

Commission paid by a borrower to a loan broker for obtaining a loan from a third person does not constitute usury. D.C. Code 1961, §§ 26-601 to 26-611, 28-2703 et seq., 47-1701 et seq. *Oliver v. United Mortg. Co.*, 230 A.2d 722, 1967 D.C. App. LEXIS 172 (App. 1967).

Even if loan broker had advanced his own funds to borrower, but had done so for convenience only and with expectation of reimbursing himself promptly from funds supplied by lender, broker who had retained commission for that service was not liable to borrower for allegedly usurious interest on ground that broker was principal on loan. D.C. Code 1961, §§ 26-601 to 26-611, 28-2703 et seq., 47-1701 et seq. *Oliver v. United Mortg. Co.*, 230 A.2d 722, 1967 D.C. App. LEXIS 172 (App. 1967).

Construction and application.

Decision that District of Columbia Loan Shark Act applied to loans originated by mortgage bankers would not be limited to prospective application. D.C. Code § 26-601 et seq. In re *Parkwood, Inc.*, 461 F.2d 158, 1971 U.S. App. LEXIS 7189 (C.A.D.C. 1971).

Though District of Columbia Loan Shark Act of 1913 was primarily intended to regulate and limit business of making small loans for security, such Act does have application to loans in excess of \$200. D.C. Code §§ 26-601 et seq., 26-601, 26-605, 26-610, 28-3303. In re *Parkwood, Inc.*, 461 F.2d 158, 1971 U.S. App. LEXIS 7189 (C.A.D.C. 1971).

"Loan shark law" making it illegal to engage in business of loaning money without procuring a license is a licensing statute, unrelated to and unaffected by usury statutes. D.C. Code 1961, §§ 26-601 to 26-611, 28-2703. *Indian Lake Estates, Inc. v. Ten Individual Defendants*, 350 F.2d 435, 1965 U.S. App. LEXIS 4726 (C.A.D.C. 1965), writ of certiorari denied by 383 U.S. 947, 86 S. Ct. 1199, 16 L. Ed. 2d 209, 1966 U.S. LEXIS 2056 (1966).

The Loan Shark Law, the usury law and the statute regarding financial institutions are to be read together and when so read constitute a comprehensive code for business of lending money in the District of Columbia. D.C. Code 1940, §§ 26—601 et seq., 28—2703, 47—1701 to 47—1709. *Hartman v. Lubar*, 133 F.2d 44, 1942 U.S. App. LEXIS 2457 (1942).

The Loan Shark Law making it unlawful to engage in business of loaning money upon which a rate of interest greater than six per cent per annum is charged on any security of any kind without procuring a license has application to a loan larger than \$200. D.C. Code 1940, § 26-601 et seq. *Hartman v. Lubar*, 133 F.2d 44, 1942 U.S. App. LEXIS 2457 (1942).

Nonresident plaintiff making occasional loans on realty held not engaged "in the business" of loaning money in District within Loan Shark Law (D.C. Code 1929, T. 17, § 25). *Zirkle v. Daly*, 54 F.2d 455, 1931 U.S. App. LEXIS 3935 (1931).

Under District of Columbia law, substance, rather than form, determines whether usury or loan sharking laws, civil or criminal, apply to a particular transaction. *Juergens v. Urban Title Servs., Inc.*, 246 F.R.D. 4, 2007 U.S. Dist. LEXIS 38002 (2007).

Only act of lender, not borrower, may be illegal under Loan Shark Law. D.C. Code § 26-601. *Shulman v. Ritzenberg*, 47 F.R.D. 202, 1969 U.S. Dist. LEXIS 13521 (D.D.C.1969).

The usury statute, and the loan shark statute which imposes licensing requirements on those in the business of lending money, read together, as the lawmakers intended, constitute a comprehensive code for the business of lending money in the District of Columbia. *Rivera v. Schlick*, 887 A.2d 492, 2005 D.C. App. LEXIS 634 (2005).

Loan of nearly \$700 was not a "small loan" within Loan Shark Law, which provides that person violating the provisions of the law shall forfeit all interest, and in addition a sum equal to one-fourth of the principal sum. D.C. Code 1940, §§ 26-601 to 26-611. *Knott v. Jackson*, 31 A.2d 662, 1942 D.C. App. LEXIS 33 (Cr.App. 1942).

The Loan Shark Law is not a usury statute, but an act licensing, under limitations and restrictions, the lending of money in small sums on personal security, and was intended to apply only to persons making small loans on personal security. D.C. Code 1940, §§ 26-601 to 26-611. *Knott v. Jackson*, 31 A.2d 662, 1942 D.C. App. LEXIS 33 (Cr.App. 1942).

Defenses.

Though it is permissible for defendant to come as close to the line as he could without violating Act Feb. 4, 1913, 37 Stat. 657, requiring a license for pawnbrokers doing business within the District of Columbia, his intent not

to break the law is no defense, if his conduct in fact violated the law because he misconceived its meaning. *Horning v. District of Columbia*, 41 S.Ct. 53, 1920 U.S. LEXIS 1200 (U.S. Dist. Col. 1920).

Evidence.

Undisputed evidence that defendant stored and returned pledged property within the District, though he transported the applicants for loans out of the District before making the loan or receiving the property, shows that he was doing business within the District, since an essential part of it was done there, and Act Feb. 4, 1913, 37 Stat. 657, requiring license from pawnbrokers within the District, is not limited to cases where the whole business is done therein. *Horning v. District of Columbia*, 41 S.Ct. 53, 1920 U.S. LEXIS 1200 (U.S. Dist. Col. 1920).

Where lender of approximately \$900 took from borrower note for \$1,000 payable in \$20 weekly installments and secured by chattel trust deed, in replevin suit by trustee of endorsee finance company to recover the chattel, evidence that lender was principal stockholder and president of endorsee company, that trustee was officer of and counsel for the company, that loan was actually made by the company and that the company was engaged in business of lending money in District of Columbia at an interest rate greater than six per cent without having procured a license was admissible to show illegality of the transaction and the resulting absence of title in trustee. D.C. Code 1940, § 26-601 et seq. *Hartman v. Lubar*, 133 F.2d 44, 1942 U.S. App. LEXIS 2457 (1942).

Evidence, in action by homeowners for rescission and restitution of money paid on second trust notes arising out of corporation's fraudulent home improvement scheme, failed to establish that licensed broker, who bought second trust notes from corporation and who sold such notes to defendant finance company, was anything but an "independent broker", and thus established, with regard to claims against company of Loan Shark Law violations and of illegal money lending, that company had made no loans. D.C. Code §§ 26-601 to 26-611, 28:3-305(2)(b). *Slaughter v. Jefferson Federal Sav. & Loan Assn.*, 361 F. Supp. 590, 1973 U.S. Dist. LEXIS 12565 (1973), reversed by 538 F.2d 397, 176 U.S. App. D.C. 49, 1976 U.S. App. LEXIS 8449, 1976 U.S. App. LEXIS 11596, 19 U.C.C. Rep. Serv. (CBC) 171, 19 U.C.C. Rep. Serv. (CBC) 534 (1976).

In suit by conditional buyer of automobile against seller and finance company, to which conditional sale agreement and note covering deferred purchase price were negotiated, to have agreement and note declared void and to recover money paid under agreement, evidence sustained finding that the transaction was a

sale and not a loan of money, and that therefore the sanctions of the Loan Shark Law did not apply. D.C. Code 1951, § 26-601 et seq. *Brooks v. Auto Wholesalers, Inc.*, 101 A.2d 255, 1953 D.C. App. LEXIS 194 (Cr.App. 1953).

Where it was established that lending agency in two instances violated statutes making it unlawful to "engage in business" of loaning money at rate greater than 6 percent per annum on any security without procuring a license, there was sufficient showing that agency did "engage in business" within meaning of statute. D.C. Code 1940, § 26-601 et seq. *Columbia Auto Loan v. District of Columbia*, 78 A.2d 857, 1951 D.C. App. LEXIS 137 (Cr.App. 1951).

Where defendant had subpoenas duces tecum served upon officers of indorsee finance company for which trustee was maintaining replevin suit to compel them to produce at trial all records regarding the company for purpose of showing that company was in business of lending money at rate of interest greater than 6 per cent. without required license, and officers failed to produce the records, jury could infer from failure to produce subpoenaed records that contents thereof would have been unfavorable to trustee's case. D.C. Code 1940, §§ 26-601 to 26-611. *Hartman v. Lubar*, 49 A.2d 553, 1946 D.C. App. LEXIS 172 (Cr.App. 1946).

Where borrowers contended that lender was engaged in business of loaning money within Loan Shark Law and that payee of note was but a straw party for the lender, trial court properly refused to admit in evidence against lender other notes payable to same payee, where witness testified that the payee lent money herself. D.C. Code 1940, §§ 26-601 to 26-611. *Knott v. Jackson*, 31 A.2d 662, 1942 D.C. App. LEXIS 33 (Cr.App. 1942).

Evidence that lender had made five loans was not sufficient to warrant finding that lender was engaged in the "business of loaning money" within Loan Shark Law. D.C. Code 1940, §§ 26-601 to 26-611. *Knott v. Jackson*, 31 A.2d 662, 1942 D.C. App. LEXIS 33 (Cr.App. 1942).

Foreclosure.

A lender in a loan contract which is merely usurious may not be liable in damages, but if there is added the fact that the lender was not licensed as required by law, loan contract is unlawful and void, and a foreclosure thereunder is wrongful and gives rise to action for damages suffered therefrom. D.C. Code 1951, § 26-601. *Royall v. Yudelevit*, 268 F.2d 577, 1959 U.S. App. LEXIS 3744 (C.A.D.C. 1959).

Where one takes note and deed of trust with notice or knowledge that transferor had obtained them through usurious loan contract made in violation of Loan Shark Law requiring license of lender, a foreclosure thereunder by

such person is unlawful and he is liable for damages caused thereby. D.C. Code 1951, § 26-601. *Royall v. Yudelevit*, 268 F.2d 577, 1959 U.S. App. LEXIS 3744 (C.A.D.C. 1959).

Where lender, not licensed as required by Loan Shark Law, grants usurious loan, and makes foreclosure possible by transfer of void note and deed of trust, lender is liable in damages resulting from foreclosure by his transferee, even if transferee was innocent throughout. D.C. Code 1951, § 26-601. *Royall v. Yudelevit*, 268 F.2d 577, 1959 U.S. App. LEXIS 3744 (C.A.D.C. 1959).

In action to recover for wrongful foreclosure of deed of trust, evidence was admissible to show that lender was doing business in violation of Loan Shark Law making it unlawful for person to engage in business of loaning money at interest rate greater than 6% per annum without procuring license. D.C. Code 1951, § 26-601. *Royall v. Yudelevit*, 268 F.2d 577, 1959 U.S. App. LEXIS 3744 (C.A.D.C. 1959).

Where used car dealer violated numerous fundamental provisions of District of Columbia regulations governing installment sales of motor vehicles, sale contract was illegal and "void" as that term is used in cases construing the District of Columbia "Loan Shark Law" and, therefore, the sale contract, being unenforceable, gave dealer no right to foreclose on the automobile. D.C. Code §§ 26-601 et seq., 40-901 et seq. *Vines v. Hodges*, 422 F. Supp. 1292, 1976 U.S. Dist. LEXIS 12780 (1976).

Where sellers of used car wrongfully foreclosed on car, buyers were entitled to damages therefor in the amount of payments they had made, minus rental value of car for period during which buyers used it and minus cost of towing car from point where it broke down, which cost sellers incurred at buyers' request. D.C. Code §§ 26-601 et seq., 40-901 et seq. *Vines v. Hodges*, 422 F. Supp. 1292, 1976 U.S. Dist. LEXIS 12780 (1976).

Illegality of contract may be used only as defense; and, therefore, even if deed of trust was illegal, for failure of lender to have license required of persons engaged in business of loaning money at interest rate greater than six per cent per annum, borrower could not recover for damage allegedly sustained by reason of wrongful foreclosure of deed of trust. D.C. Code 1951, § 26-601. *Royall v. Yudelevit*, 161 F.Supp. 217, 1958 U.S. Dist. LEXIS 2350 (D.D.C.1958).

If the disputed loan was made by one who was engaging in the business of lending money in violation of the loan shark law, and if the loan was made in the course of that business, then it constituted an illegal contract under the loan shark law, which imposes licensing requirements on those in the business of lending money, and thus, the lender has no recourse to enforce the contract. *Rivera v. Schlick*, 887 A.2d 492, 2005 D.C. App. LEXIS 634 (2005).

Plaintiff, which brought suit seeking cancellation of note and deed of trust or, in the alternative, revision of note and trust, and which could obtain the relief sought only by asserting and establishing the unconstitutionality of federal statute, was not entitled to issuance of a preliminary injunction restraining foreclosure pending final action on the complaint, since the statute upon which plaintiff was relying was presumptively constitutional and since plaintiff failed to establish a likelihood or probability of success on the merits. D.C. Code §§ 26-601 et seq., 26-612. *Murray Co. v. National Mortg. Corp.*, 299 A.2d 147, 1973 D.C. App. LEXIS 213 (1973).

Holder in due course status.

Where it appeared on face of note and deed of trust that loan was made at over 6% rate of interest, loan was shown on the face to be payable in Washington, D.C., it was stated on note that lender was certain corporation "of Washington, D.C." and purchaser of note and deed of trust knew that such corporation was engaged in making such loans in District of Columbia, even if security instrument given in violation of District of Columbia Loan Shark Act is merely voidable rather than void, purchaser was not a holder in due course. D.C. Code §§ 26-601, 26-610, 28:3-102 et seq., 28:3-302(1)(C), 28:3-307(3). In *re Parkwood, Inc.*, 461 F.2d 158, 1971 U.S. App. LEXIS 7189 (C.A.D.C. 1971).

Insurance companies as lenders.

District of Columbia Loan Shark Act is applicable to loans made by life insurance companies in regular course of their business and thus such companies, until 1963, were not exempt from requirement of obtaining license in order to make loans at rate of interest in excess of 6%, notwithstanding contentions that Act does not apply to insurance companies which "invest" their funds by making loans secured by real estate, that, in view of comprehensive regulation of insurance companies under certain title of District of Columbia Code, they cannot be subject to licensing regulation of lending activities under Act, and that Act is not intended to apply to large loans made by "institutional lenders" and secured by real estate. D.C. Code §§ 26-601, 26-610, 26-610(a), 28-3301, 35-105, 35-535, 35-535(14)(f), 47-1574, 47-1806. In *re Parkwood, Inc.*, 461 F.2d 158, 1971 U.S. App. LEXIS 7189 (C.A.D.C. 1971).

Where insurance company, which made a loan to prior owners of hotel for purpose of providing funds for refinancing hotel property and for refurbishing and renovating the hotel, at all pertinent times was licensed to do business in the District of Columbia under the Life Insurance Act, the company was exempt from the licensing requirements of the Money Lend-

ers Act. D.C. Code §§ 26-601, 26-610(a), 28-3301, 35-301 et seq. *National Life Ins. Co. v. Silverman*, 454 F.2d 899, 1971 U.S. App. LEXIS 11212 (C.A.D.C. 1971).

Law governing.

Where all documents involved in transaction wherein loan was obtained from lender, which maintained office in District of Columbia for selling insurance, in exchange for promissory note carrying 6 ¼ % interest and deed of trust on real estate were executed in Maryland, deed of trust was recorded in Maryland, and funds were received by borrower of Maryland corporation in Maryland, Maryland law was applicable to transaction, and thus District of Columbia Loan Shark Act was not applicable, though it was asserted that, subsequent to making of such loans, certain entity, which serviced such loans in district, was held out to represent lender in making of loans in district. Code Md.1957, art. 58A, § 1 et seq.; D.C. Code § 26-601 et seq. In *re Parkwood, Inc.*, 461 F.2d 158, 1971 U.S. App. LEXIS 7189 (C.A.D.C. 1971).

Where loans were negotiated in District of Columbia, made with District of Columbia money by business firms headquartered and regularly doing loan business both in and out of District and such loans were specifically repayable in District, District of Columbia law, and in particular, District's Loan Shark Act, was applicable to transactions. D.C. Code § 26-601 et seq. In *re Parkwood, Inc.*, 461 F.2d 158, 1971 U.S. App. LEXIS 7189 (C.A.D.C. 1971).

Protected persons.

A borrower is member of class for whose protection statute, requiring license of persons engaged in business of loaning money at interest rate greater than 6% per annum, was enacted. D.C. Code 1951, § 26-601. *Royall v. Yudelevit*, 268 F.2d 577, 1959 U.S. App. LEXIS 3744 (C.A.D.C. 1959).

Lender of money to borrower and his business partners so they could renovate a house and then resell it was not in the business of lending money, and thus, lender was not subject to the loan shark law, which imposed licensing requirements on those in the business of lending money; lender testified that neither he nor his part-time real estate development company was in the business of providing loans to anyone and that the loans to borrower for the renovation project were the "first and last time" he would do so. *Rivera v. Schlick*, 887 A.2d 492, 2005 D.C. App. LEXIS 634 (2005).

Class of persons protected by laws proscribing usury and loan sharking consist essentially by definition, of individuals who, as result of their financial plight, have improvidently made arrangements so unconscionable that enforcement is unwarranted. D.C. Code 1981, § 26-

701. *Browner v. District of Columbia*, 549 A.2d 1107, 1988 D.C. App. LEXIS 202 (1988).

Public policy considerations.

If title insurance policy insuring lender and its successors in interest against any defect in execution of deed of trust covered loss caused by lender's violation of Loan Shark Act, enforcement of the policy by successor in interest would not contravene public policy, where successor in interest should have known that loan transaction violated Loan Shark Act, but could not have had subjective knowledge of any violation. D.C. Code § 26-601. *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

Every consideration of "public policy" suggests that a contract made in violation of the Loan Shark Law should be unenforceable. D.C. Code 1940, § 26-601 et seq. *Hartman v. Lubar*, 133 F.2d 44, 1942 U.S. App. LEXIS 2457 (1942).

Reformation of unlawful note.

Remand would be required, in proceeding on appeal from denial of objections by trustee in reorganization of corporation under Chapter X of Bankruptcy Act to allowance of certain secured claims, for purpose of determining whether effect of claim to prior agreement between borrower, which sold property to corporation subject to deed of trust securing note, and claimant, which had purchased note from lender, to reform note to provide for interest at rate of 6% was to render note, which had originally been in violation of District of Columbia Loan Shark Act, valid and enforceable, though interest had assertedly been paid on note at rate of 6 ¼ % prior to claimant's purchase of note. *Bankr. Act*, § 101 et seq., 11 U.S.C. § 501 et seq.; D.C. Code § 26-601. *In re Parkwood, Inc.*, 461 F.2d 158, 1971 U.S. App. LEXIS 7189 (C.A.D.C. 1971).

Remedies.

A borrower who enters into a usurious contract, void because lender violated Loan Shark Law for not having license, may recover from lender any damages sustained by reason of such void contract. D.C. Code 1951, § 26-601. *Royall v. Yudelevit*, 268 F.2d 577, 1959 U.S. App. LEXIS 3744 (C.A.D.C. 1959).

Borrower under usurious loan contract made in violation of statute requiring license of lender had right to elect whether to go into equity and ask that foreclosure sale, caused by transferee of void note and deed of trust, be set aside, or to let sale stand and ask for damages. D.C. Code 1951, § 26-601. *Royall v. Yudelevit*, 268 F.2d 577, 1959 U.S. App. LEXIS 3744 (C.A.D.C. 1959).

Summary judgment.

Assuming original contracts and engagements were illegal and void because of violation

of usury statutes and "loan shark law," claims of complaint that parties entered into agreements purporting to settle and compromise original contracts and engagements and that settlement agreements did not eliminate illegality presented complex issues of fact and law and mixed questions of law and fact not susceptible of disposition by summary judgment. D.C. Code 1961, §§ 26-601, 28-2703. *Indian Lake Estates, Inc. v. Lichtman*, 311 F.2d 776, 1962 U.S. App. LEXIS 3293 (C.A.D.C. 1962).

Time for commencing actions.

Where lender's transferee purchased note and deed of trust in 1961, all installments due were paid until 1966 when borrower's grantee filed petition for reorganization, transferee filed a proof of claim later that year, trustee in bankruptcy objected to the claim in 1968 on ground that the loan was made in violation of Loan Shark Act, and loan and accompanying deed were declared void in 1971, action instituted by transferee in December, 1972 to recover its loss from lender was not barred by District of Columbia three-year limitation period for actions based on contract, despite argument that transferee's claim accrued when it purchased the note and deed. D.C. Code §§ 12-301(7), 26-601 et seq. *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

In light of 1971 Court of Appeals decision invalidating loan as being in violation of Loan Shark Law, lender's transferee, which had purchased note and deed of trust, would have been better advised to proceed immediately against lender in 1968 when trustee in bankruptcy for borrower's grantee objected to transferee's proof of claim on ground that loan violated Loan Shark Act, rather than engaging in a protracted and ultimately futile legal battle with the trustee, but it would be grossly inequitable to determine that transferee's cause of action against lender accrued in 1968 prior to the Court of Appeals' decision. D.C. Code § 26-601 et seq. *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

Lender's transferee's proposed second amended complaint of June, 1973 alleging that until 1973 lender fraudulently concealed from transferee the fact that lender was concerned, before loan was entered into in 1960, that such a loan might violate Loan Shark Act was not barred by statute of limitations, where there was no indication that transferee should have learned of lender's alleged conduct any earlier than it did. D.C. Code § 26-601 et seq. *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

§ 26-902. Applications for license — Contents; grant; notice of filing; protest and hearing; power to reject.

Applications for license to conduct such business must be made in writing to the Mayor of the District of Columbia, and shall contain the full names and addresses of applicants, if natural persons, and in the case of firms and voluntary associations, the full names and addresses of all the members thereof, and in the case of joint-stock companies, incorporated societies, and corporations, the full names and addresses of the officers and directors thereof and under what law or laws organized or incorporated, and the place where such business is to be conducted, and such other information as the said Mayor may require. Every license granted shall date from the 1st of the month in which it is issued and expire on the 31st day of the following October, and such license shall be kept conspicuously displayed in the place of business of the licensee. Every application shall be filed not less than 30 days prior to the granting of such license, and notice of the filing of such application shall be posted in the office of the Director of the Department of Licenses, Investigation and Inspections of the said District and be published twice a week for 3 successive weeks in a daily newspaper published in the District of Columbia. Protest may be made by any person to the issuing of such license, and when such protests are filed with the said Mayor the latter shall give public notice of and hold a public hearing upon such protests before issuing such license. The said Mayor shall have the power to reject any application for license after a hearing upon such protest or for failure on the part of the applicant to observe this chapter, or when such applicant shall have violated its provisions.

(Feb. 4, 1913, 37 Stat. 657, ch. 26, § 2; Mar. 3, 1917, 39 Stat. 1006, ch. 160.)

Section references. — This section is referred to in §§ 26-710 and 28-3303.

Prior Codifications. — 1981 Ed., § 26-702. 1973 Ed., § 26-602.

Transfer of Functions. — All functions of the Superintendent of Licenses were transferred to the Director of the Department of Economic Development by Commissioner's Order No. 69-96, dated March 7, 1969. The Department of Economic Development was replaced by the Department of Licenses, Investigation and Inspection by Mayor's Order No. 78-42, dated February 17, 1978.

Change in Government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of

Columbia and its Various Forms of Government Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act. 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

§ 26-903. Applications for license — Bond; actions thereon; use of certified copy; renewal and refiling.

Each application shall be accompanied by a bond to the District of Columbia in the penal sum of \$5,000, with 2 or more sufficient sureties, and conditioned that the obligor will not violate any law relating to such business. The execution of any such bond by a fidelity or surety company authorized by the laws of the United States to transact business therein shall be equivalent to the execution thereof by 2 sureties, and such company, if excepted to, shall justify in the manner required by law of fidelity and surety companies. If any person shall be aggrieved by the misconduct of any such licensed person, firm, voluntary association, joint-stock company, incorporated society, or corporation, or by his, their, or its violation of any law relating to such business, and shall recover a judgment therefor, such person or his personal representative or heirs or distributees may, after a return unsatisfied either in whole or in part of any execution issued upon such judgment, maintain an action in his own name upon such bond herein required in any court having jurisdiction of the amount claimed. The Mayor of the District of Columbia shall furnish to anyone applying therefor a certified copy of any such bond filed with him, upon the payment of a fee of \$.25, and such certified copy shall be prima facie evidence in any court that such bond was duly executed and delivered by the person, firm, voluntary association, joint-stock company, incorporated society, or corporation whose names appear thereon. Said bond shall be renewed and refiled annually in October of each year, or the licensed person, firm, voluntary association, joint-stock company, incorporated society, or corporation shall within 30 days thereafter, cease doing business, and their license shall be revoked by the said Mayor, but said bond until renewed and refiled as aforesaid shall be and remain in full force and effect. The Mayor may waive the bonding requirements of this section, if alternative surety arrangements are secured, in cases involving parties specified in § 26-910.

(Feb. 4, 1913, 37 Stat. 658, ch. 26, § 3; Apr. 9, 1997, D.C. Law 11-171, § 2(a), 43 DCR 4484.)

Section references. — This section is referred in §§ 26-710 and 28-3303.

Prior Codifications. — 1981 Ed., § 26-703. 1973 Ed., § 26-603.

Emergency legislation. — For temporary amendment of section, see § 2(a) of the Community Development Corporations Money Lender License Tax Exemption Congressional Recess Emergency Amendment Act of 1996 (D.C. Act 11-399, October 9, 1996, 43 DCR 5695), § 2(a) of the Community Development Corporations Money Lender License Tax Exemption Congressional Review Emergency Amendment Act of 1996 (D.C. Act 11-473, December 30, 1996, 44 DCR 195), and § 2(a) of the Community Development Corporations Money Lender License Tax Exemption Congressional

Review Emergency Amendment Act of 1997 (D.C. Act 12-54, March 31, 1997, 44 DCR 2216).

Legislative history of Law 11-171. — Law 11-171, the “Community Development Corporations Money Lender License Tax Exemption Amendment Act of 1996,” was introduced in Council and assigned Bill No. 11-473, which was referred to the Committee on Economic Development. The Bill was adopted on first and second readings on June 4, 1996, and July 3, 1996, respectively. Signed by the Mayor on July 19, 1996, it was assigned Act No. 11-318 and transmitted to both Houses of Congress for its review. D.C. Law 11-171 became effective on April 9, 1997.

Change in Government. — This section originated at a time when local government

powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat.

818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

§ 26-904. Register to be kept; contents; inspection; annual statements.

Every person, firm, voluntary association, joint-stock company, incorporated society, or corporation conducting such business shall keep a register, approved by said Mayor, showing in English, the amount of money loaned, the date when loaned and when due, the person to whom loaned, the property or thing named as security for the loan, where the same is located and in whose possession, the amount of interest, all fees, commissions, charges, and renewals charged, under whatever name. Such register shall be open for inspection to the said Mayor, his officers and agents, on every day, except Sundays and legal holidays, between the hours of 9:00 in the forenoon and 5:00 in the afternoon. Every such person, firm, voluntary association, joint-stock company, incorporated society, or corporation conducting such business shall, on or before the 20th day of January of each year, make to the said Mayor an annual statement in the form of a trial balance of its books on the 31st day of December in each year, specifying the different kinds of its liabilities and the different kinds of its assets, stating the amount of each, together with such other information as may be called for.

(Feb. 4, 1913, 37 Stat. 658, ch. 26, § 4.)

Section references. — This section is referred to in §§ 26-710 and 28-3303.

Prior Codifications. — 1981 Ed., § 26-704. 1973 Ed., § 26-604.

Change in Government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners

under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

§ 26-905. Maximum rate of interest; fees and charges covered; deduction from principal prohibited; statement and receipts furnished borrower; amount of loans; violations.

No such person, firm, voluntary association, joint-stock company, incorporated society, or corporation shall charge or receive a greater rate of interest upon any loan made by him or it that exceeds the lawful rate in the District of Columbia set by Chapter 33 of Title 28 on the actual amount of the loan, and this charge shall cover all fees, expenses, demands, and services of every character, including notarial and recording fees and charges, except upon the foreclosure of the security. The foregoing interest shall not be deducted from the principal of loan when same is made. Every such person, firm, voluntary association, joint-stock company, incorporated society, or corporation conducting such business shall furnish the borrower a written, typewritten, or printed statement at the time the loan is made, showing, in English, in clear and distinct terms, the amount of the loan, the date when loaned and when due, the person to whom the loan is made, the name of the lender, the amount of interest charged, and the lender shall give the borrower a plain and complete receipt for all payments made on account of the loan at the time such payments are made. No such loan greater than \$200 shall be made to any 1 person; provided, that any person contracting, directly or indirectly, for, or receiving a greater rate of interest than that fixed in this chapter, shall forfeit all interest so contracted for or received; and in addition thereto shall forfeit to the borrower a sum of money, to be deducted from the amount due for principal, equal to one-fourth of the principal sum; and provided further, that any person in the employ of the government who shall loan money in violation of the provisions of this chapter shall forfeit his office or position, and be removed from the same.

(Feb. 4, 1913, 37 Stat. 659, ch. 26, § 5; Feb. 24, 1987, D.C. Law 6-188, § 2(a), 33 DCR 7687.)

Section references. — This section is referred to in §§ 26-710 and 28-3303.

Prior Codifications. — 1981 Ed., § 26-705. 1973 Ed., § 26-605.

Legislative history of Law 6-188. — Law 6-188, the "Money Lenders Licensing Amendment Act of 1986," was introduced in Council and assigned Bill No. 6-203, which was referred

to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 5, 1986 and November 18, 1986, respectively. Signed by the Mayor on November 25, 1986, it was assigned Act No. 6-239 and transmitted to both Houses of Congress for its review.

CASE NOTES

ANALYSIS

Agent and principal.
Commissions paid to brokers.
Defense of illegality.
Statutory construction.

Agent and principal.

Evidence supported finding that loan broker

sued by borrower for usurious interest was borrower's agent rather than agent of lender. *Oliver v. United Mortg. Co.*, 230 A.2d 722, 1967 D.C. App. LEXIS 172 (App. 1967).

Borrower was not entitled to recover portion of commission retained by loan broker for arranging loan on ground that transaction was usurious in absence of showing that broker was

acting solely as agent of lender. D.C. Code 1961, §§ 26-611, 28-2703 et seq., 47-1701 et seq. *Oliver v. United Mortg. Co.*, 230 A.2d 722, 1967 D.C. App. LEXIS 172 (App. 1967).

Even if loan broker had advanced his own funds to borrower, but had done so for convenience only and with expectation of reimbursing himself promptly from funds supplied by lender, broker who had retained commission for that service was not liable to borrower for allegedly usurious interest on ground that broker was principal on loan. D.C. Code 1961, §§ 26-601 to 26-611, 28-2703 et seq., 47-1701 et seq. *Oliver v. United Mortg. Co.*, 230 A.2d 722, 1967 D.C. App. LEXIS 172 (App. 1967).

Commissions paid to brokers.

Commission paid by a borrower to a loan broker for obtaining a loan from a third person does not constitute usury. D.C. Code 1961, §§ 26-601 to 26-611, 28-2703 et seq., 47-1701 et seq. *Oliver v. United Mortg. Co.*, 230 A.2d 722, 1967 D.C. App. LEXIS 172 (App. 1967).

The usury statute may be violated by deducting a commission in advance as well as by any other means by which money in excess of the legal rate is exacted. D.C. Code 1940, § 28-2703. *Hartman v. Lubar*, 49 A.2d 553, 1946 D.C. App. LEXIS 172 (Cr.App. 1946).

Defense of illegality.

In replevin by trustee of indorsee finance

company to recover chattels named in trust deed securing a note, evidence that loan was usurious, in that an amount in excess of legal rate was deducted in advance and that plaintiff knew the amount deducted in advance, was sufficient to make defense of illegality available to defendant. D.C. Code 1940, §§ 28-2703 to 28-2705. *Hartman v. Lubar*, 49 A.2d 553, 1946 D.C. App. LEXIS 172 (Cr.App. 1946).

Statutory construction.

Though District of Columbia Loan Shark Act of 1913 was primarily intended to regulate and limit business of making small loans for security, such Act does have application to loans in excess of \$200. D.C. Code §§ 26-601 et seq., 26-601, 26-605, 26-610, 28-3303. In re *Parkwood, Inc.*, 461 F.2d 158, 1971 U.S. App. LEXIS 7189 (C.A.D.C. 1971).

Under District of Columbia law, substance, rather than form, determines whether usury or loan sharking laws, civil or criminal, apply to a particular transaction. *Juergens v. Urban Title Servs., Inc.*, 246 F.R.D. 4, 2007 U.S. Dist. LEXIS 38002 (2007).

§ 26-906. Complaints; investigation; suspension, revocation, or denial of license.

Any complaint against a licensee or applicant shall be made in writing to the Mayor and the Mayor, on the basis of a written complaint or his or her initiative, may conduct an investigation. Pursuant to the investigation, the Mayor may suspend, revoke, or deny a license to any applicant or licensee who violates the provisions of this chapter. Before suspending, revoking, or denying a license, the Mayor shall notify the applicant or licensee of his or her right to a hearing pursuant to § 2-509.

(Feb. 4, 1913, 37 Stat. 659, ch. 26, § 6; Feb. 24, 1987, D.C. Law 6-188, § 2(b), 33 DCR 7687.)

Section references. — This section is referred to in §§ 26-710 and 28-3303.

Prior Codifications. — 1981 Ed., § 26-706. 1973 Ed., § 26-606.

Legislative history of Law 6-188. — For legislative history of D.C. Law 6-188, see Historical and Statutory Notes following § 26-905.

§ 26-907. Violations.

(a) A person violating any provision of this chapter shall, upon conviction, be fined \$300, imprisoned for not less than 30 days or more than 90 days, or both. In addition, the court may order any person violating this chapter to make restitution for the value of property illegally obtained as a result of the

violation. Prosecutions for violations of this chapter or any rules issued pursuant to this chapter shall be conducted in the Superior Court of the District of Columbia by the Corporation Counsel or any of his or her assistants in the name of the District of Columbia.

(b) Civil fines, penalties, and fees may be imposed as alternative sanctions for any infraction of the provisions of this chapter, or any rules or regulations issued under the authority of this chapter, pursuant to Chapter 18 of Title 2. Adjudication of any infraction of this chapter shall be pursuant to Chapter 18 of Title 2.

(Feb. 4, 1913, 37 Stat. 659, ch. 26, § 7; Oct. 5, 1985, D.C. Law 6-42, § 466, 32 DCR 4450; Feb. 24, 1987, D.C. Law 6-188, § 2(c), 33 DCR 7687; Mar. 8, 1991, D.C. Law 8-237, § 5, 38 DCR 314.)

Section references. — This section is referred to in §§ 26-710 and 28-3303.

Prior Codifications. — 1981 Ed., § 26-707. 1973 Ed., § 26-607.

Legislative history of Law 6-42. — Law 6-42, the “Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985,” was introduced in Council and assigned Bill No. 6-187, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on June 25, 1985, and July 9, 1985, respectively. Signed by the Mayor on July 16, 1985, it was assigned Act No. 6-60 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-188. — For

legislative history of D.C. Law 6-188, see Historical and Statutory Notes following § 26-905.

Legislative history of Law 8-237. — Law 8-237, the “Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985 Technical and Clarifying Amendments Act of 1990,” was introduced in Council and assigned Bill No. 8-203, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on December 4, 1990, and December 18, 1990, respectively. Signed by the Mayor on December 27, 1990, it was assigned Act No. 8-320 and transmitted to both Houses of Congress for its review.

CASE NOTES

In general.

Under District of Columbia law, substance, rather than form, determines whether usury or loan sharking laws, civil or criminal, apply to a particular transaction. *Juergens v. Urban Title Servs., Inc.*, 246 F.R.D. 4, 2007 U.S. Dist. LEXIS 38002 (2007).

Loan sharking statutes criminalize “white collar” defendants who made unlicensed loans to borrowers. D.C. Code 1981, § 26-701. *Browner v. District of Columbia*, 549 A.2d 1107, 1988 D.C. App. LEXIS 202 (1988).

Defendants’ criminal convictions for loan sharking, making unlicensed loans, were supported by factual evidence; defendants, after advertising to help loan money to persons seeking to avoid foreclosure of their homes, ex-

cuted sham sales and lease back documents requiring borrowers to make lease payments often more onerous than original mortgage payments, and required payback of entire loan within one year period under buy back provision in sales agreement. D.C. Code 1981, § 26-701. *Browner v. District of Columbia*, 549 A.2d 1107, 1988 D.C. App. LEXIS 202 (1988).

Defendants, charged with loan sharking, which subjected them to maximum penalty of \$200 and 30 days imprisonment, did not have right to a jury trial; loan sharking was *malum prohibitum*. D.C. Code 1981, §§ 16-705(b), 26-701; U.S.C. Const. Art. 3, § 2, cl. 3; Amend. 6. *Browner v. District of Columbia*, 549 A.2d 1107, 1988 D.C. App. LEXIS 202 (1988).

§ 26-908. Fees allowed on foreclosure.

In any foreclosure on any loan made under this chapter no charges for attorneys’ or agents’ fees shall be made or collected which will exceed 10% of

the amount found due in such foreclosure proceedings.

(Feb. 4, 1913, 37 Stat. 660, ch. 26, § 8.)

Section references. — This section is referred to in §§ 26-710 and 28-3303.

Prior Codifications. — 1981 Ed., § 26-708. 1973 Ed., § 26-608.

CASE NOTES

Attorney's fees.

In absence of any evidence of actual intent of the parties, attorney's fee provision in deed of trust securing note allowed note's guarantor, which had satisfied guarantee following mortgagors' default, to recover attorney's fees incurred with respect to actual foreclosure, incurred in litigating complaint related to alleged violations of law governing terms of mortgages, and incurred in action initiated by mortgagors for guarantor's breach of its duties as trustee under deed of trust; however, guarantor could not recover fees for any work relating to its independent service to mortgagors under real estate brokerage contract, or fees based on any alleged vexatiousness or bad faith on part of mortgagors. *Singer v. Shannon & Luchs Co.*, 670 F. Supp. 1024, 1987 U.S. Dist. LEXIS 8611 (1987), affirmed by 1987 U.S. App. LEXIS 17579 (D.C. Cir. Nov. 20, 1987).

Failure by note's guarantor, which satisfied guarantee following mortgagors' default, to submit any affidavits, other than those from its own attorneys, attesting to "bracket" rates or to rates usually charged for collections cases or for cases of indebtedness secured by mortgages did not constitute failure to meet burden of proving reasonableness of \$80 per hour rate actually charged by its attorneys in guarantor's attempt to foreclose. *Singer v. Shannon & Luchs Co.*, 670 F. Supp. 1024, 1987 U.S. Dist. LEXIS 8611 (1987), affirmed by 1987 U.S. App. LEXIS 17579 (D.C. Cir. Nov. 20, 1987).

Reasonable number of hours expended by attorneys for guarantor of note secured by deed

of trust, in attempting to foreclose after guarantor was required to satisfy guarantee, would include time spent preparing to foreclose or to otherwise attempt to enforce note and deed of trust, all activity related to mortgagors' attempts to block foreclosure, and all hours related to opposition of mortgagors' first appeal of summary judgment; however, reasonable number of hours would not include time related to guarantor's independent role as mortgagors' real estate broker. *Singer v. Shannon & Luchs Co.*, 670 F. Supp. 1024, 1987 U.S. Dist. LEXIS 8611 (1987), affirmed by 1987 U.S. App. LEXIS 17579 (D.C. Cir. Nov. 20, 1987).

After guarantor of note secured by deed of trust satisfied guarantee due to mortgagors' default, it was entitled to recover attorney fees incurred in attempting to foreclose in amount of \$53,750.90, plus costs in amount of \$3,574.74, under deed of trust's fee provision. *Singer v. Shannon & Luchs Co.*, 670 F. Supp. 1024, 1987 U.S. Dist. LEXIS 8611 (1987), affirmed by 1987 U.S. App. LEXIS 17579 (D.C. Cir. Nov. 20, 1987).

After guarantor of note secured by deed of trust satisfied guarantee due to mortgagors' default, it was entitled to attorney's fees of \$12,377.16 and costs of \$278.34 incurred in connection with its application for attorney's fees under deed of trust's fee provision. *Singer v. Shannon & Luchs Co.*, 670 F. Supp. 1024, 1987 U.S. Dist. LEXIS 8611 (1987), affirmed by 1987 U.S. App. LEXIS 17579 (D.C. Cir. Nov. 20, 1987).

§ 26-909. Penalty provisions in contracts prohibited.

In any contract made in pursuance of the provisions of this chapter it shall be unlawful to incorporate any provision for liquidated or other damages as a penalty for any default or forfeiture thereunder.

(Feb. 4, 1913, 37 Stat. 660, ch. 26, § 9.)

Section references. — This section is referred to in §§ 26-710 and 28-3303.

Prior Codifications. — 1981 Ed., § 26-709. 1973 Ed., § 26-609.

§ 26-910. Exemption of certain persons and businesses; service of process thereupon.

(a) Nothing contained in this chapter shall be held to apply to the legitimate business of national banks, licensed bankers, licensed mortgage brokers, licensed mortgage lenders, any person exempt from licensure under § 26-1102 if the activity involves making or brokering a mortgage, trust companies, savings banks, building and loan associations, small business investment companies licensed and operating under the Small Business Investment Act of 1958, or to life insurance companies. As used in this section the term "life insurance companies" means and includes any life insurance company authorized to do business in the District of Columbia pursuant to Chapters 42 to 47 of Title 31 and any other life insurance company which has a valid, current license to do business as such in any state of the United States.

(b) Any person or any legal entity exempted from the provisions of this chapter by such subsection (a) of this section making loans secured on real or personal property in the District of Columbia who or which does not maintain an office for doing business in the District of Columbia or a residence in said District where such person or legal entity may be served with process in any suit arising out of any such transaction or in connection with such property shall appoint and maintain at all times in the District of Columbia a resident agent upon whom process may be served in any such suit, and shall register with the Mayor of the District of Columbia or with his designee the name and address of such resident agent. Any such person or legal entity which fails to appoint and maintain at all times in the District of Columbia such resident agent shall not, while such failure continues, be entitled to the exemption provided in this section. Whenever any such person or entity does not have in the District of Columbia an agent for service of process or such agent cannot with reasonable diligence be found at his registered address, then the said Mayor or his designee shall be the agent for the service of process for such person or entity. Service of process on the Mayor or his designee shall be made by delivering to, and leaving with him, or with any person having charge of his office, or with his designee, duplicate copies of the process accompanied by a fee in the amount of \$2 and such service shall be sufficient service upon such person or entity. In the event of such service, the Mayor, or his designee, shall immediately cause one of such copies to be forwarded by registered or certified mail, addressed to such person or entity at his or its address, as such address appears on the records of the Mayor or his designee. Any such service shall be returnable in not less than 30 days unless the rules of the court issuing such process prescribe another period, in which case such prescribed period shall govern. Nothing contained in this section shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served on any such person or entity in any other manner now or hereafter permitted by law.

(c) For the purposes of this section, the term:

(1) "Community Development Corporation" or "CDC" means any community development corporation recognized by, and under contract with, the

District of Columbia Department of Housing and Community Development (or any successor agency) that is engaged in business and economic development activities in the form of making microloans through the use of funds loaned to them by nationally or locally chartered banks or financial institutions for the specific purpose of microlending, and which organization is organized under Chapter 4 of Title 29, and whose articles of incorporation and bylaws are consistent with rules and regulations issued by the Mayor of the District of Columbia pursuant to subchapter IV [repealed] of Chapter 12 of Title 2.

(2) "Microloans" or "microlending" means a CDC engaging in the practice of making or issuing any loans up to, and including, \$25,000 to any person engaged in business within the District of Columbia.

(3) "Person" means any natural person, partnership, limited partnership, or corporation, including corporations taxed under Subchapter S of the Internal Revenue Code.

(d) No money lender license tax contained in this chapter shall be held to apply to a CDC engaged in microlending where the funds used for the microlending program were loaned to the CDC by a nationally or locally chartered bank or financial institution for the specific purpose of microlending, provided that the CDC operates and makes loans only in the geographical service area defined in their agreements with the District of Columbia Department of Housing and Community Development.

(Feb. 4, 1913, 37 Stat. 660, ch. 26, § 10; June 11, 1960, 74 Stat. 196, Pub. L. 86-502, § 7; Dec. 5, 1963, 77 Stat. 344, Pub. L. 88-191, § 1; Feb. 24, 1987, D.C. Law 6-188, § 2(d), 33 DCR 7687; Sept. 9, 1996, D.C. Law 11-155, § 23(a), 43 DCR 4213; Apr. 9, 1997, D.C. Law 11-171, § 2(b), 43 DCR 4484; June 6, 1998, D.C. Law 12-116, § 4, 45 DCR 1959; July 2, 2011, D.C. Law 18-378, § 3(h), 58 DCR 1720.)

Section references. — This section is referred to in §§ 26-903 and 28-3303.

Prior Codifications. — 1981 Ed., § 26-710. 1973 Ed., § 26-610.

Effect of amendments. — D.C. Law 18-378, in subsec. (c)(1), substituted "Chapter 4 of Title 29" for "subchapter I of Chapter 3 of Title 29".

Temporary Amendment of Section. — Section 4 of D.C. Law 12-3 inserted "any person exempt from licensure under § 26-1002 1981 Ed. if the activity involves making or brokering a mortgage" in the first sentence in (a).

Section 6(b) of D.C. Law 12-3 provided that the act shall expire after 225 days of its having taken effect.

Section 4 of D.C. Law 12-101 inserted "any person exempt from licensure under § 26-1002 1981 Ed. if the activity involves making or brokering a mortgage" in the first sentence in (a).

Section 6(b) of D.C. Law 12-101 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary

amendment of section, see § 2 of the Community Development Corporations Money Lender License Exemption Emergency Amendment Act of 1995 (D.C. Act 11-145, October 23, 1995, 42 DCR 6046) and § 2 of the Community Development Corporations Money Lender Licensing Fee and Bonding Exemption Legislative Review Emergency Amendment Act of 1996 (D.C. Act 11-184, January 23, 1996, 43 DCR 378).

For temporary amendment of section, see § 2(b) of the Community Development Corporations Money Lender License Tax Exemption Congressional Recess Emergency Amendment Act of 1996 (D.C. Act 11-399, October 9, 1996, 43 DCR 5695), § 2(b) of the Community Development Corporations Money Lender License Tax Exemption Congressional Review Emergency Amendment Act of 1996 (D.C. Act 11-473, December 30, 1996, 44 DCR 195), and § 2(b) of the Community Development Corporations Money Lender License Tax Exemption Congressional Review Emergency Amendment Act of 1997 (D.C. Act 12-54, March 31, 1997, 44 DCR 2216).

For temporary amendment of section, see § 4

of the Mortgage Lender and Broker Act of 1996 Emergency Amendment Act of 1997 (D.C. Act 12-23, March 3, 1997, 44 DCR 1773), § 4 of the Mortgage Lender and Broker Act of 1996 Emergency Amendment Act of 1997 (D.C. Act 12-245, January 13, 1998, 45 DCR 656), and § 4 of the Mortgage Lender and Broker Act of 1996 Congressional Review Emergency Amendment Act of 1998 (D.C. Act 12-308, March 20, 1998, 45 DCR 1920).

Legislative history of Law 6-188. — For legislative history of D.C. Law 6-188, see Historical and Statutory Notes following § 26-905.

Legislative history of Law 11-97. — Law 11-97, the "Community Development Corporations Money Lender Licensing Fee and Bonding Exemption Temporary Amendment Act of 1995," was introduced in Council and assigned Bill No. 11-460. The Bill was adopted on first and second readings on October 10, 1995, and December 5, 1995, respectively. Signed by the Mayor on December 27, 1995, it was assigned Act No. 11-180 and transmitted to both Houses of Congress for its review. D.C. Law 11-97 became effective on March 5, 1996.

Legislative history of Law 11-155. — Law 11-155, the "Mortgage Lender and Broker Act of 1996," was introduced in Council and assigned Bill No. 11-637, which was referred to the Committee on Economic Development. The Bill was adopted on first and second readings on May 7, 1996, and June 4, 1996, respectively. Signed by the Mayor on June 19, 1996, it was assigned Act No. 11-309 and transmitted to both Houses of Congress for its review. D.C. Law 11-155 became effective on September 9, 1996.

Legislative history of Law 11-171. — For legislative history of D.C. Law 11-171, see Historical and Statutory Notes following § 26-903.

Legislative history of Law 12-3. — Law 12-3, the "Mortgage Lender and Broker Act of 1996 Temporary Amendment Act of 1997," was introduced in Council and assigned Bill No. 12-82. The Bill was adopted on first and second readings on February 4, 1997, and March 4, 1997, respectively. Signed by the Mayor on March 19, 1997, it was assigned Act No. 12-45 and transmitted to both Houses of Congress for its review. D.C. Law 12-3 became effective on May 23, 1997.

Legislative history of Law 12-101. — Law 12-101, the "Mortgage Lender and Broker Act

of 1996 Temporary Amendment Act of 1998," was introduced in Council and assigned Bill No. 12-475. The Bill was adopted on first and second readings on December 4, 1997, and January 6, 1998, respectively. Signed by the Mayor on January 27, 1998, it was assigned Act No. 12-277 and transmitted to both Houses of Congress for its review. D.C. Law 12-101 became effective on April 30, 1998.

Legislative history of Law 12-116. — Law 12-116, the "Mortgage Lender and Broker Act of 1996 Amendment Act of 1998," was introduced in Council and assigned Bill No. 12-426, which was referred to the Committee on Economic Development. The Bill was adopted on first and second readings on February 3, 1998, and March 3, 1998, respectively. Signed by the Mayor on March 17, 1998, it was assigned Act No. 12-313 and transmitted to both Houses of Congress for its review. D.C. Law 12-116 became effective on June 6, 1998.

Legislative history of Law 18-378. — For history of Law 18-378, see notes under § 26-201.

References in text. — The Small Business Investment Act of 1958, referred to in the first sentence of subsection (a) of this section, is the Act of August 21, 1958, 72 Stat. 689, Pub. L. 85-699 and is codified in various sections of Titles 12, 15, and 18 of the United States Code.

Change in Government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

CASE NOTES

ANALYSIS

In general.

Insurance companies.
Real estate brokers.

In general.

Defense in violation of District of Columbia Loan Shark Act can be used only against those unlicensed, nonexempt lenders who actually contract for or receive interest in excess of 6%.

D.C. Code § 26-601 et seq. In re Parkwood, Inc., 461 F.2d 158, 1971 U.S. App. LEXIS 7189 (C.A.D.C. 1971).

Insurance companies.

District of Columbia Loan Shark Act is applicable to loans made by life insurance companies in regular course of their business and thus such companies, until 1963, were not exempt from requirement of obtaining license in order to make loans at rate of interest in excess of 6%, notwithstanding contentions that Act does not apply to insurance companies which "invest" their funds by making loans secured by real estate, that, in view of comprehensive regulation of insurance companies under certain title of District of Columbia Code, they cannot be subject to licensing regulation of lending activities under Act, and that Act is not intended to apply to large loans made by "institutional lenders" and secured by real estate. D.C. Code §§ 26-601, 26-610, 26-610(a), 28-3301, 35-105, 35-535, 35-535(14)(f), 47-1574, 47-1806. In re Parkwood, Inc., 461 F.2d 158, 1971 U.S. App. LEXIS 7189 (C.A.D.C. 1971).

Where insurance company, which made a

loan to prior owners of hotel for purpose of providing funds for refinancing hotel property and for refurbishing and renovating the hotel, at all pertinent times was licensed to do business in the District of Columbia under the Life Insurance Act, the company was exempt from the licensing requirements of the Money Lenders Act. D.C. Code §§ 26-601, 26-610(a), 28-3301, 35-301 et seq. National Life Ins. Co. v. Silverman, 454 F.2d 899, 1971 U.S. App. LEXIS 11212 (C.A.D.C. 1971).

Real estate brokers.

Loan which was made by real estate broker-mortgage banker in exchange for note of 6 ½ % interest and deed of trust on real estate did not fall within real estate broker exemption of District of Columbia Loan Shark Act, notwithstanding contention that integral part of real estate brokerage includes not only negotiations of loans on behalf of other investors, but also placing of loans on behalf of brokers themselves. D.C. Code §§ 26-601, 26-610, 45-1401 et seq., 45-1401, 45-1402, 47-1701 to 47-1709. In re Parkwood, Inc., 461 F.2d 158, 1971 U.S. App. LEXIS 7189 (C.A.D.C. 1971).

§ 26-911. Enforcement; rules and regulations.

The enforcement of this chapter shall be intrusted to the Mayor of the District of Columbia, and the Council of the District of Columbia is hereby authorized and empowered to make all rules and regulations necessary in its judgment for the conduct of such business and the enforcement of this chapter in addition hereto and not inconsistent herewith.

(Feb. 4, 1913, 37 Stat. 660, ch. 26, § 11.)

Section references. — This section is referred to in §§ 26-710 and 28-3303.

Prior Codifications. — 1981 Ed., § 26-711. 1973 Ed., § 26-611.

Change in Government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 402(224) of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to the District of Columbia

Council, subject to the right of the Commissioner as provided in § 406 of the Plan. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

§ 26-912. Exemption of certain loans; severability.

(a) No provision of this chapter shall apply with respect to any loan, or to the making of any loan:

(1) To any corporation which is unable to plead any statutes against usury in any action;

- (2) Repealed;
- (3) Secured on real estate located outside of the District of Columbia;
- (4) To a borrower residing, doing business, or incorporated outside of the District of Columbia; or
- (5) Greater than \$25,000.

(b) If any provision of this section or the application thereof to any person or circumstance, is held invalid, the remainder of the section, and the application of such provision to other persons or circumstances shall not be affected thereby.

(Feb. 4, 1913, ch. 26, § 14; Dec. 17, 1971, 85 Stat. 679, Pub. L. 92-200, § 9(a); Feb. 24, 1987, D.C. Law 6-188, § 2(e), (f), 33 DCR 7687.)

Section references. — This section is referred to in §§ 26-710 and 28-3303.

Prior Codifications. — 1981 Ed., § 26-712. 1973 Ed., § 26-612.

Legislative history of Law 6-188. — For legislative history of D.C. Law 6-188, see Historical and Statutory Notes following § 26-905.

CASE NOTES

ANALYSIS

Construction and application.
In general.

Construction and application.

Mortgage transaction involving loans of \$688,000 and \$177,000 was exempt from provisions of District of Columbia Loan Shark Act. *Poblete v. Indymac Bank*, 657 F.Supp.2d 86, 2009 U.S. Dist. LEXIS 89181 (2009), dismissed by 2010 U.S. Dist. LEXIS 84559 (D.D.C. Aug. 17, 2010).

In general.

Loan Shark Law had no application to debt of

\$177,500 secured by first trust on realty, since it applies only to small loans on personal security (Loan Shark Law). *Von Rosen v. Dean*, 41 F.2d 982, 1930 U.S. App. LEXIS 2924 (1930).

Under District of Columbia law, substance, rather than form, determines whether usury or loan sharking laws, civil or criminal, apply to a particular transaction. *Juergens v. Urban Title Servs., Inc.*, 246 F.R.D. 4, 2007 U.S. Dist. LEXIS 38002 (2007).

CHAPTER 10. MONEY TRANSMISSIONS.

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§ 26-1001. Definitions.

For the purposes of this chapter, the term:

(1) "Applicant" means a person filing an application for a license under this chapter.

(2) "Authorized delegate" means an entity designated by the licensee under the provisions of this chapter to sell or issue payment instruments or engage in the business of transmitting money on behalf of a licensee.

(3) "Control" means ownership of, or the power to vote, 25% or more of the outstanding voting securities of a licensee or controlling person. For purposes of determining the percentage of a licensee controlled by any person, there shall be aggregated with the person's interest the interest of any other person controlled by such person or by any spouse, parent, or child of such person.

(4) "Controlling person" means any person in control of a licensee.

(5) "Electronic Instrument" means a card or other tangible object for the transmission or payment of money (A) which contains a microprocessor chip, magnetic stripe, or other means for the storage of information; (B) that is prefunded; and (C) for which the value is decremented upon each use. It does not include a card or other tangible object that is redeemable by the issuer in the issuer's goods or services.

(6) "Executive Officer" means the licensee's president, chairman of the executive committee, senior officer responsible for the licensee's business, chief financial officer, or any other persons who perform similar functions.

(7) "Key shareholder" means any person, or group of persons acting in concert, who owns 25% or more of any voting class of an applicant's stock.

(8) "Licensee" means a person licensed under this chapter.

(9) "Material litigation" means any litigation that, according to generally accepted accounting principles, is deemed significant to an applicant's or licensee's financial health and would be required to be referenced in that entity's annual audited financial statements, report to shareholders, or similar document.

(10) "Money transmission" means the sale or issuance of payment instruments or engaging in the business of receiving money for transmission or

transmitting money within the United States, or to locations abroad, by any and all means, including but not limited to payment instrument, wire, facsimile, or electronic transfer.

(11) "Outstanding payment instrument" means any payment instrument issued by the licensee which:

(A) Has been sold in the United States directly by the licensee, sold by an authorized delegate of the licensee in the United States, or which has been reported to the licensee as having been sold; and

(B) Has not yet been paid for by the licensee.

(12) "Payment instrument" means any written or electronic check, draft, money order, travelers check, or other electronic or written instrument or order for the transmission or payment of money which is sold or issued to one or more persons, whether or not such instrument is negotiable. The term "payment instrument" does not include any credit card voucher, any letter of credit, or any instrument which is redeemable by the issuer in goods or services.

(13) "Permissible investments" means:

(A) Cash;

(B) Certificates of deposit or other debt obligations of a financial institution, either domestic or foreign;

(C) Bills of exchange or time drafts drawn on and accepted by a commercial bank, otherwise known as bankers' acceptances, which are eligible for purchase by member banks of the Federal Reserve system;

(D) Any investment bearing a rating of one of the 3 highest grades, as defined by a nationally recognized organization that rates such securities;

(E) Investment securities that are obligations of the United States, its agencies, or instrumentalities; or obligations that are guaranteed fully as to principal and interest of the United States; or any obligations of any state, municipality, or any political subdivision thereof;

(F) Shares in a money market mutual fund; interest-bearing bills, notes or bonds; debentures or stock traded on any national securities exchange or on a national over-the-counter market; mutual funds primarily composed of such securities; a mutual fund composed of one or more permissible investments as set forth herein;

(G) Any demand borrowing agreement or agreements made to a corporation or a subsidiary of a corporation whose capital stock is listed on a national exchange;

(H) Receivables which are due to a licensee from its authorized delegates pursuant to a contract described in § 26-1016 which are not past due or doubtful of collection; or

(I) any other investments or security device approved by the Superintendent [Commissioner].

(14) "Remit" means either to:

(A) Make direct payment of the funds to the licensee or its representatives authorized to receive these funds; or

(B) Deposit the funds in a bank, credit union, savings and loan association, or other similar financial institution in an account specified by the licensee.

(15) “Superintendent” means the Superintendent of the Office of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking].

(July 18, 2000, D.C. Law 13-140, § 2, 47 DCR 3431.)

Legislative history of Law 13-140. — Law 13-140, the “Money Transmitters Act of 2000,” was introduced in Council and assigned Bill No. 13-367, which was referred to the Committee on Economic Development. The Bill was adopted on first and second readings on March

7, 2000, and April 4, 2000, respectively. Signed by the Mayor on April 20, 2000, it was assigned Act No. 13-322 and transmitted to both Houses of Congress for its review. D.C. Law 13-140 became effective on July 18, 2000.

§ 26-1002. License required.

(a) After the effective date of this chapter [July 18, 2000], no person shall engage in the business of money transmission without obtaining a license issued by the Superintendent [Commissioner] under § 26-1009, except as provided in subsection (d) of this section and in § 26-1003.

(b) A licensee may conduct its business in the District of Columbia at one or more locations, directly or indirectly owned by the licensee, or through one or more authorized delegates, or both, pursuant to the single license granted to the licensee.

(c) Except as provided in § 26-1012, a license issued pursuant to this chapter shall not be transferable or assignable.

(d) Any person engaged in selling payment instruments pursuant to a license issued under Chapter 31 [repealed] of Title 47 of the District of Columbia Official Code on the effective date of this chapter [July 18, 2000] may continue to engage in selling payment instruments without a license issued under this chapter until the Superintendent [Commissioner] has acted upon such person’s application for a license; provided, that the application is filed within 90 day of the effective date of this chapter [July 18, 2000].

(July 18, 2000, D.C. Law 13-140, § 3, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1003. Exemptions.

(a) This chapter shall not apply to:

(1) The United States or any department, agency, or instrumentality thereof;

(2) The United States Post Office;

(3) The District of Columbia government;

(4) Banks, bank holding companies, credit unions, building and loan associations, savings and loan associations, savings banks, or mutual banks organized under the laws of any state, the District of Columbia or the United States; provided, that they do not issue or sell payment instruments through authorized delegates who are not banks, bank holding companies, credit

unions, building and loan associations, savings and loan associations, savings banks, or mutual banks; or

(5) The provision of electronic transfer of government benefits for any federal or District of Columbia governmental agency as defined in Federal Reserve Board Regulation E or by a contractor for and on behalf of the United States, or any department, agency or instrumentality thereof, or the District of Columbia government.

(b) Authorized delegates of a licensee, acting within the scope of authority conferred by a written contract as described in § 26-1016 shall not be required to obtain a license pursuant to this chapter.

(July 18, 2000, D.C. Law 13-140, § 4, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1004. License qualifications.

(a) Each licensee under this chapter shall at all times have a net worth of not less than \$100,000, calculated in accordance with generally accepted accounting principles. Licensees engaging in money transmission at more than one location or through authorized delegates shall have an additional net worth of \$50,000 per location or authorized delegate located in the District of Columbia, as applicable. The maximum net worth required for all locations shall not exceed \$500,000.

(b) Every corporate applicant, at the time of filing of an application for a license under this chapter and at all times after a license is issued, shall be in good standing in the state of its incorporation. All non-corporate applicants shall, at the time of the filing of an application for a license under this chapter and at all times after a license is issued, be registered or qualified to do business in the District of Columbia.

(July 18, 2000, D.C. Law 13-140, § 5, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1005. Permissible investments and statutory trust.

(a) Each licensee under this chapter shall at all times possess permissible investments having an aggregate market value, calculated in accordance with generally accepted accounting principles, of not less than the aggregate face amount of all outstanding payment instruments issued or sold by the licensee in the United States. This requirement may be waived by the Superintendent [Commissioner] if the dollar volume of a licensee's outstanding payment instruments does not exceed the bond or other security devices posted by the licensee pursuant to § 26-1007.

(b) Permissible investments, even if commingled with other assets of the licensee, shall be deemed by operation of law to be held in trust for the benefit

of the purchasers and holders of the licensee's outstanding payment instruments in the event of the bankruptcy of the licensee.

(July 18, 2000, D.C. Law 13-140, § 6, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1006. License application.

(a) Each application for a license shall be made in writing, under oath, and in a form prescribed by the Superintendent [Commissioner].

(b) For all applicants, each application shall contain:

(1) The exact name of the applicant, the applicant's principal address, any fictitious or trade name used by the applicant in the conduct of its business, and the location of the applicant's business records;

(2) The history of the applicant's material litigation and criminal convictions for the 5 year period prior to the date of the application;

(3) A description of the activities conducted by the applicant and a history of operations;

(4) A description of the business activities in which the applicant seeks to be engaged in the District of Columbia;

(5) A list identifying the applicant's proposed authorized delegates in the District of Columbia, if any, at the time of the filing of the license application;

(6) A sample authorized delegate contract, if applicable;

(7) A sample form of payment instrument, if applicable;

(8) The location or locations at which the applicant and its authorized delegates, if any, propose to conduct the licensed activities in the District of Columbia; and

(9) The name and address of the clearing bank or banks on which the applicant's payment instruments will be drawn or through which such payment instruments will be payable.

(c) If the applicant is a corporation, the applicant shall also provide:

(1) The date of the applicant's incorporation and state of incorporation;

(2) A certificate of good standing from the state in which the applicant was incorporated;

(3) A description of the corporate structure of the applicant, including the identity of any parent or subsidiary of the applicant, and the disclosure of whether any parent or subsidiary is publicly traded on any stock exchange;

(4) The name, business and residence address, and employment history for the 5 years prior to the date of the application of the applicant's executive officers and the officer or managers who will be in charge of the applicant's activities to be licensed hereunder;

(5) The name, business and residence address, and employment history for the 5 years prior to the date of the application of any key shareholder of the applicant;

(6) The history of material litigation and criminal convictions for the 5 years prior to the date of the application of every executive officer or key shareholder of the applicant;

(7) A copy of the applicant's most recent audited financial statement, including balance sheet, statement of income or loss, statement of changes in shareholder equity, and statement of changes in financial position, and, if available, the applicant's audited financial statements for the immediately preceding 2 year period. However, if the applicant is a wholly owned subsidiary of another corporation, the applicant may submit either the parent corporation's consolidated audited financial statements for the current year and for the immediately preceding 2 year period or the parent corporation's Form 10K reports filed with the United States Securities and Exchange Commission for the prior 3 years in lieu of the applicant's financial statements. If the applicant is a wholly owned subsidiary of a corporation having its principal place of business outside the United States, similar documentation filed with the parent corporation's non-United States regulator may be submitted to satisfy this provision; and

(8) Copies of all filings, if any, made by the applicant with the United States Securities and Exchange Commission, or with a similar regulator in a country other than the United States, within the year preceding the date of filing of the application.

(d) If the applicant is not a corporation, the applicant shall also provide:

(1) The name, business and residence address, personal financial statement, and employment history for the 5 years prior to the date of the application of:

(A) Each principal of the applicant; and

(B) Any other person or persons who will be in charge of the applicant's activities to be licensed under this chapter;

(2) The date of the applicant's registration or qualification to do business in the District of Columbia;

(3) The history of material litigation and criminal convictions for the 5 years prior to the date of the application for each individual having any ownership interest in the applicant and each individual who exercises supervisory responsibility with respect to the applicant's activities; and

(4) Copies of the applicant's audited financial statements, including balance sheet, statement of income or loss, and statement of changes in financial position, for the current year and, if available, for the immediately preceding 2 years.

(e) The Superintendent [Commissioner] is authorized, for good cause shown, to waive any requirement of this section with respect to any license application or to permit a license applicant to submit substituted information in its license application in lieu of the information required by this section.

(July 18, 2000, D.C. Law 13-140, § 7, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1007. Bond or other security device.

(a) Each application must be accompanied by a surety bond, irrevocable letter of credit, or such other similar security device acceptable to the

Superintendent [Commissioner] in the amount of \$50,000. If the applicant proposes to engage in business at more than one location, through authorized delegates or otherwise, then the amount of the security device will be increased by \$10,000 per location. The maximum amount of the security device required for all locations shall not exceed \$250,000. The security device shall be in a form satisfactory to the Superintendent [Commissioner] and shall run to the District of Columbia for the benefit of any claimants against the licensee to secure the faithful performance of the obligations of the licensee in respect to the receipt, handling, transmission, or payment of money in connection with the sale and issuance of payment instruments or transmission of money. In the case of a bond, the aggregate liability of the surety shall not exceed the principal sum of the bond. Claimants against the licensee may themselves bring suit directly on the security device or the Superintendent [Commissioner] may, through the Office of the Corporation Counsel, bring suit on behalf of such claimants, either in one action or in successive actions.

(b)(1) In lieu of the security device, or of any portion of the principal thereof required by subsection (a) of this section, the licensee may deposit with the Superintendent [Commissioner], or with such banks in the District of Columbia as the licensee may designate and the Superintendent [Commissioner] may approve cash, interest-bearing stocks and bonds, notes, debentures or other obligations:

- (A) Of the United States;
- (B) Of any agency or instrumentality of the United States;
- (C) Guaranteed by the United States;
- (D) Of the District of Columbia; or

(E) Guaranteed by the District of Columbia, in an aggregate amount, based upon the lower of principal amount or market value of not less than the amount of the security device or portion thereof.

(2) The securities or cash referenced in paragraph (1) of this subsection shall be held and shall secure the obligations in the same manner as the security device, but the depositor shall be entitled to receive all interest and dividends thereon.

(3) The licensee may, on the written order of the Superintendent [Commissioner], for good cause shown, substitute other securities for those deposited.

(c) The security device shall be held for 5 years after the licensee ceases money transmission operations in the District of Columbia. Notwithstanding this provision, the Superintendent [Commissioner] may permit the security device to be reduced or eliminated prior to that time to the extent that the amount of the licensee's payment instruments outstanding in the District of Columbia are reduced. The Superintendent [Commissioner] may also permit a licensee to substitute a letter of credit or such other form of security device acceptable to the Superintendent [Commissioner] for the security device in place at the time the licensee ceases money transmission operations in the District of Columbia.

(July 18, 2000, D.C. Law 13-140, § 8, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1008. Application fee.

Each application must be accompanied by a non-refundable application fee in the amount of \$500, plus \$25 for each location in the District of Columbia. The maximum amount of application fees required for all locations shall not exceed \$2,500. The application fee shall also constitute the license fee for the applicant's first year of activities if the license is granted.

(July 18, 2000, D.C. Law 13-140, § 9, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1009. Issuance of license.

(a) Upon the filing of a complete application, the Superintendent [Commissioner] shall investigate the financial condition and responsibility, financial and business experience, character, and general fitness of the applicant. The Superintendent [Commissioner] may conduct an on-site investigation of the applicant, the reasonable cost of which shall be borne by the applicant. If the Superintendent [Commissioner] finds that:

- (1) The applicant's business will be conducted honestly, fairly, and in a manner commanding the confidence and trust of the community;
- (2) The applicant has fulfilled the requirements imposed by this chapter; and

(3) The applicant has paid the required license fee, the Superintendent [Commissioner] shall issue a license to the applicant authorizing the applicant to engage in the licensed activities in the District of Columbia for a term of one year. If these requirements have not been met, the Superintendent [Commissioner] shall deny the application in writing and set forth the reasons for the denial.

(b) The Superintendent [Commissioner] shall approve or deny every application for an original license within 120 days from the date a complete application is submitted, which period may be extended by the written consent of the applicant. The Superintendent [Commissioner] shall notify the applicant of the date when the application is deemed complete. In the absence of approval or denial of the application, or consent to the extension of the 120 day period, the application is deemed approved and the Superintendent [Commissioner] shall issue the license effective as of the first day after the 120 day or extended period has elapsed.

(c) Any applicant aggrieved by a denial issued by the Superintendent [Commissioner] under this section may at any time within 30 days after the date of receipt of written notice of the denial contest the denial by serving a response on the Superintendent [Commissioner]. The Superintendent [Commissioner] shall set a date for a hearing not later than 60 days after service of the response, unless a later date is set with the consent of the denied applicant.

(July 18, 2000, D.C. Law 13-140, § 10, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1010. Renewal of license and annual report.

(a) The annual fee for renewal of a license shall be \$500, plus \$25 for each location in the District of Columbia, but not to exceed a maximum aggregate amount of \$2,500. The renewal term of a license shall be one calendar year.

(b) The renewal fee shall be accompanied by a report, in a form prescribed by rule by the Superintendent [Commissioner], which form shall be sent by the Superintendent [Commissioner] to each licensee no later than 3 months immediately preceding December 31 of each year. The licensee must include in its annual renewal report:

(1) A copy of its most recent audited consolidated annual financial statement, including balance sheet, statement of income or loss, statement of changes in shareholder's equity and statement of changes in financial position, or, in the case of a licensee that is a wholly owned subsidiary of another corporation, the consolidated audited annual financial statement of the parent corporation may be filed in lieu of the licensee's audited annual financial statement;

(2) The number of payment instruments sold by the licensee in the District of Columbia, the dollar amount of those instruments, and the dollar amount of those instruments currently outstanding for the most recent quarter for which data is available prior to the date of the filing of the renewal application, but in no event more than 120 days prior to the renewal date;

(3) Any material changes to any of the information submitted by the licensee on its original application which have not previously been reported to the Superintendent [Commissioner] on any other report required to be filed under this chapter;

(4) A list of the licensee's permissible investments; and

(5) A list of the locations within the District of Columbia at which business regulated by this chapter is being conducted by either the licensee or its authorized delegate.

(July 18, 2000, D.C. Law 13-140, § 11, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1011. Special reporting requirements.

Within 15 days of the occurrence of any of the events listed below, a licensee shall file a written report with the Superintendent [Commissioner] describing the event and its expected impact on the licensee's activities in the District:

(1) The filing for bankruptcy or reorganization by the licensee;

(2) The institution of revocation or suspension proceedings against the licensee by any state or governmental authority with regard to the licensee's money transmission activities;

(3) Any felony indictment of the licensee or any of its key officers or directors related to money transmission activities; or

(4) Any felony conviction of the licensee or any of its key officers or directors related to money transmission activities.

(July 18, 2000, D.C. Law 13-140, § 12, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1012. Changes in control of a licensee.

(a) Except as provided in this section, no person shall directly or indirectly acquire control of a licensee without the prior written approval of the Superintendent [Commissioner]. In order to obtain approval, a person shall:

(1) Notify the Superintendent [Commissioner] 30 days in advance of the proposed change in control of a licensee;

(2) File an application with the Superintendent [Commissioner] in such form as the Superintendent [Commissioner] may prescribe;

(3) Deliver such other information to the Superintendent [Commissioner] as the Superintendent [Commissioner] may require concerning the financial responsibility, background, experience, and activities of the applicant, its directors, officers, principals, and members, and of any proposed new directors, officers, principals, or members of the licensee; and

(4) Pay an application fee in the amount that the Superintendent [Commissioner] shall prescribe.

(b) The Superintendent [Commissioner] shall deny the application to acquire control of a licensee if the Superintendent [Commissioner] finds that the acquisition of control is contrary to law or that disapproval is reasonably necessary to protect the interest of the public. In making that determination, the Superintendent [Commissioner] shall consider the following:

(1) Whether the financial condition of the person who seeks to acquire control might jeopardize the financial condition of the business or the interests of the public in the conduct of the business regulated under this chapter; and

(2) Whether the financial responsibility, character, competence, experience, integrity, and general fitness of the applicant, and if applicable, its directors, officers, principals, and members and any proposed new directors, officers, principals, and members who warrant the belief that the business will not be operated efficiently and fairly and in accordance with the law and that it would not be in the interests of the public to permit that person to control the licensee.

(c) The Superintendent [Commissioner] shall grant or deny the application within 60 days after the date when a completed application, accompanied by the required filing fee, is filed, unless the period is extended by order of the Superintendent [Commissioner] reciting the reasons for the extension. If the application is denied, the Superintendent [Commissioner] shall notify the applicant of the denial and the reasons for the denial.

(d) The provisions of this section shall not apply to a person who purchases a controlling amount of shares on a national stock exchange of a publicly held licensee until the licensee has actual notice of the purchase. Within 5 days of actual notice, the licensee shall notify the Superintendent [Commissioner] in

writing of the purchase. The person who acquires control shall comply with subsections (a)(2) through (4) of this section.

(e) Whenever control of a licensee is acquired or exercised in violation of this section, the license of the licensee shall be deemed revoked as of the date of the unlawful acquisition of control. Such licensee, or its controlling person, shall surrender the license to the Superintendent [Commissioner] on demand.

(f) Nothing in this section shall prohibit a person from negotiating or entering into agreements subject to the condition that the acquisition of control will not be effective until approved by the Superintendent [Commissioner].

(July 18, 2000, D.C. Law 13-140, § 13, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1013. Examinations.

(a) The Superintendent [Commissioner] may in his discretion conduct an on-site examination of a licensee upon 45 days written notice to the licensee. The licensee shall pay all reasonably incurred costs of the examination. The on-site examination may be conducted in conjunction with examinations to be performed by representatives of agencies of another state. The Superintendent [Commissioner], in lieu of an on-site examination, may accept the examination report of an agency of another state; or a report prepared by an independent accounting firm; and reports so accepted shall be considered for all purposes as an official report of the Superintendent [Commissioner].

(b) The Superintendent [Commissioner] may (1) request financial data from a licensee in addition to that required under § 26-1010 or (2) conduct an on-site examination of a licensee, authorized delegate or location of a licensee within the District of Columbia without prior notice to the authorized delegate or licensee if the Superintendent [Commissioner] has a reasonable basis to believe that the licensee or authorized delegate is not in compliance with this chapter. When the Superintendent [Commissioner] examines an authorized delegate's operations, the authorized delegate shall pay all reasonably incurred costs of the examination. When the Superintendent [Commissioner] examines a licensee's location within the District of Columbia, the licensee shall pay all reasonably incurred costs of the examination.

(July 18, 2000, D.C. Law 13-140, § 14, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1014. Maintenance of records.

(a) Each licensee, shall make, keep and preserve the following books, accounts and other records for a period of 3 years:

(1) A record of each payment instrument sold;

(2) A general ledger containing all assets, liability, capital, income and expense accounts, which general ledger shall be posted at least monthly;

- (3) Settlement sheets received from authorized delegates;
- (4) Bank statements and bank reconciliation records;
- (5) Records of outstanding payment instruments;
- (6) Records of each payment instrument paid within the 3 year period;
- (7) A list of the names and addresses of all of the licensee's authorized delegates; and

(8) Records it is required to maintain pursuant to 31 C.F.R. Part 103.

(b) Maintenance of such documents as are required by this section in a photographic, electronic, or other similar form shall constitute compliance with this section.

(c) Records may be maintained at a location other than within the District of Columbia so long as they are made accessible to the Superintendent [Commissioner] within 7 days of written notice by the Superintendent [Commissioner].

(July 18, 2000, D.C. Law 13-140, § 15, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1015. Suspension or revocation of licenses.

After notice and hearing, the Superintendent [Commissioner] may suspend or revoke a licensee's license if the Superintendent [Commissioner] finds that:

(1) Any fact or condition exists that, if it had existed at the time when the licensee applied for its license, would have been grounds for denying the application;

(2) The licensee's net worth becomes inadequate and the licensee, after 10 days written notice from the Superintendent [Commissioner], fails to take such steps as the Superintendent [Commissioner] deems necessary to remedy such deficiency;

(3) The licensee knowingly violates any material provision of this chapter or any rule or order validly promulgated by the Superintendent [Commissioner] under authority of this chapter;

(4) The licensee is conducting its business in an unsafe or unsound manner;

(5) The licensee is insolvent;

(6) The licensee has suspended payment of its obligations, has made an assignment for the benefit of its creditors, or has admitted in writing its inability to pay its debts as they become due;

(7) The licensee has applied for an adjudication of bankruptcy, reorganization, arrangement, or other relief under any bankruptcy;

(8) The licensee refuses to permit the Superintendent [Commissioner] to make any examination authorized by this chapter;

(9) The licensee willfully fails to make any report required by this chapter; or

(10) The licensee has willfully violated any provision of the regulations set forth at 31 C.F.R. Part 103.

(July 18, 2000, D.C. Law 13-140, § 16, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1016. Authorized delegate contracts.

A Licensee which purposes to conduct licensed activities through an authorized delegate shall authorize each delegate to operate pursuant to an express written contract appointing the person as its delegate with authority to engage in money transmission on behalf of the licensee.

(July 18, 2000, D.C. Law 13-140, § 17, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1017. Authorized delegate conduct.

(a) An authorizing delegate shall not make any fraudulent or false statement or misrepresentation to a licensee or to the Superintendent [Commissioner].

(b) All money transmission or sale or issuance of payment instrument activities conducted by authorized delegates shall be strictly in accordance with the licensee's written procedures provided to the authorized delegate.

(c) An authorized delegate shall remit all money owing to the licensee in accordance with the terms of the contract between the licensee and the authorized delegate. An authorized delegate who fails to remit all money owing to a licensee within the time required shall be liable to the licensee for treble damages. The Superintendent [Commissioner] shall have the discretion to set, by regulation, the maximum remittance time.

(d) An authorized delegate is deemed to consent to inspection by the Superintendent [Commissioner], with or without prior notice to the licensee or authorized delegate, of the books and records of the authorized delegate when the Superintendent [Commissioner] has a reasonable basis to believe that the licensee or authorized delegate is not in compliance with this chapter.

(e) An authorized delegate is under a duty to act only as authorized under the contract with the licensee. An authorized delegate who exceeds its authority is subject to cancellation of its contract and further disciplinary action by the Superintendent [Commissioner].

(f) All funds, less fees, received by an authorized delegate of a licensee from the sale or delivery of a payment instrument issued by a licensee or received by an authorized delegate for transmission shall, from the time such funds are received by such authorized delegate until such time when the funds or an equivalent amount are remitted by the authorized delegate to the licensee, constitute trust funds owned by and belonging to the licensee. If an authorized delegate commingles any such funds with any other funds or property owned or controlled by the authorized delegate, all commingled proceeds and other property shall be impressed with a trust in favor of the licensee in an amount equal to the amount of the proceeds due the licensee.

(g) An authorized delegate shall report to the licensee the theft or loss of

payment instruments within 24 hours from the time it knew or should have known of the theft or loss.

(July 18, 2000, D.C. Law 13-140, § 18, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1018. Revocation or suspension of authorized delegates.

(a) If, after notice and a hearing, the Superintendent [Commissioner] finds that an authorized delegate of a licensee or any director, officer, employee, or controlling person of the authorized delegate (1) has violated any provision of this chapter or of any rule or regulation or order issued under this chapter, (2) has engaged or participated in any unsafe or unsound act with respect to the business of selling or issuing payment instruments of the licensee or the business of money transmission, (3) has willfully violated any provision of the regulations set forth in 31 C.F.R. Part 103, or (4) has made, or caused to be made in any application or report filed with the Superintendent [Commissioner] or in any proceeding before the Superintendent [Commissioner], any statement which was at the time and in the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein, the Superintendent [Commissioner] may issue an order suspending or barring the authorized delegate from continuing to be, or becoming, an authorized delegate of any licensee during the period for which the order is in effect. Upon issuance of the order, the licensee shall terminate its relationship with the authorized delegate according to the terms of the order.

(b) An authorized delegate to whom an order is issued under this section may apply to the Superintendent [Commissioner] to modify or rescind such order. The Superintendent [Commissioner] shall not grant such application unless the Superintendent [Commissioner] finds that it is in the public interest to do so and that it is reasonable to believe that such person will, if such person is permitted to resume being an authorized delegate of a licensee, comply with all applicable provisions of this chapter and of any regulation or order issued under this chapter.

(July 18, 2000, D.C. Law 13-140, § 19, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1019. Licensee liability.

The liability of a licensee to any person for a money transmission conducted by the licensee, or an authorized delegate of the licensee, on behalf of the person shall be limited to the amount of money transmitted or the face amount of the payment instrument purchased.

(July 18, 2000, D.C. Law 13-140, § 20, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1020. Hearings and procedures.

The provisions of subchapter I of Chapter 5 of Title 2 shall apply to any hearing afforded pursuant to this chapter.

(July 18, 2000, D.C. Law 13-140, § 21, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1021. Civil penalties.

(a) Any person who violates any provision of this chapter, any rule or regulation or order issued or promulgated pursuant to this chapter, or any order of the Superintendent [Commissioner] directed to that person, shall be liable for a penalty of not more than \$1,000 for each violation.

(b) The Corporation Counsel for the District of Columbia may bring proceedings to recover all amounts due to the District under this section.

(c) The Superintendent [Commissioner], in the exercise of his reasonable judgment, is authorized to compromise, settle, and collect civil penalties with or from any person for violations of any provision of this chapter, or of any rule, regulation or order issued or promulgated pursuant to this chapter.

(July 18, 2000, D.C. Law 13-140, § 22, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1022. Enforcement.

(a) The Superintendent [Commissioner] may institute an administrative cease and desist proceeding if the Superintendent [Commissioner] determines that a licensee or person required to have a license under this chapter or an authorized delegate has violated, is violating, or is about to violate any provision of this chapter or any rule, regulation or order imposed by the Superintendent [Commissioner], or written agreement entered into with the Superintendent [Commissioner] pursuant to this chapter.

(b)(1) A cease and desist proceeding shall be initiated by the issuance of a notice of charges which shall contain a statement of facts describing the alleged violations.

(2) The notice of charges shall set a date, time, and place at which a hearing will be held to determine whether a cease and desist order should be issued against a licensee or person required to have a license. The hearing date shall be no earlier than 30 days and no later than 60 days, after the date of service of the notice, unless otherwise prescribed by the Superintendent [Commissioner] or the hearing officer.

(c) A cease and desist order may require the person licensed, or required to be licensed, or authorized delegate to cease and desist the violation.

(d) The Superintendent [Commissioner] may issue and serve upon the licensee, or person required to be licensed, or authorized delegate a final cease and desist order if:

(1) The licensee or person or authorized delegate agrees to settle the proceeding by consenting to the order as negotiated by the Superintendent [Commissioner], prior to the commencement of the hearing;

(2) The licensee or person or authorized delegate served with the notice of charges fails to appear at the hearing, in which case the licensee or person or authorized delegate shall be deemed to have consented to the order as issued; or

(3) Substantial evidence in the hearing record supports the determination of the Superintendent [Commissioner] that the violation or violations specified in the notice of charges has transpired.

(e) A final cease and desist order shall become effective 10 days after the service of the order in accordance with subsection (d) of this section, except that a final cease and desist order which has been issued upon consent shall become effective upon the date specified in the order. A final cease and desist order shall remain in effect until it is stayed, modified, terminated, or set aside by the Superintendent [Commissioner] or a reviewing court.

(July 18, 2000, D.C. Law 13-140, § 23, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1023. Criminal penalties.

(a) Any person who knowingly and willfully violates any provision of this chapter for which a penalty is not specifically provided shall be guilty of a misdemeanor and, on conviction thereof, shall be fined not more than \$5,000, or imprisoned for more than 1 year, or both.

(b) Any person who knowingly and willfully makes a material, false statement in any document filed or required to be filed under this chapter with the intent to deceive the recipient of the document shall be guilty of a felony and, on conviction thereof, shall be fined not more than \$10,000, or imprisoned for not more than 3 years, or both.

(c) Any person who engages in the business of money transmission without a license as provided herein shall be guilty of a felony and, on conviction thereof, shall be fined not more than \$25,000, or imprisoned for not more than 5 years, or both.

(July 18, 2000, D.C. Law 13-140, § 24, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1024. Promulgation of rules.

The Superintendent [Commissioner] is authorized to promulgate rules and regulations to implement this chapter.

(July 18, 2000, D.C. Law 13-140, § 25, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1025. Consent to jurisdiction.

Any licensee, authorized delegate, or other person who knowingly engages in business activities that are regulated under this chapter, with or without filing an application, is deemed to have consented to the jurisdiction of the courts of the District of Columbia for all actions arising under this chapter.

(July 18, 2000, D.C. Law 13-140, § 26, 47 DCR 3431.)

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1026. Multiple licenses.

Any person licensed under this chapter shall not be required to obtain a separate license to engage in cashing of checks in the District of Columbia under Chapter 3 of this title.

(July 18, 2000, D.C. Law 13-140, § 27, 47 DCR 3431.)

Temporary Amendment of Section. — Section 13 of D.C. Law 12-210 and § 201 of D.C. Law 13-57 (46 DCR 8894) each added sections designated as §§ 26-1301 to 26-1306 1981 Ed., relating to data match requirements for financial institutions. Section 15(b) of D.C. Law 12-210 and § 401(b) of D.C. Law 13-57 each provide that their respective act shall expire after 225 days of its having taken effect.

Section 15(b) of D.C. Law 12-210 and § 401(b) of D.C. Law 13-57 each provide that their respective act shall expire after 225 days of having taken effect.

Emergency legislation. — For temporary addition of a new Chapter 13 of Title 26, comprised of §§ 26-1301 through 26-1306 1981 Ed., see § 12(a)-(f) of the Child Support and Welfare Reform Compliance Second Emergency Amendment Act of 1998 (D.C. Act 12-439, November 10, 1998, 45 DCR 6110), § 12(a)-(f) of the Child Support and Welfare Reform Compliance Legislative Review Emergency Amendment Act of 1998 (D.C. Act 12-503, February 2, 1999, 45

DCR 8495), and § 12(a)-(f) of the Child Support and Welfare Reform Compliance Second Congressional Review Emergency Amendment Act of 1998 (D.C. Act 12-600, January 20, 1999, 46 DCR 1239).

For temporary (90-day) addition of §§ 26-1301 to 26-1306 1981 Ed., see § 201(a) to (f) of the Child Support and Welfare Reform Compliance Emergency Amendment Act of 1999 (D.C. Act 13-126, August 4, 1999, 46 DCR 6606).

For temporary (90-day) addition of §§ 26-1301 to 26-1306 1981 Ed., see § 201(a) to (f) of the Child Support and Welfare Reform Compliance Legislative Review Emergency Amendment Act of 1999 (D.C. Act 13-177, November 2, 1999, 46 DCR 9678).

For temporary (90-day) addition of §§ 26-1301 to 26-1306 1981 Ed., see § 201(a) to (f) of the Child Support and Welfare Reform Compliance Congressional Review Emergency Amendment Act of 1999 (D.C. Act 13-241, January 11, 2000, 47 DCR 581).

Legislative history of Law 13-140. — For Law 13-140, see notes following § 26-1001.

§ 26-1027. Receipts.

(a) A licensee who receives money or equivalent value for a money trans-

mission shall provide an itemized receipt to the customer that clearly states the amount of money or the equivalent value presented by the customer for the money transmission and the fees charged by the money transmission licensee.

(b) If the licensee fixes, when the money transmission is initiated, the rate of exchange for a money transmission to be paid in the currency of another government, the receipt provided by subsection (a) of this section shall disclose the rate of exchange for the transaction and any limit on the length of time that the payment will be made at that fixed rate of exchange.

(c) If a licensee does not fix the rate of exchange for a money transmission to be paid in the currency of another government, the receipt provided under subsection (a) of this section shall disclose that the rate of exchange for the money transmission will be set when the person designated by the customer to receive the money takes possession of the money.

(d) For the purposes of this section:

(1) Money is deemed to have been transmitted when it is available to the person designated by the customer, whether or not the designated person has taken possession of the money.

(2) The term "fees" shall not include revenue that a licensee or its authorized delegate generates, in connection with a money transmission, in converting the money of the government into the money of another government.

(July 18, 2000, D.C. Law 13-140, § 27a, as added Mar. 12, 2011, D.C. Law 18-315, § 3, 57 DCR 12412.)

Legislative history of Law 18-315. — For history of Law 18-315, see notes under § 26-317.

CHAPTER 11. MORTGAGE LENDERS AND BROKERS.

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§ 26-1101. Definitions.

For the purposes of this chapter, the term:

(1) "Borrower" means a person who submits an application for a loan secured by a first or subordinate mortgage or deed of trust on a single to 4-family home.

(1A) "Clerical tasks" means the receipt, collection, and distribution of information common for the processing or underwriting of a loan in the mortgage industry and communication with a consumer to obtain information necessary for the processing or underwriting of a residential mortgage loan.

(1B) "Commissioner" means the Commissioner of the Department of Insurance, Securities, and Banking.

(2) "Commitment" means a written, specific, binding agreement between a borrower and a lender which sets forth the terms of the loan being extended to the borrower.

(2A) "Conference of State Bank Supervisors" means the professional association of state officials responsible for chartering, regulating, and supervising state-chartered commercial and savings banks and state-licensed branches and agencies of foreign banks.

(2B) "Depository institution" shall:

(A) Have the same meaning as provided in section 3 of the Federal Deposit Insurance Act, approved September 21, 1950 (64 Stat. 873; 12 U.S.C. § 1813); and

(B) Include any credit union.

(3) "District" means the District of Columbia.

(3A) "Federal banking agency" means the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the National Credit Union Administration, or the Federal Deposit Insurance Corporation.

(4) "Federally approved seller-servicers" means a mortgage lender that has been approved as a seller-servicer by:

(A) The Federal Home Loan Mortgage Corporation;

(B) The Federal National Mortgage Association; or

(C) The Government National Mortgage Association.

(5) "Financing agreement" means a written agreement between a borrower and a lender which sets forth the terms of a purchase money loan or a refinancing of an existing loan that:

(A) Results in or is secured by a first or subordinate mortgage or deed of trust on a single to 4-family home; and

(B) Is offered or extended to the borrower.

(5A) "Independent contractor" means an individual who is required to obtain and maintain a license under this chapter to engage in residential mortgage loan origination activities as a loan processor or underwriter.

(6) "Interest in real property" includes:

(A) A confessed judgment note or consent judgment required or obtained by any person acting as a mortgage lender or mortgage broker for the purpose of acquiring a lien on residential real property;

(B) A sale and leaseback required or obtained by any person acting as a mortgage lender or mortgage broker for the purpose of creating a lien on residential real property;

(C) A mortgage, deed of trust, or lien other than a judgment lien, on residential real property; and

(D) Any other security interest that has the effect of creating a lien on residential real property in the District of Columbia.

(7) "License" means a license issued by the Superintendent [Commissioner] under this chapter to authorize a person to engage in business as a mortgage loan originator, loan officer, mortgage lender, or mortgage broker.

(8) "Licensee" means a person who is licensed as a mortgage loan originator, loan officer, mortgage lender, or mortgage broker under this chapter.

(9) "Loan application" means the submission of a borrower's financial information in anticipation of a credit decision, whether written or computer-generated, relating to a mortgage loan. If the submission does not state or identify a specific property, the submission is an application for a pre-qualification and not an application for a mortgage loan. The subsequent addition of an identified property to the submission converts the submission to an application for a mortgage loan.

(9A) "Loan processor or underwriter" means an individual who performs clerical or support duties as an employee of and at the direction of, and subject to the supervision and instruction of, a person licensed, or exempt from licensing, under this chapter.

(10) "Mortgage broker" means any person who, for compensation or gain, or in the expectation of compensation or gain, either directly or indirectly accepts or offers to accept an application for a mortgage loan, solicits or offers to solicit a mortgage loan on behalf of a borrower, or negotiates or offers to negotiate the terms and conditions of a mortgage loan on behalf of a lender.

(11) "Mortgage lender" means:

(A) Any person who:

(i) Repealed.

(ii) Makes a mortgage loan to any person; or

(iii) Engages in the business of servicing mortgage loans for others or collecting or otherwise receiving mortgage loan payments directly from borrowers for distribution to any other person.

(B) A mortgage lender does not include:

(i) A financial institution that accepts deposits and is regulated under this title;

(ii) The Federal Home Loan Mortgage Corporation;

(iii) The Federal National Mortgage Association;

(iv) The Government National Mortgage Association; or

(v) Any person engaged exclusively in the acquisition of all or any portion of a mortgage loan under any federal, state, or local governmental program of mortgage loan purchases.

(12) "Mortgage loan" means any loan primarily for personal, family, or household use that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling, as defined in section 103(v) of the Truth in Lending Act, approved May 29, 1968 (82 Stat. 147; 15 U.S.C. § 1602(v)), or residential real estate upon which is constructed, or intended to be constructed, a dwelling.

(12A) "Non-conventional mortgage loan" means any mortgage loan that is not a fixed-rate mortgage loan with an amortization period of 30 years or less.

(12B)(A) "Mortgage loan originator" or "loan officer" means an individual who:

(i) Takes a residential mortgage application;

(ii) Offers or negotiates terms of a residential mortgage loan; or

(iii) Solicits, or offers to solicit, a mortgage loan on behalf of a borrower for compensation or gain.

(B) The term shall not include:

(i) An individual who is not otherwise described in subparagraph (A) of this paragraph;

(ii) An individual or entity solely involved in extension of credit relating to timeshare plans, as defined in 11 U.S.C. § 101(53D); or

(iii) An individual who only performs real estate brokerage activities and is licensed or registered in accordance with District of Columbia law, unless the person is compensated by a mortgage lender, a mortgage broker, mortgage loan originator, or loan officer, or by any agent of a mortgage lender, mortgage broker, mortgage loan originator, or loan officer.

(12C) "Mortgage uniform licensing form" means the SSR application form for mortgage brokers, mortgage lenders, and mortgage loan originators approved by the Commissioner.

(12D) "Nationwide Mortgage Licensing System and Registry" or "NMLSR" means a mortgage licensing system developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for the licensing and registration of licensed mortgage loan originators, mortgage lenders, mortgage brokers, and loan officers.

(13) "Nonprofit corporation" means a corporation no part of the income of which is distributable to its members, directors or officers. Nothing in this

chapter shall be construed as prohibiting the payment of reasonable compensation for services rendered and the making of distribution upon dissolution of final liquidation.

(14) "Person" means an individual, firm, corporation, business trust, estate, trust, partnership, association, 2 or more persons having a joint or common interest, or any other legal or commercial entity, or group of individuals however organized.

(15) "Principal" means any person who, directly or indirectly, owns or controls 10% or more of the outstanding stock of a stock corporation or 10% or greater interest in a nonstock corporation or a limited liability company.

(15A) "Real estate brokerage activity" means any activity that involves offering or providing real estate brokerage services to the public, including;

(A) Acting as a real estate agent or real estate broker for a buyer, seller, lessor, or lessee of real property;

(B) Bringing together parties interested in the sale, purchase, lease, rental, or exchange of real property;

(C) Negotiating, on behalf of any party, any portion of a contract relating to the sale, purchase, lease, rental, or exchange of real property (other than in connection with providing financing with respect to any such transaction);

(D) Engaging in any activity for which a person engaged in the activity is required to be registered or licensed as a real estate agent or real estate broker under any applicable law; and

(E) Offering to engage in any activity, or act in any capacity, described in subparagraph (A), (B), (C), or (D) of this paragraph.

(15B) "Registered mortgage loan originator" or "registered loan officer" means any individual who is:

(A) A mortgage loan originator or loan officer;

(B) An employee of:

(i) A depository institution;

(ii) A subsidiary that is owned and controlled by a depository institution and regulated by a federal banking agency; or

(iii) An institution regulated by the Farm Credit Administration; and

(C) Registered with, and maintains a unique identifier through, the NMLSR.

(16) Repealed.

(16A) "Sponsor" means the licensed mortgage lender or mortgage broker with whom the mortgage loan originator is employed or associated.

(16B) "SRR" means the limited liability corporation which owns and operates the NMLSR.

(17) "Superintendent" means the Superintendent of the District of Columbia Office of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking].

(17A) "Takes a residential mortgage loan application" means:

(A) Recording the borrower's application information in any form for use in a credit decision; or

(B) Receiving the borrower's application information in any form for use in a credit decision.

(17B) "Unique identifier" means a number or other identifier assigned by protocols established by the NMLSR.

(18) "Washington, D.C. metropolitan region" means the District of Columbia, the counties of Montgomery and Prince Georges in the State of Maryland, the counties of Arlington and Fairfax, and the cities of Alexandria and Falls Church in the Commonwealth of Virginia.

(Sept. 9, 1996, D.C. Law 11-155, § 2, 43 DCR 4213; June 6, 1998, D.C. Law 12-116, § 2(a), 45 DCR 1959; Jan. 29, 2008, D.C. Law 17-90, § 2(a), 54 DCR 11925; July 18, 2009, D.C. Law 18-38, § 2(a), 56 DCR 4290.)

Prior Codifications. — 1981 Ed., § 26-1001.

Effect of amendments. — D.C. Law 17-90 added par. (12A).

D.C. Law 18-38, in par. (1), deleted "to be occupied by the borrower as the borrower's primary residence" following "home"; added pars. (1A), (1B), (2A), (2B), (3A), (5A), (9A), (12B), (12C), (12D), (15A), (15B), (16A), (16B), (17A), and (17B); in par. (5)(A), deleted "to be occupied by the borrower" following "home"; in pars. (7) and (8), substituted "mortgage loan originator, loan officer, mortgage lender," for "mortgage lender"; rewrote par. (12); and repealed par. (16). Prior to amendment or repeal, pars. (12) and (16) read as follows:

"(12) 'Mortgage loan' means any loan or other extension of credit that is secured, in whole or in part, by any interest in residential real property in the District of Columbia."

"(16) 'Residential real property' means any owner-occupied real property located in the District of Columbia, which property has a dwelling on it designed principally as a residence with accommodations for not more than 4 families. This term does not include any real property held primarily for rental, investment, or the generation of income through any commercial or industrial enterprise."

Temporary Amendment of Section. — Section 2(a) of D.C. Law 12-3 rewrote (9); and repealed (11)(A)(i).

Section 6(b) of D.C. Law 12-3 provided that the act shall expire after 225 days of its having taken effect.

Section 2(a) of D.C. Law 12-101 rewrote (9); and repealed (11)(A)(i).

Section 6(b) of D.C. Law 12-101 provided that the act shall expire after 225 days of its having taken effect.

Section 2(a) of D.C. Law 17-350 rewrote the section.

Section 5(b) of D.C. Law 17-350 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary amendment of section, see § 2(a) of the Mortgage Lender and Broker Act of 1996 Emergency Amendment Act of 1997 (D.C. Act 12-23, March

3, 1997, 44 DCR 1773), § 2(a) of the Mortgage Lender and Broker Act of 1996 Second Emergency Amendment Act of 1997 (D.C. Act 12-245, January 13, 1998, 45 DCR 656), and § 2(a) of the Mortgage Lender and Broker Act of 1996 Congressional Review Emergency Amendment Act of 1998 (D.C. Act 12-308, March 20, 1998, 45 DCR 1920).

For temporary (90 day) amendment of section, see § 2(a) of Mortgage Lender and Broker Emergency Amendment Act of 2008 (D.C. Act 17-617, December 22, 2008, 56 DCR 189).

For temporary (90 day) amendment of section, see § 2(a) of Mortgage Lender and Broker Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-31, March 16, 2009, 56 DCR 2327).

Legislative history of Law 11-155. — Law 11-155, the "Mortgage Lender and Broker Act of 1996," was introduced in Council and assigned Bill No. 11-637, which was referred to the Committee on Economic Development. The Bill was adopted on first and second readings on May 7, 1996, and June 4, 1996, respectively. Signed by the Mayor on June 19, 1996, it was assigned Act No. 11-309 and transmitted to both Houses of Congress for its review. D.C. Law 11-155 became effective on September 9, 1996.

Legislative history of Law 12-3. — Law 12-3, the "Mortgage Lender and Broker Act of 1996 Temporary Amendment Act of 1997," was introduced in Council and assigned Bill No. 12-82. The Bill was adopted on first and second readings on February 4, 1997, and March 4, 1997, respectively. Signed by the Mayor on March 19, 1997, it was assigned Act No. 12-45 and transmitted to both Houses of Congress for its review. D.C. Law 12-3 became effective on May 23, 1997.

Legislative history of Law 12-101. — Law 12-101, the "Mortgage Lender and Broker Act of 1996 Temporary Amendment Act of 1998," was introduced in Council and assigned Bill No. 12-475. The Bill was adopted on first and second readings on December 4, 1997, and January 6, 1998, respectively. Signed by the Mayor on January 27, 1998, it was assigned Act No. 12-277 and transmitted to both Houses of

Congress for its review. D.C. Law 12-101 became effective on April 30, 1998.

Legislative history of Law 12-116. — Law 12-116, the “Mortgage Lender and Broker Act of 1996 Amendment Act of 1998,” was introduced in Council and assigned Bill No. 12-426, which was referred to the Committee on Economic Development. The Bill was adopted on first and second readings on February 3, 1998, and March 3, 1998, respectively. Signed by the Mayor on March 17, 1998, it was assigned Act No. 12-313 and transmitted to both Houses of Congress for its review. D.C. Law 12-116 became effective on June 6, 1998.

Legislative history of Law 17-90. — Law 17-90, the “Mortgage Disclosure Amendment Act of 2007,” was introduced in Council and assigned Bill No. 17-167 which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on October 2, 2007, and No-

vember 6, 2007, respectively. Signed by the Mayor on November 27, 2007, it was assigned Act No. 17-208 and transmitted to both Houses of Congress for its review. D.C. Law 17-90 became effective on January 29, 2008.

Legislative history of Law 18-38. — Law 18-38, the “Mortgage Lender and Broker Amendment Act of 2009,” was introduced in Council and assigned Bill No. 18-133, which was referred to the Committee on Public Service and Consumer Affairs. The Bill was adopted on first and second readings on April 7, 2009, and May 5, 2009, respectively. Signed by the Mayor on May 21, 2009, it was assigned Act No. 18-89 and transmitted to both Houses of Congress for its review. D.C. Law 18-38 became effective on July 18, 2009.

Editor’s notes. — Section 4 of D.C. Law 17-90 provided that section 2 shall apply 30 days after the effective date of this act.

CASE NOTES

Mortgage broker.

Material issues of fact existed as to whether settlement company acted solely as settlement agent with respect to borrower’s mortgage loan and had no involvement in soliciting loan, or whether company was main driving force behind efforts to secure mortgage loan and attorney who was one of company’s principals acted on company’s behalf in negotiating loan, pre-

cluding summary judgment for either borrower or company on issue of whether company acted as statutory mortgage broker, as defined under District of Columbia law, for purposes of borrower’s claim under District of Columbia Home Loan Protection Act (HPLA). *Sloan v. Urban Title Servs., Inc.*, 652 F.Supp.2d 40, 2009 U.S. Dist. LEXIS 83646 (2009).

§ 26-1102. Exemptions.

The provisions of this chapter shall not apply to:

(1) Any bank, trust company, savings bank, savings and loan association, or credit union incorporated or chartered under the laws of the United States, any state or territory of the United States, or the District, and any other financial institution incorporated or chartered under the laws of the District or of the United States, that accepts deposits and is regulated under Title 26 of the District of Columbia Official Code.

(2) Any insurance company authorized to do business in the District;

(3) Any corporate instrumentality of the United States government including:

(A) The Federal Home Loan Mortgage Corporation;

(B) The Federal National Mortgage Association; and

(C) The Government National Mortgage Association;

(4) Repealed.

(5) Any person who takes back a deferred purchase money mortgage in connection with the sale of:

(A) Residential real property owned by, and titled in the name of, that person; or

(B) A new residential dwelling that the person built.

(6) A person making a mortgage loan to a borrower who is the person’s

spouse, child, child's spouse, parent, sibling, grandparent, grandchild, or grandchild's spouse;

(7) Nonprofit corporations making mortgage loans to promote home ownership or improvements for very low, lower, and moderate income households as defined in Chapter 25 of Title 14 of the District of Columbia Municipal Regulations;

(8) Agencies of the federal government, the District, or any state or municipal government, or any quasi-governmental agency making mortgage loans under the specific authority of the laws or regulations of any state, the District, or the United States, including, without limitation, the Housing Finance Agency of the District of Columbia with respect to its activities in offering, accepting, completing, and processing mortgage loan applications under its programs;

(9) Persons acting as fiduciaries with respect to any employee pension benefit plan qualified under the Internal Revenue Code who make mortgage loans solely to plan participants from plan assets;

(10) Persons licensed by the District of Columbia as attorneys, real estate brokers, or real estate salespersons, not actively and principally engaged in negotiating, placing, or finding mortgage loans, when rendering services as an attorney, real estate broker, or real estate salesperson; however, a real estate broker or a real estate salesperson who receives any fee, commission, kickback, rebate, or other payment for directly or indirectly negotiating, placing, or finding a mortgage loan for others shall not be exempt from the provisions of this chapter;

(11) Persons acting in a fiduciary capacity conferred by authority of any court; and.

(12) Persons acting as registered mortgage loan originators.

(Sept. 9, 1996, D.C. Law 11-155, § 3, 43 DCR 4213; June 6, 1998, D.C. Law 12-116, § 2(b), 45 DCR 1959; May 7, 2002, D.C. Law 14-132, § 601(a)(1), 49 DCR 2551; July 18, 2009, D.C. Law 18-38, § 2(b), 56 DCR 4290.)

Section references. — This section is referred to in §§ 26-910 and 42-1749.

Prior Codifications. — 1981 Ed., § 26-1002.

Effect of amendments. — D.C. Law 14-132 repealed par. (4) which had read as follows: "(4) Any person who makes or brokers 3 or fewer mortgage loans per calendar year;".

D.C. Law 18-38, rewrote par. (1); in par. (10), deleted "and" from the end; in par. (11), substituted "; and" for a period at the end; and added par. (12). Prior to amendment, par. (1) read as follows: "(1) Any bank, trust company, savings bank, savings and loan association, or credit union incorporated or chartered under the laws of the United States, any state or territory of the United States, or the District, and any other financial institution incorporated or chartered under the laws of the District or of the United States, that accepts deposits and is regulated under this title, and subsidiaries and

affiliates of such entities which maintain their principal office or a branch office in the District of Columbia and in which the lender, subsidiary, or affiliate is subject to the general supervision or regulation of, or subject to audit or examination by, a regulatory body or agency of the United States, any state or territory of the United States, or the District;".

Temporary Amendment of Section. — Section 2(b) of D.C. Law 17-350, in par. (10), substituted a semicolon for "; and"; in par. (11), substituted "; and" for a period; and added par. (12) to read as follows:

"(12) Persons acting as registered mortgage loan originators, when acting for a federal banking agency."

Section 5(b) of D.C. Law 17-350 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 601(a)(1)

of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

For temporary (90 day) amendment of section, see § 2(b) of Mortgage Lender and Broker Emergency Amendment Act of 2008 (D.C. Act 17-617, December 22, 2008, 56 DCR 189).

For temporary (90 day) amendment of section, see § 2(b) of Mortgage Lender and Broker Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-31, March 16, 2009, 56 DCR 2327).

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see His-

torical and Statutory Notes following § 26-1101.

Legislative history of Law 12-116. — For legislative history of D.C. Law 12-116, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-603.

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

References in text. — The Internal Revenue Code, referred to in (9), is codified as Title 26 of the U.S. Code.

CASE NOTES

Dismissal.

Investment and loan company involved in allegedly fraudulent home loan transaction, upon which home purchasers brought action, could not be held indirectly liable under the District of Columbia Mortgage Lender and Broker Act or the District of Columbia Home Loan

Protection Act based on liability for civil conspiracy in home purchasers' action, where civil conspiracy claims had already been dismissed. *Blue v. Fremont Inv. & Loan*, 562 F.Supp.2d 33, 2008 U.S. Dist. LEXIS 47698 (2008), dismissed in part by, remanded by 584 F. Supp. 2d 10, 2008 U.S. Dist. LEXIS 81586 (D.D.C. 2008).

§ 26-1103. License requirements.

(a)(1) No person shall engage in business as a mortgage loan originator, loan officer, mortgage lender, mortgage broker, or any permissible combination thereof, or hold himself out to the public to be a mortgage loan originator, loan officer, mortgage lender, mortgage broker, or any permissible combination thereof, unless such person has first obtained a license under this chapter. Each licensee shall register with, and maintain a valid unique identifier issued by, the NMLSR.

(2) Each independent contractor loan processor or underwriter licensed as a mortgage loan originator shall have, and maintain, a valid unique identifier issued by the NMLSR.

(3) An individual engaging solely in loan processor or underwriting activities, who does not represent to the public, through advertising or other means of communicating or providing information, including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items, that such individual can or will perform any of the activities of a mortgage loan originator shall not be required to obtain and maintain a license under this chapter.

(b) To qualify for a license, an applicant shall satisfy the Superintendent [Commissioner] that the applicant, including its members, officers, directors, and principals is of good moral character and has sufficient financial responsibility, business experience, and general fitness to:

(1) Engage in business as a mortgage loan originator, loan officer, mortgage lender, or mortgage broker;

(2) Warrant the belief that the business will be conducted lawfully, honestly, fairly, and efficiently; and

(3) Meet the minimum liquidity and capital requirements as prescribed by the Commissioner.

(b-1) An applicant for a mortgage loan originator's license shall have a sponsor.

(c) The Superintendent [Commissioner] may deny an application for a license to any person who has committed any act prior to the granting of the license that would be a ground for suspension or revocation of a license under this chapter.

(c-1) The Commissioner shall deny an application if the applicant has:

(1) Had a mortgage loan originator license revoked by any governmental jurisdiction;

(2) Been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court during the 7-year period preceding the date of the application for licensing and registration; or

(3) At any time preceding the date of application, been convicted of, or pled guilty or nolo contendere to a felony, if such felony involved an act of fraud or dishonesty, a breach of trust, or money laundering.

(d) To apply for a license an applicant shall:

(1) Complete and sign an application made under oath on the form that the Commissioner requires;

(2) Comply with all conditions and provisions of the application for licensure.

(e) The application shall include:

(1) If the applicant is an individual, the applicant's name, business address, and telephone number, and residential address and telephone number;

(2) If the applicant is a partnership, limited liability company, or other noncorporate business association, the business name, business address, and telephone number, and the residential address and telephone number of each:

(A) General partner, if the applicant is a limited partnership;

(B) General partner who holds an interest in the partnership of more than 10%, if the applicant is a general partnership; or

(C) Member, if the applicant is a limited liability company or a noncorporate business association;

(3) If the applicant is a corporation:

(A) The name, address, and telephone number of the corporate entity; and

(B) The name, business telephone number, and residential address and telephone number of the president, senior vice presidents, secretary, and treasurer, each director and each stockholder owning or controlling 10% or more of any class of stock in the corporation;

(4) The name under which the mortgage lender or mortgage broker business is to be conducted;

(5) The name and address of the applicant's registered agent, if any;

(6) The address of the location of the business to be licensed;

(7) Whether the applicant seeks a license to act as a mortgage loan originator, loan officer, mortgage lender, mortgage broker, or any permissible combination thereof; and

(8) Such other information concerning the financial responsibility, back-

ground, experience, and activities of the applicant and its members, officers, directors, and principals as the Superintendent [Commissioner] may require.

(f) With each application for licensure, the applicant shall pay the applicable fees prescribed by the Commissioner and any third-party fees.

(g) The Superintendent [Commissioner] may, from time to time, increase or decrease the fees set forth in this section. The fees shall be fixed at such rates, and computed on such bases and in such manner as may, in the judgement of the Superintendent [Commissioner], be necessary to defray the approximate costs of carrying out the regulatory functions set forth in this chapter. These fees shall not be abated by surrender, suspension, or revocation of a license.

(h) For each license for which an applicant applies, the applicant shall:

(1) Submit a separate application;

(2) Pay a separate license fee;

(3)(A) File a separate surety bond or other financial guaranty under subsection (i) of this section;

(B) The applicant shall demonstrate that the applicant has met net worth and surety bond requirements or, as prescribed by the Commissioner, paid into a District of Columbia fund;

(4) Meet educational requirements prescribed by the Commissioner;

(5) Provide proof of compliance with pre-licensure testing and post-licensure continuing education requirements as prescribed by the Commissioner; and

(6) Comply with any other requirement prescribed by the Commissioner.

(h-1)(1) The Commissioner shall require, by rule, that an applicant applying for licensure under this chapter, and any such other person as the Commissioner considers appropriate, submit his name, contact information and other identifying information, fingerprints, written consent to a criminal background check, an independent credit report, and information related to any administrative, civil, or criminal findings by any governmental jurisdiction with the applicant's application.

(2) For the purposes of this chapter, the Commissioner may use the NMLSR as an agent for requesting information from, and distributing information to, the Federal Bureau of Investigation, the Department of Justice, any governmental agency, or any source so directed by the Commissioner.

(h-2) The Commissioner may waive or defer any licensing requirement, other than requirements mandated by 12 U.S.C. § 5105, 5106, and 5108(d), for good cause shown in writing.

(i) An applicant for an original license or for the renewal of a license shall file a surety bond with each original application and any renewal application for the license.

(1) The surety bond shall:

(A) Run to the Commissioner for the benefit of the District and any person who has been damaged by a licensee as a result of violating any law or regulation governing the activities of mortgage loan originators, mortgage lenders, or mortgage brokers;

(B) Be issued by a surety company authorized to do business in the District;

(C) Be conditioned upon the applicant complying with all District laws regulating the activities of mortgage lenders, mortgage brokers, and mortgage loan lending and performing all written agreements with borrowers or prospective borrowers, accounting for all funds received by the licensee in conformity with a standard system of accounting consistently applied; and

(D) Be continuously maintained thereafter for as long as any license issued under this chapter remains in force.

(2) Repealed.

(3) Repealed.

(4) Repealed.

(5) Any person who may be damaged by noncompliance of a licensee with any condition of such bond may proceed on such bond against the principal or surety thereon, or both, to recover damages. Regardless of the number of years the bond remains in effect, the number of premiums paid, the number of renewals of the license, or the number of claims made, the aggregate liability under the bond shall not exceed the penal sum of the bond.

(6) Surety bond requirements shall be prescribed by the Commissioner.

(j) Any license issued pursuant to this section shall be issued as a Financial Services endorsement to a basic business license under the basic business license system as set forth in subchapter I-A of Chapter 28 of Title 47 of the District of Columbia Official Code.

(Sept. 9, 1996, D.C. Law 11-155, § 4, 43 DCR 4213; June 6, 1998, D.C. Law 12-116, § 2(c), 45 DCR 1960; Apr. 20, 1999, D.C. Law 12-261, § 2003(s), 46 DCR 3142; Oct. 3, 2001, D.C. Law 14-28, § 3202(a), 48 DCR 6981; Oct. 28, 2003, D.C. Law 15-38, § 3(r), 50 DCR 6913; July 18, 2009, D.C. Law 18-38, § 2(c), 56 DCR 4290.)

Section references. — This section is referred to in §§ 26-603, 26-1004, 26-1006, and 26-1007.

Prior Codifications. — 1981 Ed., § 26-1003.

Effect of amendments. — D.C. Law 14-28 rewrote subsec. (f)(3), which had read:

“(3) A license fee of \$500.”

D.C. Law 15-38, in subsec. (j), substituted “Financial Services endorsement to a basic business license under the basic” for “Class A Financial Services endorsement to a master business license under the master”.

D.C. Law 18-38 rewrote the section.

Temporary Amendment of Section. — Section 2(c) of D.C. Law 17-350 rewrote subsecs. (a), (b)(1), and (b)(3) to read as follows:

“(a)(1) No person shall engage in business as a mortgage loan originator, loan officer, mortgage lender, mortgage broker, or any permissible combination thereof, or hold himself out to the public to be a mortgage loan originator, loan officer, mortgage lender, mortgage broker, or any permissible combination thereof, unless such person has first obtained a license under this act. Each licensee shall register with and

maintain a valid unique identifier issued by the NMLSR.

“(2) Each independent contractor loan processor or underwriter licensed as a mortgage loan originator shall have, and maintain, a valid unique identifier issued by the NMLSR.

“(3) An individual engaging solely in loan processor or underwriting activities, who does not represent to the public, through advertising or other means of communicating or providing information, including the use of business cards, stationery, brochures, signs, rate lists, or other promotional items, that such individual can or will perform any of the activities of a mortgage loan originator shall not be required to obtain and maintain a license under this act.”

“(1) Engage in business as a mortgage loan originator, loan officer, mortgage lender, or mortgage broker;”

“(3) Meet the minimum liquidity and capital requirements as prescribed by the Commissioner.”; added subsec. (c-1) to read as follows:

“(c-1) The Commissioner shall deny an application if the applicant has:

“(1) Had a mortgage loan originator license revoked by any governmental jurisdiction;

"(2) Been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court during the 7-year period preceding the date of the application for licensing and registration; or

"(3) At any time preceding such date of application, been convicted of, or pled guilty or nolo contendere to a felony, if such felony involved an act of fraud or dishonesty, a breach of trust, or money laundering."; rewrote subsecs. (d)(1), (e)(7), and (f) to read as follows:

"(1) Complete and sign an application made under oath on the form that the Commissioner requires."

"(7) Whether the applicant seeks a license to act as a mortgage loan originator, loan officer, mortgage lender, mortgage broker, or any permissible combination thereof; and"

"(f) With each application for licensure, the applicant shall pay the applicable fees prescribed by the Commissioner and any third-party fees."; in subsec. (h)(2), deleted "and" at the end; in subsec. (h)(3), substituted a semicolon for a period, designated the existing text as subpar. (A) and added subpar. (B) to read as follows:

"(B) The applicant shall demonstrate that the applicant has met net worth and surety bond requirements or, as prescribed by the Commissioner, paid into a District of Columbia fund."; added subsecs. (h)(4) through (6) to read as follows:

"(4) Meet educational requirements prescribed by the Commissioner;

"(5) Provide proof of compliance with precensure testing and post-licensure continuing education requirements as prescribed by the Commissioner; and

"(6) Comply with any other provision prescribed by the Commissioner."; added subsec. (h-1) to read as follows:

"(h-1) The Commissioner shall require, by rule, that an applicant, and any such other person as the Commissioner considers appropriate, applying for licensure under this act, submit his name, contact information and other identifying information, fingerprints, written consent to a criminal background check, an independent credit report, and information related to any administrative, civil, or criminal findings by any governmental jurisdiction with the applicant's application. For the purposes of this act, the Commissioner may use the NMLSR as an agent for requesting information from, and distributing information to, the Federal Bureau of Investigation, the Department of Justice, any governmental agency, or any source so directed by the Commissioner."; in subsec. (i), substituted "mortgage lenders, mortgage brokers, mortgage loan originators, or loan officers" for "mortgage lenders or mortgage brokers" in par. (1)(A), repealed pars. (2)

through (4), and added par. (6) to read as follows:

"(6) Surety bond requirements shall be prescribed by the Commissioner."

Section 5(b) of D.C. Law 17-350 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary amendment of section, see § 2(a) of the Mortgage Lender and Broker Act of 1996 Time Extension Emergency Act of 1996 (D.C. Act 11-439, December 4, 1996, 44 DCR 6656), and § 2(a) of the Mortgage Lender and Broker Act of 1996 Time Extension Congressional Review Emergency Amendment Act of 1997 (D.C. Act 12-21, March 3, 1997, 44 DCR 1768).

For temporary amendment of section, see § 2(b) of the Mortgage Lender and Broker Act of 1996 Emergency Amendment Act of 1997 (D.C. Act 12-23, March 3, 1997, 44 DCR 1773), § 2(b) of the Mortgage Lender and Broker Act of 1996 Second Emergency Amendment Act of 1997 (D.C. Act 12-245, January 13, 1998, 45 DCR 656), and § 2(b) of the Mortgage Lender and Broker Act of 1996 Congressional Review Emergency Amendment Act of 1998 (D.C. Act 12-308, March 20, 1998, 45 DCR 1920).

For temporary (90 day) amendment of section, see § 2902 of Fiscal Year 2002 Budget Support Emergency Act of 2001 (D.C. Act 14-124, August 3, 2001, 48 DCR 7861).

For temporary (90 day) amendment of section, see § 3(r) of Streamlining Regulation Emergency Act of 2003 (D.C. Act 15-145, August 11, 2003, 50 DCR 6896).

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 12-3. — For legislative history of D.C. Law 12-3, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 12-101. — For legislative history of D.C. Law 12-101, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 12-116. — For legislative history of D.C. Law 12-116, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 12-261. — Law 12-261, the "Second Omnibus Regulatory Reform Amendment Act of 1998," was introduced in Council and assigned Bill No. 12-845, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 1, 1998, and December 15, 1998, respectively. Signed by the Mayor on December 31, 1998, it was assigned Act No. 12-615 and transmitted to both Houses of Congress for its review. D.C. Law 12-261 became effective on April 20, 1999.

Legislative history of Law 14-28. — For Law 14-28, see notes following § 26-131.10.

Legislative history of Law 15-38. — For Law 15-38, see notes following § 26-901.

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

Editor's notes. — Temporary amendment of section: Section 2(b) of D.C. Law 12-3, in (b)(3), substituted "maintaining" for "having" twice.

Section 6(b) of D.C. Law 12-3 provided that the act shall expire after 225 days of its having taken effect.

Section 2(b) of D.C. Law 12-101, in (b)(3), substituted "maintaining" for "having" twice.

Section 6(b) of D.C. Law 12-101 provided that

the act shall expire after 225 days of its having taken effect.

Fees credited to the Office of Banking and Financial Institutions Enterprise Fund: Section 1804(4) of D.C. Law 12-60 provided that all fees received pursuant to § 26-1003(f) shall be credited to the Office of Banking and Financial Institutions Enterprise Fund.

Section 3 of D.C. Law 18-38 provided: "Sec. 3. Applicability. Except for section 2(c)(1), (g), (j), and (o), this act shall not apply until the Commissioner of the Department of Insurance, Securities, and Banking has promulgated rules implementing this act."

CASE NOTES

Standing.

Federal savings association satisfied actual injury requirement for standing to sue District of Columbia (D.C.) alleging that Home Owners' Loan Act (HOLA) preempted implementing regulations of D.C. statute requiring that persons engaged in mortgage lending activities, including marketing, be licensed and overseen by D.C.; although regulations exempted federal

savings associations, association's use of independent contractor agents was business opportunity, denial of which constituted injury, and association had to pay for costs of fees and exams in order to have its agents market its services. *State Farm Bank, F.S.B. v. District of Columbia*, 640 F.Supp.2d 17, 2009 U.S. Dist. LEXIS 65237 (2009).

§ 26-1104. Issuance of license.

(a) When an applicant for a license files the application and bond and pays the fees required by this chapter, the Superintendent [Commissioner] shall investigate to determine if the applicant meets the requirements of this chapter. The Superintendent [Commissioner] shall make such investigations as deemed necessary to determine if the applicant has complied with all applicable provisions of law and any regulations promulgated thereunder.

(b) The Superintendent [Commissioner] shall approve or deny each application for a license within 60 days after the date from when the application and bond are filed and the fees are paid.

(c) The Superintendent [Commissioner] shall issue a license to any applicant who meets the requirements of this chapter.

(d) Every license shall remain in force until it has been surrendered, revoked, or suspended. The surrender, revocation, or suspension of a license shall not affect any pre-existing legal right or obligation of such licensee.

(1) A license issued under this section authorizes the licensee to act as mortgage lender, mortgage broker, mortgage loan originator, or loan officer under the license at the licensed place of business.

(2) Only 1 place of business may be maintained under any 1 license.

(3) A licensee may maintain more than 1 license under this section provided that a separate application for each license is made pursuant to § 26-1103 and the Superintendent [Commissioner] approves such application.

(e)(1) The Superintendent [Commissioner] shall include on each license:

(A) The name of the licensee; and

(B) The address at which the business is to be conducted.

(2) A person may not conduct any mortgage loan business at any location or under any name different from the address and name that appears on the person's license.

(f)(1) A licensee may not receive any application for a loan or allow any note or contract for a loan or mortgage, evidence of any note or contract for a loan or mortgage, or evidence of indebtedness to be signed or executed at any place for which the licensee does not have a license, except at the office of:

(A) The attorney for the borrower or for the licensee; or

(B) A title insurance company, a title company, or an attorney for a title insurance company or a title company.

(2) Notwithstanding paragraph (1)(A) of this subsection, a licensee may accept a loan application from a borrower by mail or telephone or in person at the borrower's residence or place of employment to accommodate the borrower at the borrower's request.

(3) The Superintendent [Commissioner] shall adopt regulations to ensure that the loan application process is conducted fairly and in a manner consistent with the best interests of both the borrower and mortgage lender.

(g) A license may be issued under this chapter to a business entity whose principal office is located outside the District provided that the business entity maintains a resident agent within the District at all times during the term of the license, regardless of whether:

(1) The business entity maintains any office within the District; and

(2) The activities of the business entity constitute doing business or having a tax situs in the District.

(h) Each license shall be prominently posted in each place of business of the licensee. Licenses shall not be transferable or assignable, by operation of law or otherwise. No licensee shall use any name other than the name set forth on the license issued by the Superintendent [Commissioner].

(Sept. 9, 1996, D.C. Law 11-155, § 5, 43 DCR 4213; July 18, 2009, D.C. Law 18-38, § 2(d), 56 DCR 4290.)

Prior Codifications. — 1981 Ed., § 26-1004.

Effect of amendments. — D.C. Law 18-38, in subsec. (d)(1), substituted "mortgage lender, mortgage broker, mortgage loan originator, or loan officer" for "mortgage lender or mortgage broker".

Temporary Amendment of Section. — Section 2(d) of D.C. Law 17-350, in subsec. (c), inserted the following sentence at the end: "To assist in the performance of the Commissioner's duties under this act, the Commissioner may contract with a third party, including the SRR, the Conference of State Bank Supervisors, or its affiliates or subsidiaries, to perform any functions, including the collection of licensing and processing fees, collection of contact information and other identifying information, fingerprints, written consent to a criminal background check, personal history and experience, and conduct of examinations related to

mortgage loan originator, loan officer, mortgage lender, or mortgage broker activities, that the Commissioner may consider appropriate."; and, in subsec. (d)(1), substituted "mortgage lender, mortgage broker, mortgage loan originator, or loan officer" for "mortgage lender or mortgage broker".

Section 5(b) of D.C. Law 17-350 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary amendment of section, see § 2(b) of the Mortgage Lender and Broker Act of 1996 Time Extension Emergency Act of 1996 (D.C. Act 11-439, December 4, 1996, 44 DCR 6656), and § 2(b) of the Mortgage Lender and Broker Act of 1996 Time Extension Congressional Review Emergency Amendment Act of 1997 (D.C. Act 12-21, March 3, 1997, 44 DCR 1768).

For temporary (90 day) amendment of section, see § 2(d) of Mortgage Lender and Broker

Emergency Amendment Act of 2008 (D.C. Act 17-617, December 22, 2008, 56 DCR 189).

For temporary (90 day) amendment of section, see § 2(d) of Mortgage Lender and Broker Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-31, March 16, 2009, 56 DCR 2327).

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

§ 26-1105. Acquisition of control; application.

(a) Except as provided in this section, no person shall acquire directly or indirectly 25% or more of the voting shares of a corporation or 25% of the ownership of any other entity licensed to conduct business under this chapter unless such person first:

(1) Files an application with the Superintendent [Commissioner] in such form as the Superintendent [Commissioner] may prescribe from time to time;

(2) Delivers such other information to the Superintendent [Commissioner] as the Superintendent [Commissioner] may require concerning the financial responsibility, background, experience, and activities of the applicant, its directors, officers, principals, and members, and of any proposed new directors, officers, principals, or members of the licensee; and

(3) Pays such application fee as the Superintendent [Commissioner] may prescribe.

(b) Upon the filing and investigation of an application, the Superintendent [Commissioner] shall permit the applicant to acquire the interest in the licensee if it finds that the applicant, its members if applicable, its directors, officers, and principals and any proposed new directors, members, officers, and principals have the financial responsibility, character, reputation, experience and general fitness to warrant the belief that the business will be operated efficiently and fairly, in the public interest, and in accordance with the law. The Superintendent [Commissioner] shall grant or deny the application within 60 days after the date a completed application accompanied by the required fee is filed unless the period is extended by order of the Superintendent [Commissioner] reciting the reasons for the extension. If the application is denied, the Superintendent [Commissioner] shall notify the applicant of the denial and the reasons for the denial.

(c) The provisions of this section shall not apply to:

(1) The acquisition of an interest in a licensee directly or indirectly, including an acquisition by merger or consolidation by or with a person licensed by this chapter or a person exempt from this chapter;

(2) The acquisition of an interest in a licensee directly or indirectly, including an acquisition by merger or consolidation by or with a person affiliated through common ownership with the licensee; or

(3) The acquisition of an interest in a licensee by a person by bequest, descent, survivorship, or operation of law.

(d) The person acquiring an interest in a licensee in a transaction which is exempt from filing an application pursuant to subsection (c) of this section shall send written notice to the Superintendent [Commissioner] of such

acquisition within 10 days after the closing of such acquisition.

(Sept. 9, 1996, D.C. Law 11-155, § 6, 43 DCR 4213.)

Section references. — This section is referred to in § 26-603.

Prior Codifications. — 1981 Ed., § 26-1005.

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Editor's notes. — Fees credited to the Office of Banking and Financial Institutions Enterprise Fund: Section 1804(4) of D.C. Law 12-60 provided that all fees received pursuant to § 26-1005(a)(3) shall be credited to the Office of Banking and Financial Institutions Enterprise Fund.

§ 26-1106. Rejection of license application.

(a)(1) If an applicant does not meet the requirements of § 26-1103, the Superintendent [Commissioner] shall:

- (A) Immediately notify the applicant in writing of this fact;
- (B) Return the bond filed under § 26-1103; and
- (C) Refund the license fee.

(2) The Superintendent [Commissioner] shall, subject to the appropriations process, keep the investigation fee and application fee.

(b) Within 30 days after the Superintendent [Commissioner] denies an application, the Superintendent [Commissioner] shall:

- (1) Issue a written decision containing the reasons upon which the denial was based;
- (2) Send a copy of the decision to the applicant; and
- (3) Advise the applicant of a right to a hearing which shall be held in accordance with subchapter I of Chapter 5 of Title 2.

(c)(1) An applicant who seeks a hearing on a license application denial shall file a written request for a hearing within 45 days following receipt of the written decision for denial.

(2) A hearing date established in response to the filing of a notice under this subsection may be postponed only once for a period of up to 30 days after the initial hearing date.

(Sept. 9, 1996, D.C. Law 11-155, § 7, 43 DCR 4213.)

Prior Codifications. — 1981 Ed., § 26-1006.

Legislative history of Law 11-155. — For

legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

§ 26-1107. License expiration and renewal; annual fee.

(a)(1) A license issued under this chapter shall expire on a date to be determined by the Superintendent [Commissioner]; provided, that the initial term of the license shall be not less than 180 days, or greater than 18 months, after the effective date of the license. A license may thereafter be renewed for one-year term extensions as provided by this section.

(2) The Superintendent [Commissioner] may change the expiration date of a license for the purpose of staggering the expiration dates of licenses issued

under this chapter; provided, that the new expiration date shall not be less than 180 days after the effective date or renewal date of the license.

(b) Before a license expires, the licensee periodically may renew the license for additional 1-year terms, if the licensee:

(1) Demonstrates that he or she continues to meet the licensing standards under this chapter and has satisfied the annual continuing education requirements under this chapter;

(1A) Pays all applicable fees and assessments as prescribed by the Commissioner and all third-party fees;

(2) Submits to the Superintendent [Commissioner] a renewal application on the form that the Superintendent [Commissioner] requires; and

(3) Files a bond or bond continuation certificate for the amount required under § 26-1103.

(c) If a license is issued for less than a full year, is surrendered voluntarily, is suspended, or is revoked, the Superintendent [Commissioner] may not refund any part of the license fee regardless of the time remaining in the license year.

(d) Repealed.

(Sept. 9, 1996, D.C. Law 11-155, § 8, 43 DCR 4213; Apr. 3, 2001, D.C. Law 13-239, § 2, 48 DCR 606; Oct. 3, 2001, D.C. Law 14-28, § 3202(b), 48 DCR 6981; July 18, 2009, D.C. Law 18-38, § 2(e), 56 DCR 4290.)

Section references. — This section is referred to in § 26-603.

Prior Codifications. — 1981 Ed., § 26-1007.

Effect of amendments. — D.C. Law 13-239 rewrote subsec. (a) which had read:

“(a) A license expires on the December 31 after its effective date unless the license is renewed for a 1-year term as provided in this section.”

D.C. Law 14-28 rewrote subsec. (d) which had read:

“(d) In order to defray the costs of their examination, supervision, and regulation, every mortgage lender required to be licensed under this chapter shall pay an annual renewal fee calculated in accordance with a schedule set by regulation promulgated by the Superintendent. The schedule shall bear a reasonable relationship to the total assets of such individual mortgage lenders and to other factors relating to their supervision and regulation. Every mortgage broker required to be licensed under this chapter shall pay an annual renewal fee calculated in accordance with a schedule set by regulation promulgated by the Superintendent. All such fees shall be assessed on or before April 25, for that calendar year, and on or before April 25 for every calendar year thereafter. All such fees shall be paid by the licensed mortgage lenders and mortgage brokers to the Superintendent on or before May 25 of each calendar year or within 30 days of the receipt of each assessment.”

D.C. Law 18-38 rewrote subsec. (b)(1); added subsec. (b)(1A); and repealed subsec. (d).

Temporary Amendment of Section. — Section 2(e) of D.C. Law 17-350, in subsec. (d), repealed pars. (1) and (2) and added pars. (3) and (4) to read as follows:

“(3) With each renewal application, the applicant shall demonstrate that the applicant continues to meet the minimum standards for license issuance under this act and that the applicant has satisfied the annual continuing education requirements under this act.

“(4) With each renewal application, the applicant shall pay all applicable fees and assessments as prescribed by the Commissioner and all third-party fees.”

Section 5(b) of D.C. Law 17-350 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2 of the Mortgage Lender and Broker License Renewal Emergency Amendment Act of 2000 (D.C. Act 13-523, December 30, 2000, 48 DCR 622).

For temporary (90 day) amendment of section, see § 2(e) of Mortgage Lender and Broker Emergency Amendment Act of 2008 (D.C. Act 17-617, December 22, 2008, 56 DCR 189).

For temporary (90 day) amendment of section, see § 2(e) of Mortgage Lender and Broker Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-31, March 16, 2009, 56 DCR 2327).

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 13-239. — Law 13-239, the “Mortgage Lender and Broker License Renewal Amendment Act of 2000”, was introduced in Council and assigned Bill No. 13-708, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 8, 2000, and December 5, 2000, respectively. Signed by the Mayor on December 21, 2000, it was assigned Act No. 13-517 and

transmitted to both Houses of Congress for its review. D.C. Law 13-239 became effective on April 3, 2001.

Legislative history of Law 14-28. — For Law 14-28, see notes under § 26-131.01.

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

Editor’s notes. — Fees credited to the Office of Banking and Financial Institutions Enterprise Fund: Section 1804(4) of D.C. Law 12-60 provided that all fees received pursuant to § 26-1007(d) shall be credited to the Office of Banking and Financial Institutions Enterprise Fund.

§ 26-1108. Change of place of business.

(a) A licensee may not change the place of business for which a license is issued unless the licensee:

(1) Notifies the Superintendent [Commissioner] in writing of the proposed change; and

(2) Receives the written consent of the Superintendent [Commissioner].

(b) The application for a change of place of business shall be approved unless the Superintendent [Commissioner] finds that the applicant has not conducted business under this chapter efficiently, fairly, in the public interest, and in accordance with all applicable laws and regulations.

(c) Notwithstanding subsection (a)(2) of this section, if the Superintendent [Commissioner] does not approve or disapprove of the proposed change of place of business within 30 days of the mailing of the notice required under subsection (a)(1) of this section, the proposed change of place of business shall be deemed approved.

(d) After approval, the applicant for a change of place of business shall give written notice to the Superintendent [Commissioner] within 10 days after the commencement of business at the additional or relocated office.

(e) Every licensee shall notify the Superintendent [Commissioner], in writing of the closing of any office not less than 10 days before such closing, and of the name, address, and position of each new principal, officer, member, partner, or director not more than 10 days after such new principal, officer, member, partner, or director assumes such position. Every licensee shall also provide such other information with respect to any such changes as the Superintendent [Commissioner] may reasonably require.

(Sept. 9, 1996, D.C. Law 11-155, § 9, 43 DCR 4213.)

Prior Codifications. — 1981 Ed., § 26-1008.

Legislative history of Law 11-155. — For

legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

§ 26-1109. Record keeping requirements.

(a) Each licensee shall keep and make available to the Superintendent [Commissioner] at the licensee’s place of business any books and records that the Superintendent [Commissioner], by rule or regulation, requires to enable

the Superintendent [Commissioner] to enforce this chapter and any rule or regulation adopted under this chapter.

(b) Each mortgage lender required to be licensed under this chapter shall retain for at least 3 years after final payment is made on any mortgage loan or after the mortgage loan is sold, whichever first occurs, copies of the note, settlement statement, truth-in-lending disclosure, and such other papers or records relating to the loan as may be required by rule or regulation.

(c) On approval of the Superintendent [Commissioner], a licensee need not keep at the licensee's place of business any books and records otherwise required by the Superintendent [Commissioner] under subsection (a) of this section if the licensee:

(1) Is a federally approved seller-servicer; or

(2)(A) Makes the books and records available to the Superintendent [Commissioner] at the licensee's place of business within 5 business days of the Superintendent's [Commissioner's] official request; and

(B) Retains the records for at least 60 months in a storage facility disclosed to the Superintendent [Commissioner].

(d) Each independent contractor or mortgage broker required to be licensed under this chapter shall retain for at least 3 years after a mortgage loan is made the original contract for his or her compensation, a copy of the settlement statement, an account of fees received in connection with the loan, and such other papers or records as may be required by rule or regulation.

(Sept. 9, 1996, D.C. Law 11-155, § 10, 43 DCR 4213; July 18, 2009, D.C. Law 18-38, § 2(f), 56 DCR 4290.)

Prior Codifications. — 1981 Ed., § 26-1009.

Effect of amendments. — D.C. Law 18-38, in subsec. (d), substituted "independent contractor or mortgage broker" for "mortgage broker".

Temporary Amendment of Section. — Section 2(f) of D.C. Law 17-350, in subsec. (d), substituted "independent contractor or mortgage broker" for "mortgage broker".

Section 5(b) of D.C. Law 17-350 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(f) of

Mortgage Lender and Broker Emergency Amendment Act of 2008 (D.C. Act 17-617, December 22, 2008, 56 DCR 189).

For temporary (90 day) amendment of section, see § 2(f) of Mortgage Lender and Broker Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-31, March 16, 2009, 56 DCR 2327).

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

§ 26-1110. Annual report.

(a) Each mortgage lender or mortgage broker required to be licensed under this chapter shall annually, on or before March 31, file a written report with the Superintendent [Commissioner] containing such information as the Superintendent [Commissioner] may require concerning the licensee's operations during the preceding calendar year as to each licensed place of business. Reports shall be accompanied by a sworn affidavit and in the form prescribed by the Superintendent [Commissioner] who shall make and publish annually an analysis and recapitulation of the reports.

(b) Annual reports shall include: •

(1) The number and total dollar amount of mortgage loans which were originated or purchased by the licensee in the District during each fiscal year for which a valid license is maintained by the licensee;

(2) The number and dollar amount of all loans where the applicant filed notices of intent to foreclose in the last year, including the borrower's:

(A) Address;

(B) Tract income level;

(C) Racial characteristics; and

(D) Census tract where the property is located; and

(3) The number of loans brokered, originated, made, and serviced under Chapter 11A of this title.

(c) Any information relating to mortgage loans required to be maintained under subsection (b) of this section shall be itemized in order to disclose for each such item:

(1) The number and dollar amount of mortgage loans made to mortgagors who did not, at the time of execution of the mortgage, intend to reside in the property securing the mortgage; and

(2) The number and dollar amount of mortgage loans and completed application involving mortgagors or mortgage applicants grouped according to census tract, income level, racial characteristics and gender.

(Sept. 9, 1996, D.C. Law 11-155, § 11, 43 DCR 4213; May 7, 2002, D.C. Law 14-132, § 601(a)(2), 49 DCR 2551.)

Prior Codifications. — 1981 Ed., § 26-1010.

Effect of amendments. — D.C. Law 14-132 made nonsubstantive changes in subsecs. (b)(1) and (b)(2)(D); and added subsec. (b)(3).

Emergency legislation. — For temporary (90 day) amendment of section, see § 601(a)(2) of Home Loan Protection Emergency Act of

2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-603.

§ 26-1111. Surrender of license.

(a) A licensee may surrender a license by sending to the Superintendent [Commissioner] the license and a written statement that the license is surrendered.

(b) The surrender of a license does not affect any civil or criminal liability of a licensee for acts committed before the license was surrendered.

(Sept. 9, 1996, D.C. Law 11-155, § 12, 43 DCR 4213.)

Prior Codifications. — 1981 Ed., § 26-1011.

Legislative history of Law 11-155. — For

legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

§ 26-1112. Examinations and investigations.

(a) The Superintendent [Commissioner], or his or her designated agent, shall examine the affairs, business, premises, and records of each licensee at

least once in every 3 year period and at any other time the Superintendent [Commissioner] reasonably considers necessary.

(b)(1) Any person aggrieved by the conduct of a licensee under this subsection in connection with a mortgage loan may file a written complaint with the Superintendent [Commissioner] who shall investigate the complaint.

(2) The Superintendent [Commissioner] may make any other examination or investigation of any person if the Superintendent [Commissioner] has reasonable cause to believe that the person has violated any provision of this chapter, any regulation adopted under this chapter, or any other law regulating mortgage loan lending in the District.

(c) In the course of any investigation or examination, the owners, member, officers, directors, partners, and any employees of such mortgage lender or mortgage broker being investigated or examined shall afford the Superintendent [Commissioner] full access to all premises, books, and records. For the foregoing purposes, the Superintendent [Commissioner], or his or her designated agent, shall have authority to administer oaths, examine under oath all the aforementioned persons, compel the production of papers and objects of all kinds, subpoena documents or other evidence, and summons and examine under oath any person whose testimony the Superintendent [Commissioner] requires.

(d)(1) If any person fails to comply with a subpoena or summons of the Superintendent [Commissioner] under this chapter or to testify concerning any matter about which the person may be interrogated under this chapter, the Superintendent [Commissioner] may file a petition for enforcement with the Civil Actions Branch of the Superior Court of the District of Columbia.

(2) On petition by the Superintendent [Commissioner], the court may order the person to attend and testify or produce evidence.

(e) When it becomes necessary to examine or investigate the books and records of a licensee required to be licensed under this chapter at a location outside the Washington, D.C. metropolitan region, the licensee shall be liable for, and shall pay to the Superintendent [Commissioner] within 30 days, the actual travel and reasonable living expenses incurred on account of its examination, supervision, and regulation, or shall pay a reasonable per diem rate approved by the Superintendent [Commissioner].

(f) To carry out the purposes of this section, the Commissioner may do any of the following:

(1) Retain attorneys, accountants, or other professionals and specialists as examiners, auditors, or investigators to conduct or assist in the conduct of examinations or investigations;

(2) Enter into agreements or relationships with other government officials or regulatory associations to improve efficiencies and reduce regulatory burdens by sharing resources, standardized or uniform methods or procedures, and documents, records, information, or evidence obtained under this section;

(3) Use, hire, contract, or employ public or privately available analytical systems, methods, or software to examine or investigate the licensee or person subject to this chapter;

(4) Accept and rely on examination or investigation reports made by other government officials within or without the District of Columbia;

(5) Accept audit reports made by an independent certified public accountant for the licensee, or person subject to this chapter, in the course of an examination covering the same general subject matter as the audit and may incorporate the audit report in the report of the examination, report of investigation, or other writing of the Commissioner; or

(6) Assess the licensee, or person subject to this chapter, the cost of the services in paragraph (1) of this subsection.

(g) This section shall remain in effect whether such licensee, or person subject to this chapter, acts or claims to act under any licensing or registration law of the District of Columbia, or claims to act without such authority.

(h) No licensee, or person subject to investigation or examination under this section, shall knowingly withhold, abstract, remove, mutilate, destroy, or secrete any books, records, computer records, or other information.

(i) All examination fees shall be prescribed by the Commissioner.

(Sept. 9, 1996, D.C. Law 11-155, § 13, 43 DCR 4213; July 18, 2009, D.C. Law 18-38, § 2(g), 56 DCR 4290.)

Prior Codifications. — 1981 Ed., § 26-1012.

Effect of amendments. — D.C. Law 18-38 added subsecs. (f) to (i).

Temporary Amendment of Section. — Section 2(g) of D.C. Law 17-350 added subsecs. (f), (g), (h), and (i) to read as follows:

“(f) To carry out the purposes of this section, the Commissioner may do any of the following:

“(1) Retain attorneys, accountants, or other professionals and specialists as examiners, auditors, or investigators to conduct or assist in the conduct of examinations or investigations;

“(2) Enter into agreements or relationships with other government officials or regulatory associations to improve efficiencies and reduce regulatory burdens by sharing resources, standardized or uniform methods or procedures, and documents, records, information, or evidence obtained under this section;

“(3) Use, hire, contract, or employ public or privately available analytical systems, methods, or software to examine or investigate the licensee or person subject to this act;

“(4) Accept and rely on examination or investigation reports made by other government officials within or without the District of Columbia;

“(5) Accept audit reports made by an independent certified public accountant for the licensee, or person subject to this act, in the course of an examination covering the same general subject matter as the audit and may incorporate the audit report in the report of the examination, report of investigation, or other writing of the Commissioner;

“(6) Assess the licensee, or person subject to this act, the cost of the services in paragraph (1) of this subsection.”.

“(g) This section shall remain in effect whether such licensee, or person subject to this act, acts or claims to act under any licensing or registration law of the District of Columbia, or claims to act without such authority.

“(h) No licensee, or person subject to investigation or examination under this section, shall knowingly withhold, abstract, remove, mutilate, destroy, or secrete any books, records, computer records, or other information.

“(i) All examination fees shall be prescribed by the Commissioner.”

Section 5(b) of D.C. Law 17-350 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(g) of Mortgage Lender and Broker Emergency Amendment Act of 2008 (D.C. Act 17-617, December 22, 2008, 56 DCR 189).

For temporary (90 day) amendment of section, see § 2(g) of Mortgage Lender and Broker Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-31, March 16, 2009, 56 DCR 2327).

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

Editor's notes. — Section 3 of D.C. Law 18-38 provided: “Sec. 3. Applicability. Except for section 2(c)(1), (g), (j), and (o), this act shall not apply until the Commissioner of the Department of Insurance, Securities, and Banking has promulgated rules implementing this act.”

§ 26-1113. Required loan disclosures.

(a)(1) A licensee who offers to make or procure a loan secured by a first or subordinate mortgage or deed of trust on a single to 4-family home shall provide the borrower with a financing agreement executed by the lender.

(2) The financing agreement shall provide:

(A) The term and principal amount of the loan;

(B) An explanation of the type of mortgage loan being offered;

(C) The rate of interest that will apply to the loan and, if the rate is subject to change, or is a variable rate, or is subject to final determination at a future date based on some objective standard, a specific statement of those facts;

(D) The points and all fees, if any, to be paid by the borrower or the seller, or both; and

(E) The term during which the financing agreement remains in effect.

(3) If all the provisions of the financing agreement are not subject to future determination, change, or alteration, the financing agreement shall constitute a final binding agreement between the parties as to the items covered by the financing agreement.

(a-1)(1) Within 3 business days of an application for a non-conventional mortgage loan, the licensee shall provide to the borrower the written disclosures executed by the lender that are required under this section.

(2) No non-conventional mortgage loan shall be consummated unless the borrower has signed the disclosures required under this section and returned the disclosures to the mortgage lender.

(3) The written disclosures required under this section shall be printed on a single page, front and back, and include the following:

“Mortgage Disclosure Form

“(A) Borrower(s)

“(B) Property Address

“(C) Lender

“(D) Lender Address

“(E) Lender Phone Number

“(F) Your loan is for \$, for a term of years. The final maturity date is

“Your beginning interest rate is _____ %. This rate is good for _____ months/years [circle one]. This rate and your payment can increase, starting on [date], and may continue to increase, depending on the terms of your mortgage.

“(G) Beginning on, you will be charged at the fully-indexed rate, which is your margin (..... %) plus an index value, which for you is Estimating based on the current rate of the index, which is %, your monthly payment at the fully-indexed rate would be \$ While the index rate does vary, your mortgage provides that the fully-indexed rate will not rise above %. At that rate, your monthly payment would be \$.....

“(H) YOU HAVE INDICATED THAT YOUR GROSS MONTHLY INCOME IS \$

“(I) WARNING: Industry standards suggest that a homeowner should spend no more than 28% of his or her gross monthly income on mortgage costs (including taxes and insurance).

“(J) \$ /month = Your principal + initial interest + taxes and insurance.

“(K) \$ /month = Your principal + adjusted interest + taxes and insurance.

“(L) \$ /month = Your principal + maximum interest + taxes and insurance.

“(M) \$ /month = 28% of your current gross monthly income (the recommended limit).

“(N) Your gross monthly income may rise or fall over time, but if either of the first 3 amounts exceeds the fourth, you may want to reconsider the suitability of this loan for your needs. You may cancel your mortgage application within 5 business days of receiving this form.

“(O) Your mortgage carries a balloon payment. This means that on , you will have to fully pay the remaining balance on the loan.

“(P) Your loan has a prepayment penalty. This means that if you pay off your mortgage in the first years, you will have to pay a penalty of \$ If you refinance your mortgage in that period, you will be required to pay this amount.

“(Q) See definitions of underlined terms on reverse side. DO NOT SIGN THIS IF YOU DO NOT UNDERSTAND IT!

“.....

“Lender’s Authorized Representative and date

“.....

“Borrower(s) and date.”

(4) The disclosures required under this section shall be in the following form:

MORTGAGE DISCLOSURE FORM

Borrower(s): _____ Lender: _____
 Property: _____ Address: _____

 Phone: (____) _____

Your loan is for \$ _____, for a term of _____ years. The final maturity date is _____.

Your beginning interest rate is _____ %. This rate is good for _____ months/years [circle one]. This rate and your payment can increase, starting on [date], and may continue to increase, depending on the terms of your mortgage.

Beginning on [date], you will be charged at the fully-indexed rate, which is your margin (____ %) plus an index value, which for you is [index name]. Estimating based on the current rate of the index, which is _____ %, your monthly payment at the fully-indexed rate would be \$ _____. While the index rate does vary, your mortgage provides that the fully-indexed rate will not rise above _____ %. At that rate, your monthly payment would be \$ _____.

YOU HAVE INDICATED THAT YOUR GROSS MONTHLY INCOME IS \$ _____.

WARNING: Industry standards suggest that a homeowner should spend **no more than 28%** of his or her gross monthly income on mortgage costs (including taxes and insurance).

\$ _____ /month = Your beginning interest rate + property taxes and insurance.

\$ _____ /month = Your estimated fully-indexed rate (i.e. what you pay after the beginning rate ends) + property taxes and insurance.

\$ _____ /month = Your maximum possible interest rate + property taxes and insurance.

\$ _____ /month = 28% of your current gross monthly income (the recommended limit).

Your gross monthly income may rise or fall over time, but if any of the first three amounts exceeds the fourth, you may want to reconsider the suitability of this loan for your needs. **You**

- ☐ Your mortgage carries a balloon payment. This means that on [date] you will have to fully pay the remaining balance on the loan.
- ☐ Your loan has a prepayment penalty. This means that if you pay off your mortgage in the first _____ years, you will have to pay a penalty of \$ _____. **If you refinance your mortgage in that period, you will be required to pay this amount.**

See definitions of underlined terms on the reverse side.

DO NOT SIGN THIS IF YOU DO NOT UNDERSTAND IT!

Lender _____ Date _____

Borrower _____ Date _____

Borrower _____ Date _____

(5) The Commissioner may prescribe, by rule, a different form for the written disclosures. The proposed rules shall be transmitted to the Council for a 60-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules by resolution within the 60-day review period, the proposed rules shall be deemed approved.

(6) Certain definitions and explanations arising from the written disclosures required under this section shall be printed on a single page, front and back, and include the following:

“Beginning interest rate: means the interest rate the borrower pays at the beginning of the loan. In many types of loans, this rate is good for only a few years and may increase significantly.

“Fully indexed rate: is an indicator of what will happen to the interest rate on the loan and the monthly payments. It is today’s estimate of how high the interest rate on an adjustable rate mortgage will go. It is calculated by taking a defined index rate and adding a certain number of percentage points, called the margin. Since the index rate can go up or down, the borrower cannot be sure what the future adjustable interest rate will be. Borrowers must make sure they can afford the fully indexed interest rate and not just the initial interest rate.

“Maximum possible interest rate: means the highest your interest rate can go. Most loans with adjustable rates have a defined maximum rate or lifetime cap. Borrowers need to think about how likely it may be that the interest rate can go this high.

“Gross monthly income: means the borrower’s gross, pre-tax income per month. Borrowers should make sure the monthly household income amount shown on the form is correct.

“Monthly mortgage payment including taxes and insurance: means the amount the borrower must pay every month for interest, repayment of loan principal, home insurance premiums, and property taxes owed to the District of Columbia. Over time, in addition to any possible increases in the loan’s interest rate, the insurance premiums and property taxes are likely to increase.

“Prepayment penalty: means any additional fee imposed by the mortgage lender on the borrower if the borrower pays off the loan early. Borrowers must make sure they know whether their loan has a prepayment penalty fee and how it works.

“Balloon payment: means that a large repayment of loan principal is due at the end of the loan. This almost always means that the borrower has to get a new loan to make the balloon payment.

“Payment option loan: means a mortgage loan that allows the borrower to pay less than the interest being charged on the loan. The unpaid interest is added to the loan, so the loan amount grows larger. Borrowers must make sure they know whether their loan is a payment option loan and how it works.

“Points: means the fee, expressed as a percentage of the loan, a borrower pays to the mortgage lender at closing, usually in exchange for a lower interest rate.

“Default: means a borrower has failed to make the payments due on the mortgage loan. Once a borrower is in default on the loan, the mortgage lender can seek to foreclose on the property.

“Foreclosure: means the legal process in which the mortgage lender can seize the borrower’s property if the borrower continually fails to make the payments due on the mortgage loan.

“Property tax: means the taxes owed to the District of Columbia as a result of the borrower owning the property.

“Insurance: means property insurance that covers private homes and residences. It is required by mortgage loans in order to protect the mortgage lender if the home is destroyed.

“Monthly condominium/co-operative/homeowner association fees: means the monthly fees that must be paid by the borrower if the borrower’s property is a condominium, co-operative, or subject to a homeowner association. These fees usually are collected on a monthly basis. Failure to pay these fees can result in a lawsuit against the borrower by the condominium, co-operative, or homeowner association. As with property taxes and homeowners’ insurance, these fees are likely to increase over time.”

(7) The Commissioner may prescribe, by rule, additional terms, definitions, and explanations. The proposed rules shall be transmitted to the Council for a 60-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules by resolution within the 60-day review period, the proposed rules shall be deemed approved.

(8) The information pursuant to this section shall be given to the borrower in a prominent form, separate from other disclosures, in either electronic or physical form and:

(A) In a 12-point font;

(B) In plain English or in the language of the mortgage lender’s presentation to the borrower; and

(C) If given to the borrower on a physical piece of paper, shall be printed on a red piece of paper measuring 8.5 inches by 11 inches.

(9) Within 5 business days of receiving the information pursuant to this section, the borrower may cancel the application for a mortgage loan with no loss of any security deposit or any other funds applied to guarantee an interest rate, not including reasonable fees incurred to process the application. The borrower shall be notified of this right to cancel at the time the information pursuant to this section is provided.

(b)(1) The financing agreement executed by the lender shall be delivered to the borrower at least 72 hours before the time of settlement agreed to by the parties and shall include:

(A) The effective fixed interest rate or initial interest rate that will be applied to the loan; and

(B) A restatement of all the remaining unchanged provisions of the financing agreement.

(2) Prior to execution of the financing agreement, the borrower may waive in writing the 72-hour advance presentation requirement and accept the

commitment at settlement only if compliance with the 72-hour requirement is shown by the lender to be infeasible.

(3) A borrower aggrieved by any violation of this section shall be entitled to bring a civil suit for damages, including reasonable attorney's fees, against the lender.

(Sept. 9, 1996, D.C. Law 11-155, § 14, 43 DCR 4213; Jan. 29, 2008, D.C. Law 17-90, § 2(b), 54 DCR 11925; July 18, 2009, D.C. Law 18-38, § 2(h), 56 DCR 4290.)

Prior Codifications. — 1981 Ed., § 26-1013.

Effect of amendments. — D.C. Law 17-90 added subsec. (a-1).

D.C. Law 18-38, in subsec. (a)(1), deleted "to be occupied by the borrower" following "home"; in subsec. (a-1), rewrote pars. (1), (3)(J) to (L), and (9).

Temporary Amendment of Section. — Section 2(h) of D.C. Law 17-350, in subsec. (a)(1), deleted "to be occupied by the borrower"; and, in subsec. (a-1), rewrote pars. (1), (3)(J) through (L), and (9), to read as follows:

"(a-1)(1) Within 3 business days of an application for a non-conventional mortgage loan, the licensee shall provide to the borrower the written disclosures executed by the lender that are required under this section."

"(J) \$ /month = Your principal + initial interest + taxes and insurance.

"(K) \$ /month = Your principal + adjusted interest + taxes and insurance.

"(L) \$ /month = Your principal + maximum interest + taxes and insurance."

"(9) Within 5 business days of receiving the information pursuant to this section, the borrower may cancel the application for a mortgage loan with no loss of any security deposit or any other funds applied to guarantee an inter-

est rate, not including reasonable fees incurred to process the application. The borrower shall be notified of this right to cancel at the time the information pursuant to this section is provided."

Section 5(b) of D.C. Law 17-350 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(h) of Mortgage Lender and Broker Emergency Amendment Act of 2008 (D.C. Act 17-617, December 22, 2008, 56 DCR 189).

For temporary (90 day) amendment of section, see § 2(h) of Mortgage Lender and Broker Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-31, March 16, 2009, 56 DCR 2327).

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 17-90. — For Law 17-90, see notes following § 26-1101.

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

Editor's notes. — Section 4 of D.C. Law 17-90 provided that section 2 shall apply 30 days after the effective date of this act.

§ 26-1114. Prohibited practices.

(a) No mortgage broker, mortgage lender, mortgage loan originator, or loan officer required to be licensed under this chapter, or person required to be licensed under this chapter, shall:

(1) Obtain any agreement or instrument in which blanks are left to be filled in after execution;

(2) Take an interest in collateral other than the real estate or residential property, including fixtures and appliances thereon, securing a mortgage loan;

(3) Obtain any exclusive dealing or exclusive agency agreement from any borrower;

(4) Delay closing of any mortgage loan for the purpose of increasing interest, costs, fees, or charges payable by the borrower;

(5) Obtain any agreement or instrument executed by a borrower which contains an acceleration clause permitting the unpaid balance of a mortgage loan to be declared due for any reason other than failure to make timely

payments of interest and principal or to perform other obligations undertaken in the agreement or instrument;

(6) Make, directly or indirectly, any mortgage loan with the intent to foreclose on the borrower's property. For purposes of this paragraph, any of the following factors may be considered in determining whether a mortgage loan was made with the intent to foreclose on the borrower's property:

(A) Lack of the probability of full repayment of the loan by the borrower; and

(B) A significant proportion of similarly foreclosed loans by the lender;

(7) If acting as a mortgage lender, fail to require the person closing the mortgage loan to provide to the borrower prior to the closing of the mortgage loan:

(A) A settlement statement as required pursuant to the Real Estate Settlement Procedures Act, approved December 22, 1974 (88 Stat. 1724; 12 U.S.C. § 2601 et seq.), and any regulations promulgated thereunder; and

(B) Any disclosure which is required by the Truth in Lending Act, approved May 29, 1968 (82 Stat. 146; 15 U.S.C. § 1601 et seq.), and Regulation Z (12 CFR Part 226);

(8) Except for an application fee in an amount not to exceed 1% of the original principal amount of the mortgage loan applied for, and documented costs of credit reports and appraisals, receive compensation from a borrower until a written commitment to make a mortgage loan is given to the borrower by a mortgage lender which written commitment shall be given not less than 72 hours prior to the closing of the mortgage loan, unless this time period is waived by the borrower;

(9) Make predatory loans or engage in predatory lending activities in violation of Chapter 11A of this title;

(10) Purchase loans from an unlicensed mortgage broker or lender, unless the unlicensed mortgage broker or lender is exempt under § 26-1102; or

(11) Engage in the business as a mortgage loan originator, mortgage lender, loan officer, or mortgage broker, or hold himself out to the public to be a mortgage loan originator, loan officer, mortgage lender, or mortgage broker, without a license under § 26-1104 or without an exemption under § 26-1102.

(b) No mortgage broker required to be licensed under this chapter shall:

(1) Receive compensation from a mortgage lender of which he is a principal, partner, trustee, director, member, officer, or employee;

(2) Receive compensation from a borrower in connection with any mortgage loan transaction in which he is the lender or a principal, partner, trustee, director, member, officer, or employee of the mortgage lender; or

(3)(A) Receive compensation for negotiating, placing, or finding a mortgage loan where a mortgage broker, or any person affiliated with such mortgage broker, has otherwise acted as a real estate broker, agent, or salesperson in connection with the sale of the real estate which secures the mortgage loan and such mortgage broker or affiliated person has received or will receive any other compensation or thing of value from the lender, borrower, seller, or any other person, unless the borrower is given the following notice in writing at the time the mortgage broker's services are first offered to the borrower:

DISCLOSURE OF DUAL CAPACITY

WE HAVE OFFERED TO ASSIST YOU IN OBTAINING A MORTGAGE LOAN. IF WE ARE SUCCESSFUL IN OBTAINING A LOAN FOR YOU, WE WILL CHARGE AND COLLECT FROM YOU A FEE NOT TO EXCEED _____ % OF THE LOAN AMOUNT. THIS FEE IS IN ADDITION TO ANY OTHER FEE WE MAY RECEIVE IN CONNECTION WITH THE SALE OR PURCHASE OF THE REAL ESTATE THAT WILL SECURE THE LOAN. WE DO NOT REPRESENT ALL OF THE LENDERS IN THE MARKET AND THE LENDERS WE DO REPRESENT MAY NOT OFFER THE LOWEST INTEREST RATES OR BEST TERMS AVAILABLE TO YOU. YOU ARE FREE TO SEEK A LOAN WITHOUT OUR ASSISTANCE, IN WHICH EVENT YOU WILL NOT BE REQUIRED TO PAY US A FEE FOR THAT SERVICE. THE BORROWER ACKNOWLEDGES HAVING READ AND UNDERSTOOD THIS DISCLOSURE OF DUAL CAPACITY AND HAVING RECEIVED A COPY HEREOF.

BORROWER'S SIGNATURE

DATE

BROKER'S SIGNATURE

DATE

(B) The foregoing notice shall be at least 10-point type and the prospective borrower shall acknowledge receipt of the written notice.

(C) The phrase "person affiliated with such mortgage broker" means any person which is a subsidiary, stockholder, partner, trustee, director, member, officer, or employee of a mortgage broker, and any corporation, 10% or more of the capital stock of which is owned by a mortgage broker or by any person which is a subsidiary, stockholder, partner, trustee, director, member, officer, or employee of a mortgage broker.

(c) Notwithstanding the provisions of subsection (b) of this section, no person shall act as a mortgage broker in connection with any real estate sales transaction entered into prior to September 9, 1996 in which such person, or any person affiliated with such person, has acted as a real estate broker, agent, or salesperson and has received or will receive compensation in connection with such transaction, unless such person was regularly engaged in acting as a mortgage broker in connection with such transaction as of September 9, 1996.

(d) A licensee or any person required to be licensed under this chapter shall not:

(1) Directly or indirectly employ any scheme, device, or artifice to defraud or mislead borrowers or lenders or to defraud any person;

(2) Engage in any unfair or deceptive practice toward any person;

(3) Obtain property by fraud or misrepresentation;

(4) Solicit or enter into a contract with a borrower that provides in substance that the person or individual subject to this chapter may earn a fee or commission through "best efforts" to obtain a loan even though no loan is actually obtained for the borrower;

(5) Solicit, advertise, or enter into a contract for specific interest rates,

points, or other financing terms unless the terms are actually available at the time of soliciting, advertising, or contracting;

(6) Assist or aid or abet any person in the conduct of business under this chapter without a valid license as required under this chapter;

(7) Fail to make disclosures as required by this chapter and any other applicable federal or District law, including regulations thereunder;

(8) Fail to comply with this chapter or rules promulgated under this chapter, or fail to comply with any other federal or District law, including the rules and regulations thereunder, applicable to any business authorized or conducted under this chapter;

(9) Make, in any manner, any false or deceptive statement or representation, including with regard to the rates, points, or other financing terms or conditions for a residential mortgage loan, or engage in bait-and-switch advertising;

(10) Negligently make any false statement or knowingly and willfully make any omission of material fact in connection with any information or reports filed with a governmental agency or the NMLSR or in connection with any investigation conducted by the Commissioner or another governmental agency;

(11) Make any payment, threat, or promise, directly or indirectly, to any person for the purposes of influencing the independent judgment of the person in connection with a residential mortgage loan, or make any payment, threat, or promise, directly or indirectly, to any appraiser of a property for the purposes of influencing the independent judgment of the appraiser with respect to the value of the property;

(12) Collect, charge, attempt to collect or charge, or use or propose any agreement purporting to collect or charge any fee prohibited by this chapter;

(13) Cause or require a borrower to obtain property insurance coverage in an amount that exceeds the replacement cost of the improvements as established by the property insurer; or

(14) Fail to truthfully account for monies belonging to a party to a residential mortgage loan transaction.

(Sept. 9, 1996, D.C. Law 11-155, § 15, 43 DCR 4213; May 7, 2002, D.C. Law 14-132, § 601(a)(3), 49 DCR 2551; July 18, 2009, D.C. Law 18-38, § 2(i), 56 DCR 4290.)

Prior Codifications. — 1981 Ed., § 26-1014.

Effect of amendments. — D.C. Law 14-132, in subsec. (a), substituted “, or person required to be licensed under this chapter, shall,” for “shall”; made nonsubstantive changes in subsecs. (a)(7) and (a)(8); and added subsecs. (a)(9), (a)(10), and (a)(11).

D.C. Law 18-38, in subsec. (a), rewrote the introductory language and par. (11); and added subsec. (d).

Temporary Amendment of Section. — Section 2(i) of D.C. Law 17-350, in subsec. (a), substituted “mortgage broker, mortgage lender, mortgage loan originator, or loan officer” for

“mortgage broker or lender” in the lead-in text and rewrote par. (11) to read as follows:

“(11) Engage in the business as a mortgage loan originator, mortgage lender, loan officer, or mortgage broker, or hold himself out to the public to be a mortgage loan originator, loan officer, mortgage lender, or mortgage broker, without a license under section 5 or without an exemption under section 3.”; and added subsec. (d) to read as follows:

“(d) A mortgage loan originator or loan officer required to be licensed under this act shall not:

“(1) Directly or indirectly employ any scheme, device, or artifice to defraud or mislead borrowers or lenders or to defraud any person;

"(2) Engage in any unfair or deceptive practice toward any person;

"(3) Obtain property by fraud or misrepresentation;

"(4) Solicit or enter into a contract with a borrower that provides in substance that the person or individual subject to this act may earn a fee or commission through "best efforts" to obtain a loan even though no loan is actually obtained for the borrower;

"(5) Solicit, advertise, or enter into a contract for specific interest rates, points, or other financing terms unless the terms are actually available at the time of soliciting, advertising, or contracting;

"(6) Assist or aid or abet any person in the conduct of business under this act without a valid license as required under this act;

"(7) Fail to make disclosures as required by this act and any other applicable federal or District law, including regulations thereunder;

"(8) Fail to comply with this act or rules promulgated under this act, or fail to comply with any other federal or District law, including the rules and regulations thereunder, applicable to any business authorized or conducted under this act;

"(9) Make, in any manner, any false or deceptive statement or representation, including with regard to the rates, points, or other financing terms or conditions for a residential mortgage loan, or engage in bait and switch advertising;

"(10) Negligently make any false statement or knowingly and willfully make any omission of material fact in connection with any information or reports filed with a governmental agency or the NMLSR or in connection with any investigation conducted by the Commissioner or another governmental agency;

"(11) Make any payment, threat, or promise, directly or indirectly, to any person for the purposes of influencing the independent judgment of the person in connection with a residential mortgage loan, or make any payment, threat, or promise, directly or indirectly, to any appraiser of a property for the purposes of influencing the independent judgment of the appraiser with respect to the value of the property;

"(12) Collect, charge, attempt to collect or charge, or use or propose any agreement purporting to collect or charge any fee prohibited by this act;

"(13) Cause or require a borrower to obtain property insurance coverage in an amount that exceeds the replacement cost of the improvements as established by the property insurer; or

"(14) Fail to truthfully account for monies belonging to a party to a residential mortgage loan transaction."

Section 5(b) of D.C. Law 17-350 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 601(a)(3) of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

For temporary (90 day) amendment of section, see § 2(i) of Mortgage Lender and Broker Emergency Amendment Act of 2008 (D.C. Act 17-617, December 22, 2008, 56 DCR 189).

For temporary (90 day) amendment of section, see § 2(i) of Mortgage Lender and Broker Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-31, March 16, 2009, 56 DCR 2327).

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-603.

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

CASE NOTES

Intent to foreclose.

Lender and mortgage broker did not violate District of Columbia's Home Loan Protection Act (HLPA) by extending loan with intent to foreclose, even though they failed to verify adequately borrower's ability to repay loan, given lender's explanation that, in extending

loans, he hoped, as real estate agent, to obtain listing to sell borrowers' homes, and given lack of existence of significant proportion of similarly foreclosed loans by lender. *Dawson v. Thomas* (In re Dawson), 411 B.R. 1, 2008 Bankr. LEXIS 1074 (2008).

§ 26-1115. Escrow accounts.

(a) All moneys required by a mortgage lender to be paid by borrowers in escrow to defray future taxes or insurance premiums, or for other lawful purposes, shall be kept in accounts segregated from accounts of the mortgage lender, and shall not be commingled with other funds of the mortgage lender.

(b) No licensed mortgage lender shall require any borrower who, on the date of execution of the loan or financial transaction, has made a down payment equaling 20% or more of the total purchase price of the property or who has an equity interest in the property equal to, or greater than, 20% of the fair market value of the property, to make advance payments of the real estate taxes or casualty insurance premiums to enable the mortgage lender to have funds on hand for disbursement for payment of such taxes or insurance premiums. Licensed mortgage lenders shall provide such borrowers with a separate statement, in writing, which clearly and conspicuously sets forth the right to pay such taxes and insurance premiums directly. Nothing contained in this subsection shall be construed to prohibit a licensed mortgage lender from obtaining, during any period during which the loan is in default and in consideration for the lender not exercising some or all of the remedies to which it is entitled, a written agreement from the borrower to make such advance payments to enable the mortgage lender to have funds on hand for disbursement from payment of such taxes or insurance premiums.

(c) No licensed mortgage lender shall require any borrower to pay any money in escrow to defray future taxes and insurance premiums, or for any other purposes, in connection with a subordinate mortgage loan, except where escrows for such purposes are not being maintained in connection with the mortgage loan superior to such subordinate mortgage loans.

(Sept. 9, 1996, D.C. Law 11-155, § 16, 43 DCR 4213.)

Prior Codifications. — 1981 Ed., § 26-1015. legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 11-155. — For

§ 26-1116. Advertising.

No mortgage lender, mortgage broker, mortgage loan originator, or loan officer required to be licensed under this chapter shall use, or cause to be published, any advertisement which:

- (1) Contains any false, misleading, or deceptive statement or representation; or
- (2) Identifies the mortgage lender, mortgage broker, mortgage loan originator, or loan officer by any name other than the name set forth on the license issued by the Superintendent [Commissioner].

(Sept. 9, 1996, D.C. Law 11-155, § 17, 43 DCR 4213; July 18, 2009, D.C. Law 18-38, § 2(j), 56 DCR 4290.)

Prior Codifications. — 1981 Ed., § 26-1016.

Effect of amendments. — D.C. Law 18-38, in the introductory language, substituted “mortgage lender, mortgage broker, mortgage loan originator, or loan officer” for “mortgage lender or mortgage broker”; and, in par. (2), substituted “mortgage lender, mortgage broker,

mortgage loan originator, or loan officer” for “lender or broker”.

Temporary Amendment of Section. — Section 2(j) of D.C. Law 17-350, in the lead-in text, substituted “mortgage lender, mortgage broker, mortgage loan originator, or loan officer” for “mortgage lender or mortgage broker”; and, in par. (2), substituted “mortgage lender,

mortgage broker, mortgage loan originator, or loan officer" for "lender or broker".

Section 5(b) of D.C. Law 17-350 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(j) of Mortgage Lender and Broker Emergency Amendment Act of 2008 (D.C. Act 17-617, December 22, 2008, 56 DCR 189).

For temporary (90 day) amendment of section, see § 2(j) of Mortgage Lender and Broker Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-31, March 16, 2009, 56 DCR 2327).

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

Editor's notes. — Section 3 of D.C. Law 18-38 provided: "Sec. 3. Applicability. Except for section 2(c)(1), (g), (j), and (o), this act shall not apply until the Commissioner of the Department of Insurance, Securities, and Banking has promulgated rules implementing this act."

§ 26-1117. Evasive business tactics.

(a) If the Commissioner finds that the conduct of any other business conceals a violation or evasion of this chapter, any rule or regulation adopted under this chapter, or any law regulating mortgage loan lending in the District, the Commissioner may issue a written order to a licensee or person required to be licensed under this chapter to:

(1) Stop doing business at any place in which the other business is conducted or solicited; or

(2) Stop doing business in association or conjunction with the other business.

(b) A licensee or person required to be licensed under this chapter who violates an order of the Commissioner issued under this section shall be subject to the penalties provided by § 26-1118.

(c) The Commissioner may request the Attorney General of the District of Columbia to take appropriate action for the enforcement of an order issued under this section.

(Sept. 9, 1996, D.C. Law 11-155, § 18, 43 DCR 4213; July 18, 2009, D.C. Law 18-38, § 2(k), 56 DCR 4290.)

Section references. — This section is referred to in § 26-1119.

Prior Codifications. — 1981 Ed., § 26-1017.

Effect of amendments. — D.C. Law 18-38 substituted "Commissioner" for "Superintendent"; in subsecs. (a) and (b), substituted "licensee or person required to be licensed under this chapter" for "licensee"; and, in subsec. (c),

substituted "Attorney General" for "Corporation Counsel".

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

§ 26-1118. Suspension, revocation, and enforcement.

(a) The Superintendent [Commissioner] may suspend or revoke the license of any licensee if the licensee or any owner, director, officer, member, partner, stockholder, employee, or agent of the licensee, while acting on behalf of the licensee:

- (1) Makes any material misstatement in an application for a license;
- (2) Has been convicted of any crime of moral turpitude;

- (3) In connection with any mortgage loan or loan application transaction:
 - (A) Commits any fraud;
 - (B) Engages in any illegal or dishonest activities; or
 - (C) Misrepresents or fails to disclose any material facts to anyone entitled to that information;
 - (4) Violates any provision of this chapter, any rule or regulation adopted under it, or any other law regulating mortgage loan lending in the District;
 - (5) Engages in a course of conduct consisting of the failure to perform written agreements with borrowers;
 - (6) Fails to account for funds received or disbursed to the satisfaction of the person supplying or receiving such funds;
 - (7) Fails to disburse funds in accordance with any agreement connected with, and promptly upon closing of, a mortgage loan, taking into account any applicable right of rescission;
 - (8) Is convicted of a felony or misdemeanor involving fraud, misrepresentation, or deceit;
 - (9) Has a judgment entered against such licensee involving fraud, misrepresentation, or deceit;
 - (10) Has been found by a federal, state, or District agency to be in violation of any law or any regulation applicable to the conduct of the licensee's business;
 - (11) Refuses to permit an investigation or examination by the Superintendent [Commissioner];
 - (12) Fails to pay any fee or assessment imposed by this chapter;
 - (12A) Has been found in violation of Chapter 11A of this title or determined by the Commissioner to have made a loan in violation of Chapter 11A of this title;
 - (13) Fails to comply with any order of the Superintendent [Commissioner]; or
 - (14) Otherwise demonstrates unworthiness, bad faith, dishonesty, or any other quality that indicates that the business of the licensee has not been, or will not be, conducted honestly, fairly, equitably, and efficiently.
- (b)(1) The Commissioner may enforce the provisions of this section or any rules and regulations adopted hereunder, by issuing an order against any licensee or person required to be licensed. The Commissioner may issue an order requiring a licensee or any person engaging in any activity or business within the scope of this chapter to show cause as to the reasons enforcement action should not be taken against such licensee or person.
- (2) If a violator fails to comply with an order issued under paragraph (1) of this subsection, the Superintendent [Commissioner] may impose a civil penalty of up to \$25,000 for each violation from which the violator failed to cease and desist or for which the violator failed to take affirmative action to correct.
- (c) The Superintendent [Commissioner] may request the Corporation Counsel of the District of Columbia to take appropriate action in the Superior Court of the District of Columbia for the enforcement of an order issued under this section. The Corporation Counsel may also seek, and the Superior Court of the

District of Columbia may order or decree, damages and such other relief allowed by law, including restitution. Persons entitled to any relief as authorized by this section shall be identified by order of the court within 180 days after the date of the order permanently enjoining the unlawful act or practice. In any action brought by the Corporation Counsel by virtue of this provision, the Corporation Counsel shall be entitled to seek attorney's fees and costs.

(d) In determining the amount of financial penalty to be imposed under subsection (b) of this section, the Superintendent [Commissioner] shall consider the following:

- (1) The seriousness of the violation;
- (2) The good faith of the violator;
- (3) The violator's history of previous violations;
- (4) The deleterious effect of the violation on the public and mortgage industry;
- (5) The assets of the violator; and
- (6) Any other factors relevant to the determination of the financial penalty.

(e) Nothing in this chapter shall be construed to preclude any individual or entity who suffers loss as a result of any violation of this chapter from maintaining an action to recover damages or restitution and, as provided by statute, attorney's fees.

(Sept. 9, 1996, D.C. Law 11-155, § 19, 43 DCR 4213; May 7, 2002, D.C. Law 14-132, § 601(a)(4), 49 DCR 2551; July 18, 2009, D.C. Law 18-38, § 2(l), 56 DCR 4290.)

Section references. — This section is referred to in §§ 26-1117 and 26-1119.

Prior Codifications. — 1981 Ed., § 26-1018.

Effect of amendments. — D.C. Law 14-132 added subsec. (a)(12A); and, in subsec. (b)(1), substituted "The Commissioner may enforce the provisions of this section, or any rules and regulations adopted hereunder, by issuing an order against any licensee or person required to be licensed." for "The Superintendent may enforce the provisions of this section or any rules and regulations adopted by issuing an order: (A) To cease and desist from the violation and any further similar violations; and (B) Requiring the violator to take affirmative action to correct the violation including the restitution of money or property to any person aggrieved by the violation."

D.C. Law 18-38, in subsec. (b)(1), added the second sentence; and, in subsec. (b)(2), substituted "\$25,000" for "\$1,000".

Temporary Amendment of Section. — Section 2(k) of D.C. Law 17-350, in subsec. (b)(2), substituted "\$25,000" for "\$1,000".

Section 5(b) of D.C. Law 17-350 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 601(a)(4) of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

For temporary (90 day) amendment of section, see § 2(k) of Mortgage Lender and Broker Emergency Amendment Act of 2008 (D.C. Act 17-617, December 22, 2008, 56 DCR 189).

For temporary (90 day) amendment of section, see § 2(k) of Mortgage Lender and Broker Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-31, March 16, 2009, 56 DCR 2327).

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-603.

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

§ 26-1119. Hearing procedures.

(a) A person to whom an order is issued pursuant to § 26-1117 or § 26-1118

shall be given reasonable notice and the opportunity for a hearing as provided in this section. Upon the issuance of any order, the Commissioner shall notify the respondent, applicant, licensee, or person required to be licensed that the order has been entered and the reasons for the order. The order shall include a statement that the respondent, applicant, licensee, or person required to be licensed may submit a written request for a hearing within 20 days of receipt of the order.

(b) The order under subsection (a) of this section shall be served by hand or by certified mail, return receipt requested at the last known address of the person required to be licensed or the last known address maintained in the Department of Insurance and Securities and Banking records for the applicant or licensee.

(c) If the person to whom an order has been issued fails to request a hearing within 20 days of receipt or delivery of the order, the person shall be deemed in default and the order shall, on the 21st day, become permanent and remain in full force and effect until and unless later modified or vacated by the Commissioner.

(Sept. 9, 1996, D.C. Law 11-155, § 20, 43 DCR 4213; May 7, 2002, D.C. Law 14-132, § 601(a)(5), 49 DCR 2551; July 18, 2009, D.C. Law 18-38, § 2(m), 56 DCR 4290.)

Prior Codifications. — 1981 Ed., § 26-1019.

Effect of amendments. — D.C. Law 14-132, rewrote subsec. (a); and added subsec. (d). Subsec. (a) had read as follows: “(a) Before the Superintendent takes any action under § 26-1117 or § 26-1118, the Superintendent shall give the licensee an opportunity for a hearing.”

D.C. Law 18-38 rewrote the section.

Emergency legislation. — For temporary (90 day) amendment of section, see § 601(a)(5)

of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-603.

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

§ 26-1120. Limitation on name of mortgage business.

A mortgage lender, mortgage broker, mortgage loan originator, or loan officer may not do business under any trade name that misrepresents or tends to misrepresent that the mortgage lender is:

- (1) A bank, trust company, or savings bank;
- (2) A savings and loan association;
- (3) A credit union; or
- (4) An insurance company.

(Sept. 9, 1996, D.C. Law 11-155, § 21, 43 DCR 4213; July 18, 2009, D.C. Law 18-38, § 2(n), 56 DCR 4290.)

Prior Codifications. — 1981 Ed., § 26-1020.

Effect of amendments. — D.C. Law 18-38 substituted “mortgage lender, mortgage broker, mortgage loan originator, or loan officer” for “mortgage lender or mortgage broker”.

Temporary Amendment of Section. — Section 2(l) of D.C. Law 17-350 substituted “mortgage lender, mortgage broker, mortgage loan originator, or loan officer” for “mortgage lender or mortgage broker”.

Section 5(b) of D.C. Law 17-350 provided that

the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(l) of Mortgage Lender and Broker Emergency Amendment Act of 2008 (D.C. Act 17-617, December 22, 2008, 56 DCR 189).

For temporary (90 day) amendment of section, see § 2(l) of Mortgage Lender and Broker

Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-31, March 16, 2009, 56 DCR 2327).

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

§ 26-1120.01. Confidential information.

(a) To assist in the performance of the Commissioner's duties under this chapter, the Commissioner may:

(1) Share documents, materials, or other information, including confidential and privileged documents, materials, or information subject to this chapter, with other local, state, federal, and international regulatory agencies, with the Conference of State Bank Supervisors, SRR, NMLSR, their affiliates, or subsidiaries, or with state, federal, and international law enforcement authorities; provided, that the recipient agrees to maintain the confidentiality and privileged status of the document, material, or other information;

(2) Receive documents, materials, or information, including confidential and privileged documents, materials, or other information, from the Conference of State Bank Supervisors, SRR, NMLSR, their affiliates, or subsidiaries, or from regulatory and law enforcement officials of foreign or other domestic jurisdictions, and shall maintain as confidential or privileged any document, material, or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or information;

(3) Enter into agreements with the entities set forth in paragraph (1) of this subsection governing sharing and use of information consistent with this chapter;

(4) Authorize a national criminal background check and submission of fingerprints and other identifying information, submitted through the NMLSR, and other information with, and receive criminal history record information from, the NMLSR, the Metropolitan Police Department, and the Federal Bureau of Investigation for the purposes of facilitating determinations regarding eligibility for licensure under this chapter; or

(5) Contract with a third party, including the SRR, the Conference of State Bank Supervisors, or its affiliates or subsidiaries, to perform any functions, including the collection of licensing and processing fees, collection of contact information and other identifying information, fingerprints, written consent to a criminal background check, personal history and experience, and conduct of examinations related to mortgage loan originator, loan officer, mortgage lender, or mortgage broker activities, that the Commissioner may consider appropriate.

(Sept. 9, 1996, D.C. Law 11-155, § 21a, as added July 18, 2009, D.C. Law 18-38, § 2(o), 56 DCR 4290.)

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

Editor's notes. — Section 3 of D.C. Law 18-38 provided: "Sec. 3. Applicability. Except for

section 2(c)(1), (g), (j), and (o), this act shall not apply until the Commissioner of the Department of Insurance, Securities, and Banking has promulgated rules implementing this act."

§ 26-1120.02. Nationwide Mortgage Licensing System and Registry reporting requirements.

(a) The Commissioner shall regularly report violations of this chapter, as well as enforcement actions and other relevant information, to the NMLSR. The reports shall be subject to the provisions of § 26-1120.01.

(b) Each licensee shall submit to the NMLSR reports of condition, which shall be in such form and shall contain such information as the NMLSR may require.

(Sept. 9, 1996, D.C. Law 11-155, § 21b, as added July 18, 2009, D.C. Law 18-38, § 2(o), 56 DCR 4290.)

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

Editor's notes. — Section 3 of D.C. Law 18-38 provided: "Sec. 3. Applicability. Except for

section 2(c)(1), (g), (j), and (o), this act shall not apply until the Commissioner of the Department of Insurance, Securities, and Banking has promulgated rules implementing this act."

§ 26-1120.03. Nationwide Mortgage Licensing System and Registry information challenge process.

The Commissioner shall establish a process whereby licensees may challenge information entered into the NMLSR by the Commissioner.

(Sept. 9, 1996, D.C. Law 11-155, § 21c, as added July 18, 2009, D.C. Law 18-38, § 2(o), 56 DCR 4290.)

Legislative history of Law 18-38. — For Law 18-38, see notes following § 26-1101.

Editor's notes. — Section 3 of D.C. Law 18-38 provided: "Sec. 3. Applicability. Except for

section 2(c)(1), (g), (j), and (o), this act shall not apply until the Commissioner of the Department of Insurance, Securities, and Banking has promulgated rules implementing this act."

§ 26-1121. Authority of Superintendent to issue rules and regulations.

The Superintendent [Commissioner of the Department of Insurance, Securities, and Banking] is hereby authorized to promulgate such rules and regulations as deemed necessary and appropriate to implement the provisions of this chapter in accordance with subchapter I of Chapter 5 of Title 2.

(Sept. 9, 1996, D.C. Law 11-155, § 22, 43 DCR 4213.)

Prior Codifications. — 1981 Ed., § 26-1021.

Temporary Addition of Section. — Section 2(m) of D.C. Law 17-350 added sections to read as follows:

"Sec. 22a. Confidential information.

"(a) To assist in the performance of the Com-

missioner's duties under this act, the Commissioner may:

"(1) Share documents, materials, or other information, including confidential and privileged documents, materials, or information subject to this act, with other local, state, federal, and international regulatory agencies,

with the Conference of State Bank Supervisors, SRR, NMLSR, their affiliates, or subsidiaries, or with state, federal, and international law enforcement authorities; provided, that the recipient agrees to maintain the confidentiality and privileged status of the document, material, or other information;

“(2) Receive documents, materials, or information, including confidential and privileged documents, materials, or other information, from the Conference of State Bank Supervisors, SRR, NMLSR, their affiliates, or subsidiaries, or from regulatory and law enforcement officials of foreign or other domestic jurisdictions, and shall maintain as confidential or privileged any document, material, or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or information;

“(3) Enter into agreements with the entities set forth in paragraph (1) of this subsection governing sharing and use of information consistent with the act; or

“(4) Authorize a national criminal background check and submission of fingerprints and other identifying information, submitted through the NMLSR, and other information with, and receive criminal history record information from, the NMLSR, the Metropolitan Police Department, and the Federal Bureau of Investigation for the purposes of facilitating determinations regarding eligibility for licensure under this act.

“Sec. 22b. Nationwide Mortgage Licensing System and Registry reporting requirements.

“(a) The Commissioner shall regularly report violations of this act, as well as enforcement actions and other relevant information, to the NMLSR. The reports shall be subject to the provisions of section 22a.

“(b) Each licensee shall submit to the NMLSR reports of condition, which shall be in

such form and shall contain such information as the NMLSR may require.

“Sec. 22c. Nationwide Mortgage Licensing System and Registry information challenge process. “The Commissioner shall establish a process whereby licensees may challenge information entered into the NMLSR by the Commissioner.”

Section 3 of D.C. Law 17-350 added a provision to read as follows:

“Sec. 3. Applicability.

“Except for section 2(c)(1), (g), (j), and (l), this act shall not apply until the Commissioner of the Department of Insurance, Securities, and Banking (‘Commissioner’) has promulgated rules implementing this act. The mortgage loan originator requirements shall not apply until such time as the District of Columbia, through the Commissioner, has become a part of the Nationwide Mortgage Licensing System and Registry (‘NMLSR’) and the NMLSR is operational to receive and process applications for licensing of District of Columbia loan originators or by December 31, 2009, whichever is later.”

Section 5(b) of D.C. Law 17-350 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90 day) additions, see §§ 2(m), 3 of Mortgage Lender and Broker Emergency Amendment Act of 2008 (D.C. Act 17-617, December 22, 2008, 56 DCR 189).

For temporary (90 day) additions, see §§ 2(m), 3 of Mortgage Lender and Broker Congressional Review Emergency Amendment Act of 2009 (D.C. Act 18-31, March 16, 2009, 56 DCR 2327).

Legislative history of Law 11-155. — For legislative history of D.C. Law 11-155, see Historical and Statutory Notes following § 26-1101.

CHAPTER 11A. HOME LOAN PROTECTION.

Subchapter I. Definitions; Federally Regulated and Supervised Entities and Fannie Mae and Freddie Mac

Sec.

26-1151.01. Definitions.

26-1151.02. Federally regulated, supervised, and insured entities and the Federal National Mortgage Association and Federal Home Loan Corporation.

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26-1152.12. Prepayment premium, fee or charge.

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26-1152.19. Homeownership counseling.

26-1152.20. Broker licensor.

26-1152.21. Filing requirements.

26-1152.22. Suspect settlement service providers.

26-1152.23. Median family income.

Subchapter III. Violations and Remedies; Enforcement and Civil Liability

26-1153.01. Violations and remedies.

26-1153.02. Enforcement.

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Subchapter IV. Rulemaking

26-1154.01. Rulemaking authority.

Subchapter V. Applicability

26-1155.01. Applicability.

*Subchapter I. Definitions; Federally Regulated and Supervised Entities and Fannie Mae and Freddie Mac.***§ 26-1151.01. Definitions.**

For the purposes of this chapter, the term:

(1) "Annual percentage rate" means the annual percentage rate for the mortgage loan calculated according to the provisions of the Truth in Lending Act, the regulations promulgated thereunder by the Board of Governors of the Federal Reserve System, and the official staff commentary thereto.

(2) "Assessed value" means the full market value of real property for assessment and taxation purposes as determined by the Office of Tax and Revenue and in effect on the applicable date.

(3) "Bona fide loan discount points" means loan discount points which are knowingly paid by the borrower for the express purpose of reducing, and which reduce, the annual percentage rate.

(4) "Borrower" means each accommodation party, borrower, co-borrower, cosigner, co-maker, obligor, mortgagor, or guarantor obligated to repay a loan that is secured by a lien instrument.

(5) "Bridge loan" means a loan that has a term of less than one year and that only requires that payments of interest be made until the entire unpaid balance becomes due.

(6) "Commissioner" shall have the same meaning as set forth in § 26-551.02(7).

(7)(A) "Covered loan" means a mortgage loan, secured by property located in the District (including an open-end line of credit, but not including a mortgage loan insured or guaranteed by a state or local authority, the District of Columbia Housing Finance Agency, the Federal Housing Administration, or the Department of Veteran Affairs, or a reverse mortgage transaction), in which the terms of the mortgage loan exceed one or more of the following thresholds:

(i) The loan is secured by a first mortgage on the borrower's principal dwelling and the annual percentage rate at closing will exceed by more than 6 percentage points the yield on United States Treasury securities having comparable periods of maturity to the loan maturity measured as of the 15th day of the month immediately preceding the month in which the application for the residential mortgage loan is received by the creditor;

(ii) The loan is secured by a junior mortgage on the borrower's principal dwelling and the annual percentage rate at closing will exceed by more than 7 percentage points the yield on United States Treasury securities having comparable periods of maturity to the loan maturity measured as of the 15th day of the month immediately preceding the month in which the application for the residential mortgage loan is received by the creditor; or

(iii) The origination/discount points and fees payable by the borrower at or before loan closing exceed 5% of the total loan amount.

(B) Notwithstanding subparagraph (A) of this paragraph, in the case of a loan made or purchased by the Federal National Mortgage Association, Federal Home Loan Corporation, or a bank, trust company, savings and loan association, or savings bank that is regulated and supervised by a supervising federal agency, which entities shall include the finance and operating subsidiaries of such entities that are so regulated and supervised, the term "covered loan" shall have the same meaning as a mortgage in section 103(aa) of the Truth in Lending Act, and regulations adopted pursuant thereto by the Federal Reserve Board, including 12 C.F.R. § 226.32 (relating to requirements for certain closed-end home mortgages).

(8) "Department" shall have the same meaning as set forth in § 26-551.02(9).

(9) "District" means the District of Columbia.

(10) "Gross income" means a borrower's gross income as set forth in a mortgage loan application and by a borrower, the borrower's financial statement, a credit report, financial information provided to the lender on behalf of the borrower, or as determined by any other reasonable means available to a lender, including a signed statement of the borrower; provided, that the borrower certifies the accuracy of the statement of his or her income and provides documentation that evidences such gross income.

(11) "Lender" means any person to whom the obligation is initially payable, either under the terms of the note or contract, or by agreement if there is no note or contract. The term "lender" shall include a mortgage broker, obligee, or mortgagee.

(12) “Lien instrument” means a deed of trust; mortgage; security agreement; trust deed; land installment contract; contract for a deed; assignment of lease, rent, or profit; or any other conveyance or retention of an interest in real property or personal property related to real property, including cooperative housing units and garage spaces, which secures the performance of a note or other obligation and creates a lien on real property or security interest in personal property. The term “lien instrument” shall include an amendment, modification, supplement, replacement, or restatement of a lien instrument.

(13) “Mortgage broker” shall have the same meaning as in § 26-1101(10).

(14)(A) “Mortgage loan” means any loan or other extension of credit:

(i) To a natural person primarily for personal, family, or household purposes;

(ii) That is secured by a lien instrument secured, in whole or in part, by residential real property located within the District which there is located, or there is to be located, a structure, intended principally for occupancy of from one to 4 families, and which is, or will be, occupied by the borrower as the borrower’s principal dwelling; and

(iii) For which the principal amount does not exceed the conforming loan size limit for a comparable dwelling as established and revised from time to time by the Federal National Mortgage Association or the Federal Home Loan Corporation.

(B) A mortgage loan shall not include an extension of credit for the purpose of financing the acquisition or initial construction of a borrower’s residential real property.

(15) “Note” means a promissory note secured by a deed of trust, a promissory note or mortgage bond secured by a mortgage, or any other written evidence of indebtedness or obligation secured by a lien instrument.

(16) “Notice” means a written notice that describes with reasonable clarity the specific act, event, or default and the response that the notice sender is seeking from the addressee or other party obligated to the sender of the notice.

(17) “Origination/discount points and fees” means points and fees as defined in 12 C.F.R. § 226.32(b).

(18) “Person” means an individual, corporation, governmental subdivision or agency, business trust, estate, trustee for a trust, partnership, association, limited liability company, joint venture, government, or any other legal or commercial entity or agent.

(19) “Point” means, when referring to a fee, one percent applied to a portion of a loan amount.

(20) “Principal balance” means the principal amount of a note.

(21) “Real property” means real property in the District and interests in real property located in the District, including the stock of a cooperative housing corporation and associated residential lease of a cooperative housing unit or garage space.

(22) “Red Flag Warning Disclosure Notice” means the notice provided for by § 26-1152.11.

(23) “Residential real property” means real property in the District improved by:

(A) A one to 4 family dwelling, including a condominium or cooperative housing unit; or

(B) A mixed-use building with an assessed value of \$1 million or less containing one to 4 family dwelling units where:

(i) The owner of the residential real property is one or more natural persons who occupy one of the dwelling units as the owner's principal dwelling; or

(ii) The borrower is one or more natural persons who intend, in good faith, to occupy one of the dwelling units as the borrower's principal dwelling at the time of the loan closing.

(24) "Servicer" shall have the same meaning as in section 6(i)(2) of the Real Estate Settlement Procedures Act of 1974, approved November 28, 1990 (104 Stat. 4405; 12 U.S.C. § 2605(i)(2)).

(25) "Subsidiary", with respect to a specified bank holding company, means a company:

(A) Twenty-five percent or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the United States) is directly or indirectly owned or controlled by the bank holding company, or is held by it with power to vote;

(B) The election of a majority of whose directors is controlled in any manner by the bank holding company; or

(C) With respect to the management or policies of which the bank holding company has the power, directly or indirectly, to exercise a controlling influence, as determined by the Board of Governors of the Federal Reserve System, after notice and opportunity for hearing.

(26) "Supervising federal agency" means the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Reserve Board, or the Federal Deposit Insurance Corporation.

(27) "Truth in Lending Act" means the Truth in Lending Act, approved May 29, 1968 (82 Stat. 146; 15 U.S.C. § 1601 et seq.).

(May 7, 2002, D.C. Law 14-132, § 101, 49 DCR 2551; June 11, 2004, D.C. Law 15-166, § 4(d), 51 DCR 2817.)

Effect of amendments. — D.C. Law 15-166 rewrote pars. (6) and (8).

Emergency legislation. — For temporary (90 day) addition of section, see § 101 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

For temporary (90 day) amendment of section, see § 4(d) of Consolidation of Financial Services Emergency Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 14-132. — Law 14-132, the "Home Loan Protection Act of 2002", was introduced in Council and assigned Bill No. 14-515, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on February 5, 2002, and February 19,

2002, respectively. Signed by the Mayor on March 1, 2002, it was assigned Act No. 14-296 and transmitted to both Houses of Congress for its review. D.C. Law 14-132 became effective on May 7, 2002.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 26-131.02.

References in text. — The "Truth in Lending Act", referred to in par. (1), is classified to 15 U.S.C. § 1601 et seq.

Section 103(aa) of the "Truth and Lending Act", referred to in par. (7)(B), is classified to 15 U.S.C. § 1602(aa).

Delegation of Authority. — Delegation of Authority Pursuant to D.C. Law 14-132, "The Home Loan Protection Act of 2002", see Mayor's Order 2002-154, September 13, 2002 (49 DCR 8622).

CASE NOTES

ANALYSIS

Covered loan.
Mortgage broker.

Covered loan.

Borrower's residential mortgage was not "covered loan" under District of Columbia law, absent evidence that annual percentage rate on loan exceeded yield on United States Treasury securities, having comparable rates of maturity, by more than six percentage points. *Richards v. Option One Mortg. Corp.*, 682 F.Supp.2d 40, 2010 U.S. Dist. LEXIS 9573 (2010), affirmed by 403 Fed. Appx. 523, 2010 U.S. App. LEXIS 25906 (D.C. Cir. 2010).

Mortgagor's refinancing loan amount of \$427,500 exceeded conforming loan size limit necessary to be covered under District of Columbia Home Loan Protection Act (HPLA); at time of loan, Federal National Mortgage Asso-

ciation had set \$417,000 as limit. *Palmer v. GMAC Commer. Mortg.*, 628 F.Supp.2d 186, 2009 U.S. Dist. LEXIS 54015 (2009).

Mortgage broker.

Material issues of fact existed as to whether settlement company acted solely as settlement agent with respect to borrower's mortgage loan and had no involvement in soliciting loan, or whether company was main driving force behind efforts to secure mortgage loan and attorney who was one of company's principals acted on company's behalf in negotiating loan, precluding summary judgment for either borrower or company on issue of whether company acted as statutory mortgage broker, as defined under District of Columbia law, for purposes of borrower's claim under District of Columbia Home Loan Protection Act (HPLA). *Sloan v. Urban Title Servs., Inc.*, 652 F.Supp.2d 40, 2009 U.S. Dist. LEXIS 83646 (2009).

§ 26-1151.02. Federally regulated, supervised, and insured entities and the Federal National Mortgage Association and Federal Home Loan Corporation.

(a) Nothing in subchapter II of this chapter shall be construed to apply to loans made or purchased by the Federal National Mortgage Association, Federal Home Loan Corporation, or a bank, trust company, savings and loan association, or savings bank, that is regulated and supervised by a supervising federal agency, including the finance and operating subsidiaries of such entities that are so regulated and supervised.

(b) This section shall not apply to any lender that is not federally regulated and supervised, except the Federal National Mortgage Association, or the Federal Home Loan Corporation.

(c) Except as provided in subsection (d) of this section, the Home Ownership and Equity Protection Act of 1994, approved September 23, 1994 (108 Stat. 2190; codified in various sections of Chapter 16 of the U.S. Code), and the implementing regulations issued by the Federal Reserve Board, as each may be amended from time to time, are hereby adopted by reference thereto and shall apply to loans made or purchased by the Federal National Mortgage Association, Federal Home Loan Corporation, or a bank, trust company, savings and loan association, or savings bank that is regulated and supervised by a supervising federal agency, including the finance and operating subsidiaries of such entities that are so regulated and supervised, that engage in lending activities in the District.

(d) The violations, remedies, penalties, and enforcement provisions set forth in subchapter III of this chapter shall apply to loans made or purchased by the Federal National Mortgage Association, Federal Home Loan Corporation, or a bank, trust company, savings and loan association, or savings bank that is

regulated and supervised by a supervising federal agency, including the finance and operating subsidiaries of such entities that are so regulated and supervised, that engage in lending activities in the District with regard to violations of this chapter.

(May 7, 2002, D.C. Law 14-132, § 102, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 102 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

References in text. — The “Home Ownership and Equity Protection Act of 1994”, referred to in subsec. (c), is Pub. L. 103-325, Title I, Subtitle B, Sept. 23, 1994, 108 Stat. 2190, which is codified to various sections in Chapter 16 of Title 15 of U.S.C.

CASE NOTES

Dismissal.

Investment and loan company involved in allegedly fraudulent home loan transaction, upon which home purchasers brought action, could not be held indirectly liable under the District of Columbia Mortgage Lender and Broker Act or the District of Columbia Home Loan

Protection Act based on liability for civil conspiracy in home purchasers’ action, where civil conspiracy claims had already been dismissed. *Blue v. Fremont Inv. & Loan*, 562 F.Supp.2d 33, 2008 U.S. Dist. LEXIS 47698 (2008), dismissed in part by, remanded by 584 F. Supp. 2d 10, 2008 U.S. Dist. LEXIS 81586 (D.D.C. 2008).

Subchapter II. Prohibited Practices.

§ 26-1152.01. Applicability.

This subchapter shall only apply to a covered loan as defined in § 26-1151.01(7)(A).

(May 7, 2002, D.C. Law 14-132, § 201, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 201 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.02. Insufficient repayment ability.

(a) A lender shall not make a covered loan if the borrower, at the time that the covered loan is closed, cannot reasonably be expected to make the scheduled payments. For purposes of making this determination:

(1) The lender’s consideration shall include the ability to make any payments for mortgage insurance premiums, escrow deposits, or direct payment of real estate taxes and property insurance premiums (in addition to the payments of interest and principal) and the employment status of the borrower. The lender may consider the current and expected income, current obligations, and other financial resources of the borrower (other than the borrower’s equity in the dwelling which secures repayment of the loan).

(2) The lender shall not consider the borrowers’ equity interest in the residential real property which secures repayment of the covered loan; provided, that the borrower’s equity interest in the residential real property which secures repayment of the covered loan may be considered by the lender

in determining whether to approve the loan as part of the evaluation of the borrower's likelihood of default.

(3) In the case of a covered loan which includes payment terms under which the aggregate amount of the scheduled payments will not fully amortize the outstanding principal balance, the lender's determination of the ability of the borrowers to make an expected balloon payment at the scheduled maturity date may include consideration of the borrowers' equity interest in the residential real property and the borrowers' ability, based on current market conditions, to refinance the covered loan without penalty, hardship, or material loss of equity.

(4) A lender shall not include or add a borrower to the covered loan who did not own or reside in the residential real property securing the covered loan prior to the covered loan transaction for the purpose of increasing the income and ability of the borrowers owning or residing in the residential real property to make all the scheduled payments of interest, principal, and mortgage insurance premiums, and escrow deposits for, or direct payment of, real estate taxes and property insurance premiums, unless the included or added borrower separately confirms in writing to the lender that the borrower expects and commits to make or substantially contribute to:

(A) The scheduled payments on the covered loan; and

(B) Escrow deposits for or direct payment of real estate taxes and property insurance premiums.

(b) The requirements of subsection (a) of this section shall only apply to borrowers whose gross income, as reported on the loan application which the lender relied upon in making the credit decision, does not exceed 120% of median family income. For purposes of this subsection, the median family income shall be the most recent estimate made by the U.S. Department of Housing and Urban Development at the time the application is received. For purposes of determining gross income under this section, only the income of the borrower shall be considered.

(c) The current and expected income, current debts, current assets, and employment of the borrowers shall be verified by the lender in accordance with standard residential mortgage lending industry practices to underwrite a loan secured by a residential lien instrument. For the purposes of this subsection, the lender shall be deemed to have followed standard residential mortgage lending industry practices if the lender verified the borrowers' current and expected income and current debts in accordance with the verification guidelines and practices of the Federal National Mortgage Association, Federal Home Loan Corporation, U.S. Department of Housing and Urban Development, or U.S. Department of Veterans Affairs. Nothing in this subsection shall preclude the utilization of other standard industry verification practices accepted by applicable regulatory authorities.

(May 7, 2002, D.C. Law 14-132, § 202, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 202 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

CASE NOTES

ANALYSIS

Ability to make payments.
Covered loan.
Equitable estoppel.

Ability to make payments.

Lender did not satisfy his obligation under District of Columbia's Home Loan Protection Act (HLPa) to verify borrower's ability to repay loan by looking only to whether, if property securing loan was sold, borrower would have sufficient proceeds to make balloon payment under loan; lender had broader obligation to determine whether borrower could reasonably be expected to make all scheduled payments, including monthly payments. *Dawson v. Thomas* (In re Dawson), 411 B.R. 1, 2008 Bankr. LEXIS 1074 (2008).

Covered loan.

Borrower's residential mortgage was not "covered loan" under District of Columbia law, absent evidence that annual percentage rate on loan exceeded yield on United States Treasury securities, having comparable rates of maturity, by more than six percentage points. *Richards v. Option One Mortg. Corp.*, 682 F.Supp.2d 40, 2010 U.S. Dist. LEXIS 9573 (2010), affirmed by 403 Fed. Appx. 523, 2010 U.S. App. LEXIS 25906 (D.C. Cir. 2010).

Material issues of fact existed as to whether it was reasonable for a lender to conclude, in extending mortgage loan, that borrower would be able to obtain refinancing for loan in light of her equity in condominium and improvement in her credit rating that purportedly would

result after she made one year of payments on loan, precluding summary judgment for settlement company on borrower's claim under District of Columbia Home Loan Protection Act (HLPa) on grounds that even if company qualified as lender under HLPa, it did not make covered loan to borrower at a time when she reasonably could not have been expected to make scheduled balloon payment. *Sloan v. Urban Title Servs., Inc.*, 652 F.Supp.2d 40, 2009 U.S. Dist. LEXIS 83646 (2009).

Mortgagor's refinancing loan amount of \$427,500 exceeded conforming loan size limit necessary to be covered under District of Columbia Home Loan Protection Act (HLPa); at time of loan, Federal National Mortgage Association had set \$417,000 as limit. *Palmer v. GMAC Commer. Mortg.*, 628 F.Supp.2d 186, 2009 U.S. Dist. LEXIS 54015 (2009).

Equitable estoppel.

In arguing that borrower was equitably estopped from pursuing claim against lender and mortgage broker under District of Columbia's Home Loan Protection Act (HLPa) on grounds that she supplied materially incorrect information in connection with her mortgage loan application, lender and broker could not rely upon statute permitting lenders to challenge borrower HLPa claims in situations in which violation arose from borrower's provision of materially false information in connection with loan application, given failure of lender and broker to make requisite reasonable attempt to verify borrower's current and expected income and debts. *Dawson v. Thomas* (In re Dawson), 411 B.R. 1, 2008 Bankr. LEXIS 1074 (2008).

§ 26-1152.03. Restrictions on the financing of single-premium credit insurance.

A lender shall not sell any individual or group credit life, accident, health, or unemployment insurance product on a prepaid single premium basis in conjunction with a covered loan. Credit insurance sold by a lender on a basis other than a prepaid single premium shall be accompanied by a clear and conspicuous disclosure, provided at least 3 days before closing, stating that the credit insurance shall not be a condition to the extension of mortgage credit and that the borrower may elect not to purchase the insurance. Insurance premiums or debt cancellation or suspension fees calculated and paid on a monthly or bi-weekly basis shall not be considered financed by the lender; provided, that the disclosure required by this section shall be provided to the borrower for any insurance, debt cancellation, or suspension services purchased by the borrower.

(May 7, 2002, D.C. Law 14-132, § 203, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 203 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.04. Restriction on financing origination/discount points and fees.

If a lender refinances a loan secured by the same residential real property to the same borrower which was made 18 months or less before the covered loan is made, the same lender shall not finance, directly or indirectly, any portion of the covered loan's origination/discount points and fees or other fees payable to the lender or any third party in excess of the greatest of 3% of the new covered loan principal amount actually funded, \$400, or such amount as the Mayor may establish by regulation, excluding:

- (1) Reasonable charges described in 12 C.F.R. § 226.4(c)(7)(i), (iii), (iv), and (v); and
- (2) Bona fide loan discount points.

(May 7, 2002, D.C. Law 14-132, § 204, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 204 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.05. No encouragement of default.

A lender shall not recommend or encourage the borrower to default on an existing loan or other debt prior to and in connection with the closing or planned closing of a covered loan that refinances all or any portion of the existing loan or other debt.

(May 7, 2002, D.C. Law 14-132, § 205, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 205 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.06. Unfair steering or improper use of credit scores.

(a) A lender shall not steer, counsel, or direct any prospective borrower to accept a loan product with a risk grade less favorable than the risk grade that the borrower would qualify for based on that lender's then current underwriting guidelines, prudently applied, considering the information available to that lender, including the information provided by the borrower. A lender shall not violate this section if the risk grade determination applied to a borrower is reasonably based on the lender's underwriting guidelines and if it is an appropriate risk grade category for which the borrower qualifies with the lender.

§ 26-1152.07 **BANKS AND OTHER FINANCIAL INSTITUTIONS**

(b) The lender shall not make, or cause to be made, any false, deceptive, or misleading statement, representation, or determination regarding the borrower's ability to qualify for any mortgage product or the borrower's credit score.

(May 7, 2002, D.C. Law 14-132, § 206, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 206 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534). **Legislative history of Law 14-132.** — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.07. Failing to report favorable payment record.

A lender or its servicer shall report a borrower's favorable payment history and information to a nationally recognized credit-reporting agency at least once every 12 months. This section shall not prevent a lender or its servicer from agreeing with the borrower not to report payment history information and shall not apply to covered loans held or serviced by a lender for less than 90 days. Nothing in this section shall prevent a lender from reporting a borrower's unfavorable payment history.

(May 7, 2002, D.C. Law 14-132, § 207, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 207 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534). **Legislative history of Law 14-132.** — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.08. Home improvement contracts.

(a) A lender shall not pay a contractor under a home improvement contract from the proceeds of a covered loan other than by an instrument payable to the borrower or jointly payable to the borrower and the contractor or, at the election of the borrower, through a third-party escrow agent that is independent from the contractor in accordance with the terms established in a written agreement signed by the borrower, the mortgage lender, and the contractor prior to the disbursement of funds to the contractor. The borrower shall be responsible for any reasonable fees or costs associated with the election. A lender may conclusively rely on a certified written statement from either the contractor or the third-party escrow agent that states that the escrow agent and contractor are independent from each other.

(b) A lender shall not purchase a home improvement contract in connection with, or make an instrument payable to, a home improvement contractor that is not bonded with the District pursuant to subchapter IV of Chapter 28 of Title 47. The Mayor shall maintain a list of home improvement contractors that are bonded and in good standing. Unless the lender has notice that the contractor is not licensed or authorized to do business in the District, a lender who relies on the list within 60 days of the closing shall be considered in compliance with this section; provided, that the lender has provided the Mayor with a name, telephone number, mailing address, and electronic mail address of a contact

person to whom the Mayor can provide updates or amendments to the list required by this subsection.

(May 7, 2002, D.C. Law 14-132, § 208, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 208 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.09. No increase in interest rate upon default.

A lender shall not make a covered loan that includes a provision that increases the covered loan's interest rate upon a default. This section shall not apply to an interest rate increase in adjustable rate covered loans based on a recognized adjustable rate mortgage index and constant margin amount if an event of default or the acceleration of the maturity date of the covered loan does not cause or permit the increase in the interest rate.

(May 7, 2002, D.C. Law 14-132, § 209, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 209 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.10. Charges in bad faith.

A lender shall not charge and retain fees paid by the borrower in making a covered loan which are:

- (1) For services that are not actually performed;
- (2) For loan discount points which are not bona fide discount points; or
- (3) In violation of the Real Estate Procedures Settlement Act of 1974, approved December 22, 1974 (88 Stat. 1724; 12 U.S.C. § 2601 et seq.).

(May 7, 2002, D.C. Law 14-132, § 210, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 210 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

CASE NOTES

Fees.

Borrower failed to establish that consulting fee of \$5,000 paid to mortgage broker and lender's fee of \$5,000 paid in connection with her home mortgage loan were impermissible charges for services not actually performed or

for loan discount points that were not bona fide discount points in violation of District of Columbia's Home Loan Protection Act (HLPa). Dawson v. Thomas (In re Dawson), 411 B.R. 1, 2008 Bankr. LEXIS 1074 (2008).

§ 26-1152.11. Failure to timely send disclosure notice.

(a) In making a covered loan, a lender shall send to the borrower a Red Flag Warning Disclosure Notice.

§ 26-1152.12 **BANKS AND OTHER FINANCIAL INSTITUTIONS**

(b) This notice shall be received by the borrower at least 3 business days prior to closing of the loan.

(c) If the loan is originated with the assistance of a mortgage broker, the mortgage broker shall provide the Red Flag Warning Disclosure Notice.

(d) Only one Red Flag Warning Disclosure Notice must be provided to each borrower.

(e) The Mayor shall promulgate, by regulation, the Red Flag Warning Disclosure Notice and instructions for completing, executing, and sending the disclosure notice. The Mayor may revise the disclosure notice or instructions at any time not less than 90 days in advance of the publication in the District of Columbia Register. After the publication of a revised disclosure notice or revised instructions, either the existing or revised instructions may be followed and either the existing or revised disclosure notice shall be accepted until the advance publication period expires.

(May 7, 2002, D.C. Law 14-132, § 211, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 211 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.12. Prepayment premium, fee or charge.

A lender shall not include in a covered loan or collect or attempt to collect any prepayment premium, fee, or charge in violation of Chapter 33 of Title 28.

(May 7, 2002, D.C. Law 14-132, § 212, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 212 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.13. Limitations on balloon payments.

A lender shall not make a covered loan that provides for a scheduled payment that is more than twice as large as the average of earlier scheduled monthly payments unless the balloon payment becomes due and payable not less than 7 years after the date of the loan closing. This section shall not apply if the payment schedule is adjusted to account for the seasonal or irregular income of the borrower or if the loan is a bridge loan connected with or related to the acquisition or construction of a dwelling intended to become the borrower's principal dwelling.

(May 7, 2002, D.C. Law 14-132, § 213, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 213 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

CASE NOTES

ANALYSIS

Business loans.
Construction and application.

Business loans.

Loan that was obtained for property that was rented out by promisor was not a “covered loan” under District of Columbia Home Loan Protection Act (HPLA), although loan contained a balloon payment, where note was a business loan secured by promisor’s rental property.

Onyeoziri v. Spivok, 44 A.3d 279, 2012 D.C. App. LEXIS 269 (2012).

Construction and application.

Mortgage loan which provided for balloon payment to become due and payable six months after loan closing, and which did not fall within statutory exceptions for bridge loans and for payment schedules adjusted to account for borrower’s seasonal or irregular income, violated District of Columbia’s Home Loan Protection Act (HPLA). Dawson v. Thomas (In re Dawson), 411 B.R. 1, 2008 Bankr. LEXIS 1074 (2008).

§ 26-1152.14. No call provision.

A lender shall not make a covered loan that includes a call provision that permits the lender, in its sole discretion, to accelerate the indebtedness; provided, that this prohibition shall not apply when repayment of the covered loan has been accelerated by a bona fide default or pursuant to some other provision of the loan agreement unrelated to the payment schedule.

(May 7, 2002, D.C. Law 14-132, § 214, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 214 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.15. No negative amortization.

A lender shall not make a covered loan with a payment schedule with regular periodic payments that causes the principal balance to increase.

(May 7, 2002, D.C. Law 14-132, § 215, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 215 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.16. No advance payments.

A lender shall not make a covered loan that includes terms under which any periodic payments required under the loan are paid in advance from loan proceeds.

(May 7, 2002, D.C. Law 14-132, § 216, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 216 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.17. No advance waivers.

A provision in a covered loan whereby a borrower waives in advance a violation of this chapter shall be void.

(May 7, 2002, D.C. Law 14-132, § 217, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 217 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.18. No oppressive mandatory arbitration clause.

(a) A mandatory arbitration clause in a note, lien, instrument, or ancillary lien instrument or obligation that evidences or secures a covered loan that is oppressive, unfair, unconscionable, or in substantially in derogation of the rights of borrowers shall be void.

(b) Arbitration clauses that comply with the standards adopted by the Mayor pursuant to regulation shall be presumed not to violate this section; provided, the Mayor's standards be in accordance with the procedures of a nationally recognized arbitration forum such as the American Arbitration Association.

(May 7, 2002, D.C. Law 14-132, § 218, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 218 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.19. Homeownership counseling.

A lender shall inform a borrower of his or her right to obtain counseling in connection with a covered loan. A Red Flag Warning Disclosure Notice shall satisfy this requirement.

(May 7, 2002, D.C. Law 14-132, § 219, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 219 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.20. Broker licenser.

Upon initiation of a business relationship with a mortgage broker, a lender shall verify that each mortgage broker with whom it does business in connection with making a covered loan is licensed or otherwise authorized to do business in the District. After verifying that the broker is licensed or authorized to do business in the District, the lender shall be entitled thereafter to rely upon a signed written statement by the mortgage broker that the mortgage broker is duly authorized to conduct business in the District unless the lender has notice that the mortgage broker is not licensed or authorized to

do business in the District; provided, that the lender has provided the Mayor with a name, telephone number, mailing address, and electronic mail address of a contact to whom the Mayor can provide updates or amendments to the list of licensed brokers.

(May 7, 2002, D.C. Law 14-132, § 220, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 220 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.21. Filing requirements.

(a) Within 14 days following the funding of a covered loan, a lender otherwise subject to the jurisdiction of the Mayor shall submit to the Mayor a loan package including copies of the following documents:

- (1) The settlement statement;
- (2) The FP-7 Form filed with the Recorder of Deeds;
- (3) The final Truth in Lending Act disclosure; and
- (4) The note.

(b) In its transmittal of the loan package required by subsection (a) of this section, the lender shall certify that each of the documents provided are true copies of the original documents.

(c) The loan package submitted pursuant to subsection (a) of this section shall remain confidential and exempt from disclosure under any law except to the borrower, a lender involved in the covered loan transaction, or current noteholder.

(May 7, 2002, D.C. Law 14-132, § 221, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 221 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.22. Suspect settlement service providers.

The Mayor may create and maintain a public list of lenders and other settlement service providers, including real estate agents and appraisers, who have been found by a court to have engaged in a systematic pattern or practice of fraud or in operations in violation of the requirements of District law.

(May 7, 2002, D.C. Law 14-132, § 222, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 222 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1152.23. Median family income.

The Mayor shall periodically publish or make available to lenders median

family income for Washington, D.C. that may be relied upon by lenders for purposes of this chapter.

(May 7, 2002, D.C. Law 14-132, § 223, 49 DCR 2551; Oct. 19, 2002, D.C. Law 14-213, § 42(a), 49 DCR 8140.)

Effect of amendments. — D.C. Law 14-213 deleted “the” before “Washington D.C.”.

Emergency legislation. — For temporary (90 day) addition of section, see § 223 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

Legislative history of Law 14-213. — Law 14-213, the “Technical Amendments Act of

2002”, was introduced in Council and assigned Bill No. 14-671, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 4, 2002, and July 2, 2002, respectively. Signed by the Mayor on July 26, 2002, it was assigned Act No. 14-459 and transmitted to both Houses of Congress for its review. D.C. Law 14-213 became effective on October 19, 2002.

Subchapter III. Violations and Remedies; Enforcement and Civil Liability.

§ 26-1153.01. Violations and remedies.

(a) The Mayor or any borrower under a covered loan may recover damages for a lender’s violation of § 26-1151.02 or subchapter II of this chapter.

(b) Notwithstanding subsection (a) of this section, if the violation of § 26-1151.02 or subchapter II of this chapter was caused by the borrower, his or her employer, or a creditor providing materially incorrect information to the lender, which inaccuracy the lender did not discover prior to the covered loan funding, and if the lender reasonably attempted to verify the current and expected income and current debts of the borrowers in accordance with § 26-1152.02(c), the lender shall not be liable.

(c) Damages or other relief awarded to the borrower under this section may include:

(1) Reformation of the covered loan to correct or remove an unfair term or a term obtained in violation of § 26-1151.02 or subchapter II of this chapter, whichever is applicable as of the date of initial funding;

(2) Actual damages;

(3) Injunctive relief;

(4) Reasonable attorneys’ fees and costs; or

(5) Statutory damages in an amount to be determined by the finder of fact if the finder of fact determines that the lender has engaged in a systematic pattern of practices and acted in violation of § 26-1151.02 or subchapter II of this chapter.

(d) An action for violation of § 26-1151.02 or subchapter II of this chapter shall be filed no later than 3 years after the violation has been discovered or should have been discovered.

(e)(1) A lender making a covered loan who, when acting in good faith, fails to comply with § 26-1151.02 or subchapter II of this chapter, shall not be deemed to have violated § 26-1151.02 or subchapter II of this chapter if the lender establishes one of the following:

(A) Without regard to who discovered the error, within 120 days of the covered loan initial funding and prior to the institution of judicial process under this section, the borrower was notified of the violation, appropriate restitution was made, and whatever adjustments are necessary were made to the covered loan, at the choice of the lender, to:

(i) Conform the covered loan to the requirements of § 26-1151.02 or subchapter II of this chapter;

(ii) Materially change the terms of the covered loan to benefit the borrower; or

(iii) Remove the features that caused the loan to be considered a covered loan.

(B) The violation resulted from a bona fide error notwithstanding the lender's maintenance of procedures reasonably designed to avoid the error and, within 60 days after the discovery of the compliance failure and prior to the filing of an action under this section, the borrower was notified of the compliance failure, appropriate restitution was made, and whatever adjustments are necessary were made to the covered loan, at the choice of the lender, to:

(i) Conform the covered loan to the requirements of § 26-1151.02 or subchapter II of this chapter;

(ii) Materially change the terms of the covered loan to benefit the borrower; or

(iii) Remove the features that caused the loan to be considered a covered loan.

(2) If the lender fails to comply with § 26-1152.11 or section 129(a) and (b) of the Truth in Lending Act in the case of a lender covered by § 26-1151.02, the lender shall not be deemed to have violated § 26-1151.02 or subchapter II of this chapter, only if:

(A) The lender satisfies paragraph (1) (A) (i) or (B) (ii) of this subsection;

(B) The lender provided the borrower with a disclosure notice prior to the closing of the covered loan; and

(C) The failure to comply with § 26-1152.11, or section 129(a) or (b) of the Truth in Lending Act in the case of a lender covered by § 26-1151.02, shall not have been shown to be part of a pattern or practice of such non-compliance.

(3) For the purposes of this subsection, a bona fide error shall include clerical error or, calculation, computer malfunction, and programming and printing errors. An error of legal judgment with respect to a lender's obligations under § 26-1151.02 or subchapter II of this chapter shall not constitute a bona fide error.

(f) No provision of this chapter shall be applied or interpreted to bar a borrower from bringing an action in an appropriate court of competent jurisdiction pursuant to any District or federal law for damages, injunctive relief, or any other relief.

(g) The remedies provided in this chapter shall be the sole and exclusive remedies for the violation of any provision of this chapter.

(May 7, 2002, D.C. Law 14-132, § 301, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 301 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

References in text. — Sections 129(a) and (b) of the Truth in Lending Act, referred to in subsecs. (e)(2) and (e)(2)(C), is classified to 15 U.S.C. § 1639(a) and (b).

CASE NOTES

Reformation of loan.

Violations of District of Columbia's Home Loan Protection Act (HLPa) by mortgage broker and lender warranted reformation of loan on terms consistent with acceptable consumer lending practices, including reinstatement of original interest rate and elimination of provision allowing for increased interest rate of 24 percent in event of default, extension, to seven-year period, of due date upon which balloon

payment became payable, reduction of balance due by amount of any penalties or fees traced to rate increases triggered by balloon-payment due date, reduction of note's 10 percent late fee to statutory limit of five percent, and striking of note's provision for reinstatement fee based upon entire loan balance. *Dawson v. Thomas* (In re Dawson), 411 B.R. 1, 2008 Bankr. LEXIS 1074 (2008).

§ 26-1153.02. Enforcement.

The Mayor may conduct examinations and investigations, and issue orders to enforce the provisions of this chapter, with respect to lenders over which it otherwise has jurisdiction. The Mayor may examine any relevant instrument, document, account, book, record, or file of a lender over which the Mayor has jurisdiction. The Mayor may recover the reasonable cost of the examinations and investigations from the lender. A lender shall maintain records which allow the Mayor to determine compliance with this chapter and any regulations promulgated hereunder.

(May 7, 2002, D.C. Law 14-132, § 302, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 302 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1153.03. Administrative penalties.

(a) If the Mayor determines that a person has violated this chapter, the Mayor may impose one or more of the following penalties:

(1) A civil penalty imposed as follows:

(A) \$1,000 for the first violation;

(B) For the second and each subsequent violation occurring within a 24-month period of a prior violation, twice the immediately preceding civil penalty imposed (or which could have been imposed).

(2) Order a person to cease and desist from engaging in any violation of this chapter and to make restitution for actual damages to the borrower.

(b) If the Mayor determines that any person has a systematic pattern of violations of this chapter, the Mayor may impose one or more of the following penalties in addition to the penalties set forth in subsection (a) of this section:

(1) Suspend, revoke, or refuse to renew any license issued by the Mayor;

(2) Prohibit or suspend an individual responsible for a violation of this

chapter from working in his or her present capacity or in any other capacity related to the activities regulated by the Mayor; or

(3) Obtain an injunction or other process against any person to restrain and prevent the person from engaging in any activity violating this chapter.

(May 7, 2002, D.C. Law 14-132, § 303, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 303 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1153.04. Final decision.

A decision of the Mayor under § 26-1153.03 shall be a final order for the purposes of subchapter I of Chapter 5 of Title 2, and shall be enforceable in a court of competent jurisdiction. The Mayor shall publish the final decisions, subject to redaction or modification to preserve confidentiality. Any person aggrieved by a final decision of the Mayor pursuant to this subchapter may appeal the decision to Superior Court of the District of Columbia.

(May 7, 2002, D.C. Law 14-132, § 304, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 304 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

§ 26-1153.05. Assignee liability.

(a) Any person who purchases or is otherwise assigned a covered loan shall be subject to all claims and defenses with respect to the covered loan that the borrower could assert against the originator of the covered loan, unless the purchaser or assignee demonstrates, by a preponderance of the evidence, that a reasonable person exercising ordinary due diligence could not determine that the loan was a covered loan for the purposes of this chapter, based on:

(1) The documentation required by § 26-1151.02 or subchapter II of this chapter;

(2) The itemization of the amount financed; and

(3) Other disclosure of disbursements.

(b) Nothing in subsection (a) of this section shall affect the rights of a borrower under any other provision of this chapter.

(c) Notwithstanding any other provision of law, the relief provided under this section shall not exceed:

(1) With respect to actions based upon a violation of this chapter, the amount of actual damages; and

(2) With respect to all other causes of action, the sum of:

(A) The amount of all remaining indebtedness; and

(B) The total amount paid by the consumer in connection with the transaction, reduced by the amount of any damages awarded under paragraph (1) of this subsection.

(d) Any person who sells or otherwise assigns a covered loan shall include a prominent notice, in the form as provided by the Mayor pursuant to rules of the potential liability under this section.

(May 7, 2002, D.C. Law 14-132, § 305, 49 DCR 2551; Apr. 13, 2005, D.C. Law 15-354, § 38, 52 DCR 2638.)

Effect of amendments. — D.C. Law 15-354, in subsec. (c)(2), validated a previously made technical correction.

Emergency legislation. — For temporary (90 day) addition of section, see § 305 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

Legislative history of Law 15-354. — For Law 15-354, see notes following § 26-551.05.

Subchapter IV. Rulemaking.

§ 26-1154.01. Rulemaking authority.

The Mayor shall promulgate rules in accordance with Chapter 5 of Title 2, to carry out the purposes of this chapter. The rules shall be promulgated within 90 days of May 7, 2002.

(May 7, 2002, D.C. Law 14-132, § 401, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 401 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

Subchapter V. Applicability.

§ 26-1155.01. Applicability.

(a) Subchapters I through III of this chapter shall apply 60 days after the effective date of the regulations promulgated by the Mayor pursuant to this chapter.

(b) The provisions of this chapter shall be interpreted and applied to the fullest extent practical in a manner consistent with applicable federal laws and regulations. Nothing in this chapter is intended to preempt federal laws and regulations.

(May 7, 2002, D.C. Law 14-132, § 501, 49 DCR 2551.)

Emergency legislation. — For temporary (90 day) addition of section, see § 501 of Home Loan Protection Emergency Act of 2002 (D.C. Act 14-295, March 1, 2002, 49 DCR 2534).

Legislative history of Law 14-132. — For Law 14-132, see notes following § 26-1151.01.

CHAPTER 12. SAVINGS AND LOAN ACQUISITION.

Sec.

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§ 26-1201. Definitions.

For the purposes of this chapter, the term:

(1) "Acquire" means:

(A) The merger or consolidation of 1 association with another association or with a savings and loan holding company or the merger of 1 savings and loan holding company with another savings and loan holding company;

(B) The acquisition by an association or savings and loan holding company of direct or indirect ownership or control of voting shares of an association or of a savings and loan holding company if, after the acquisition, the association or savings and loan holding company making the acquisition will directly or indirectly own or control more than 5% of any class of voting shares of the other association or savings and loan holding company;

(C) The direct or indirect acquisition by an association or a savings and loan holding company of all or substantially all of the assets of another association or savings and loan holding company; or

(D) Any other action that would result in direct or indirect control by an association or savings and loan holding company of another association or savings and loan holding company.

(2) "Association" means a mutual or capital stock savings and loan association, building and loan association, or savings bank chartered under the laws of any 1 of the states or by the Federal Home Loan Bank Board pursuant to the federal act.

(3) "Branch" or "branch office" means any office or other fixed location where an association has the authority to accept deposits and make loans, except:

(A) An automatic teller machine, point of sale terminal, or other similar unmanned electronic banking facility at which deposits may be accepted;

(B) An office located outside the United States;

(C) A loan production office or representative office;

(D) A service corporation office where deposits are not accepted; or

(E) Any other fixed location where deposits are not accepted.

(4) "Company" means "company" as defined in 12 U.S.C. § 1730a(a)(1)(C) [repealed] ("National Housing Act").

(5) "Control" means "control" as defined in 12 U.S.C. § 1730a(a)(2) [repealed].

(6) "Deposit" means any demand, time, or savings deposit, savings share account, withdrawable or repurchasable share, investment certificate, or other savings account or savings deposit account made by an individual, corporation, partnership, state or federal governmental unit, or any other organization, without regard to the location of the depositor. The term "deposit" shall not include a deposit by a foreign government, foreign official institution, or other associations. For purposes of this chapter, determination of deposits shall be made by reference to regulatory reports made by or to state or federal regulatory authorities.

(7) "District" means the District of Columbia.

(8) "District association" means an association organized under the laws of the District or a federal association that:

(A) Has its principal place of business in the District;

(B) Is not controlled by a company other than a District association, a District savings and loan holding company, a regional association, or a regional savings and loan holding company; and

(C) Has more than 80% of its total deposits other than deposits located in branch offices acquired pursuant to an emergency supervisory acquisition under federal law, held in branch offices located in the region.

(9) "District savings and loan holding company" means a savings and loan holding company that:

(A) Has its principal place of business in the District;

(B) Is not controlled by a company other than District association, District savings and loan holding company, regional association, or regional savings and loan holding company; and

(C) Has more than 80% of the total deposits held by all of its association subsidiaries, other than association subsidiaries acquired pursuant to an emergency supervisory acquisition under federal law, held by association subsidiaries in branch offices located within the region.

(10) "Federal act" means the Home Owners' Loan Act of 1933, approved June 13, 1933 (48 Stat. 128; 12 U.S.C. 1461 et seq.).

(11) "Federal association" means an association chartered by the Federal Home Loan Bank Board pursuant to the federal act.

(12) "Low- and moderate-income area" means any area within the District that the Superintendent [Commissioner], by rule, designates as a low- and moderate-income area after consideration of the income levels of residents within the area and the mix and locations of the levels of income of residents within the area.

(13) "Nonregional association" means any association that is neither a District association nor a regional association.

(14) "Nonregional savings and loan holding company" means any savings and loan holding company that is neither a District savings and loan holding company nor a regional savings and loan holding company.

(15) "Person" means an individual or a company.

(16) "Principal place of business of an association" means the state in which the aggregate deposits of the association are the largest.

(17) "Principal place of business of a savings and loan holding company"

means the state where the total deposits held by the offices of the association subsidiaries of the savings and loan holding company are the largest.

(18) "Region" means the states of Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia, and the District.

(19) "Regional association" means an association other than a District association, organized under the laws of 1 of the states in the region or under the laws of the United States that:

(A) Has its principal place of business in a state in the region other than the District;

(B) Is not controlled by a company other than a regional association or a regional savings and loan holding company; and

(C) Has more than 80% of its total deposits, other than deposits located in branch offices or association subsidiaries acquired pursuant to 12 U.S.C. § 1730a(m) [repealed] ("Garn-St. Germain Act"), or comparable provisions in federal or state law, held by association subsidiaries in branches located within the region.

(20) "Regional savings and loan holding company" means a savings and loan holding company other than a District savings and loan holding company that:

(A) Has its principal place of business in a state in the region;

(B) Is not controlled by a company other than a regional association or a regional savings and loan holding company; and

(C) Has more than 80% of the total deposits of its association subsidiaries, other than association subsidiaries acquired pursuant to 12 U.S.C. § 1730a(m) [repealed] or comparable provisions in federal or state law, held by association subsidiaries in branches located within the region.

(21) "Savings and loan holding company" means any company that directly or indirectly controls an association or any other company which is a savings and loan holding company.

(22) "Service corporation" means any corporation, the majority of the capital stock of which is owned by 1 or more associations, that engages, directly or indirectly, in any activity which may be engaged in by a service corporation under the laws of 1 of the states or under the laws of the United States.

(23) "State" means any state of the United States or the District.

(24) "Subsidiary" means "subsidiary" as defined in 12 U.S.C. § 1730a(a)(1)(H) [repealed].

(25) "Superintendent" means the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking].

(26) "Target development area" means any low- and moderate-income area within the District or any area which the Superintendent [Commissioner], by rule, designates as an underserved area.

(27) "Target economic development project" means any commercial, industrial, residential real estate, business, or other economic development activity that the Superintendent [Commissioner], in consultation with the

Council and the District of Columbia Office of Business and Economic Development ("OBED"), determines to be beneficial to residents in low- and moderate-income areas or small businesses in low- and moderate-income areas based on policies set forth in the District of Columbia Comprehensive Plan of 1984, effective April 10, 1984 (D.C. Law 5-76; 31 DCR 1049), and placing special emphasis on economic development project activity in economically distressed areas which have been historically underserved.

(28) "Underserved area" means any area which the Superintendent [Commissioner], in consultation with the Council and OBED designates as an "underserved area" based on the availability of deposit, loan, and credit services within the area to satisfy housing and small business needs or the availability and need for other financial services within the area.

(29) "Women-owned" means that at least 51% of the savings and loan association is owned by a woman or women who make the policy decisions and actually manage day-to-day operations.

(Oct. 12, 1988, D.C. Law 7-175, § 2, 35 DCR 6133; Mar. 16, 1989, D.C. Law 7-187, § 3(a), 35 DCR 8648.)

Section references. — This section is referred to in § 26-1211.

Prior Codifications. — 1981 Ed., § 26-901.

Legislative history of Law 7-175. — Law 7-175, the "District of Columbia Savings and Loan Acquisition Amendment Act of 1988," was introduced in Council and assigned Bill No. 7-399, which was referred to the Committee on Housing and Economic Development. The Bill was adopted on first and second readings on June 28, 1988 and July 12, 1988, respectively. Signed by the Mayor on August 1, 1988, it was assigned Act No. 7-235 and transmitted to both Houses of Congress for its review.

Legislative history of Law 7-187. — Law 7-187, the "District of Columbia Minority Banks Encouragement Amendment Act of 1988," was introduced in Council and assigned Bill No. 7-471, which was referred to the Committee on Housing and Economic Development. The Bill was adopted on first and second read-

ings on October 25, 1988 and November 15, 1988, respectively. Signed by the Mayor on December 1, 1988, it was assigned Act No. 7-249 and transmitted to both Houses of Congress for its review.

References in text. — "12 U.S.C. § 1730a," referred to in (4), (5), (19)(C), (20)(C), and (24), was repealed by Pub. L. 101-73, title IV, § 407, August 9, 1989, 103 Stat. 363.

The Home Owners' Loan Act of 1933, approved June 13, 1933, referred to in (10), as amended, is referred to as "The Home Owners' Loan Act".

The "Federal Home Loan Bank Board", referred to in paragraphs (2) and (11), has been abolished. For provisions relating to the abolition of the Federal Home Loan Bank Board and the transfer of functions, personnel and property of that agency, see §§ 401 to 406 of Pub. L. 101-73, set out as a note under 12 U.S.C. § 1437.

§ 26-1202. Authorization of regional acquisitions.

(a) A regional association, regional savings and loan holding company, District association, or District savings and loan holding company may acquire a District association or District savings and loan holding company on the approval of the Superintendent [Commissioner], if and only if, each of the following requirements is met:

(1) The laws of the state in which the regional association or regional savings and loan holding company making the acquisition has its principal place of business permit the regional association or regional savings and loan holding company to be acquired by the District association or District savings and loan holding company sought to be acquired;

(2) Either the District association sought to be acquired has been in

existence and continuously operating for more than 2 years or all of the District association subsidiaries of the District savings and loan holding company sought to be acquired have been in existence and continuously operating for more than 2 years, if the acquisition is by a regional association or regional savings and loan holding company. A regional association or regional savings and loan holding company may acquire an association or savings and loan holding company organized solely for the purpose of facilitating the acquisition of a District association that has been in existence and continuously operating for more than 2 years or a District savings and loan holding company, all of the District association subsidiaries of which have been in existence and continuously operating for more than 2 years;

(3) The acquisition complies with conditions, restrictions, requirements, or other limitations that would apply to the acquisition by a District association or District savings and loan holding company of an association or savings and loan holding company located in the state in which the regional association or regional savings and loan holding company making the acquisition has its principal place of business, but that would not apply to the acquisition by an association or savings and loan holding company, all of whose branches or association subsidiaries are located in that state, if the acquisition is by a regional association or regional savings and loan holding company; and

(4) The acquisition, when the acquisition results in a regional association, will not be prejudicial to the interests of the depositors, members, or shareholders of an acquired District association or the general public upon consideration of, at least, the following factors:

(A) The character, experience, and financial responsibility of the association or savings and loan holding company seeking to make the acquisition, its directors and officers, if applicable, and any proposed new directors and officers to control and operate a District association or District savings and loan holding company; and

(B) The future prospects and stability of the association or savings and loan holding company sought to be acquired.

(b) Subject to the provisions of this section, a District association organized under the laws of the District may apply to the Superintendent [Commissioner] to consolidate or merge with, transfer all or substantially all of its assets to, or effect a statutory merger with a regional association.

(c)(1) A regional association or a regional savings and loan holding company having a District association subsidiary, a District saving and loan holding company subsidiary, or branches in the District, acquired other than pursuant to an emergency supervisory acquisition under federal law or resulting from the regular course of securing or collecting a debt previously contracted in good faith, may apply to the Superintendent [Commissioner] to acquire another District association or a District savings and loan holding company on the approval of the Superintendent [Commissioner] and appropriate federal authorities.

(2) The approval of the Superintendent [Commissioner] shall be subject to any laws and regulations applicable to the acquisition of District associations and District savings and loan holding companies by an association or savings

and loan holding company whose branches, association subsidiaries, or association subsidiary branches are located in the District.

(Oct. 12, 1988, D.C. Law 7-175, § 3, 35 DCR 6133.)

Section references. — This section is referred to in §§ 26-206, 26-1204, 26-1206, and 26-1216.

Prior Codifications. — 1981 Ed., § 26-902.

Legislative history of Law 7-175. — For legislative history of D.C. Law 7-175, see Historical and Statutory Notes following § 26-1201.

§ 26-1203. Authorization of regional branches.

(a) Ninety days after October 12, 1988, a regional association or a regional savings and loan holding company may obtain a certificate of authority to establish, maintain, and acquire branches in the District on approval of the Superintendent [Commissioner].

(b) Before granting approval, the Superintendent [Commissioner] shall determine that each of the following requirements is met:

(1) The laws of the state in which the branching regional association or regional savings and loan holding company has its principal place of business authorize District associations or District savings and loan holding companies to establish or maintain branches in that state on terms and conditions reasonably equivalent to those applicable to the establishment or maintenance of branches in the District by District associations and District savings and loan holding companies and on terms and conditions reasonably equivalent to those applicable to the establishment or maintenance of branches in that state by an association or savings and loan holding company located in that state;

(2) The establishment or maintenance of a branch complies with conditions, restrictions, requirements, or other limitations that would apply to the branching of a District association or District savings and loan holding company in the state in which the regional association or regional savings and loan holding company has its principal place of business, but that would not apply to the branching of an association or savings and loan holding company, all of whose branches or association subsidiaries are located in that state; and

(3) The establishment or maintenance of a branch will not be prejudicial to the interests of the general public; among the factors to be considered by the Superintendent [Commissioner] in making a determination under this paragraph are the character, experience, and financial responsibility of the association or savings and loan holding company seeking to establish a branch and its directors and officers.

(Oct. 12, 1988, D.C. Law 7-175, § 4, 35 DCR 6133.)

Section references. — This section is referred to in §§ 26-1204, 26-1206, and 26-1216.

Prior Codifications. — 1981 Ed., § 26-903.

Legislative history of Law 7-175. — For

legislative history of D.C. Law 7-175, see Historical and Statutory Notes following § 26-1201.

§ 26-1204. Conditions for regional acquisitions and regional branches.

(a) When not inconsistent with federal law, the Superintendent [Commissioner] shall require each association or savings and loan holding company seeking to make an acquisition under § 26-1202 or seeking to branch under § 26-1203 to file information applicable to the nature of the application, a general plan of business, a proposed plan for capital investment in the District, and a community development program. In determining whether and to what extent the submissions are appropriate, the Superintendent [Commissioner] shall consider the overall purposes and resources of the savings and loan industry. The community development program shall set forth the applicant's plan to:

(1) Assist in the development of economically-disadvantaged and underserved neighborhoods in the District;

(2) Assist in meeting the credit and deposit service needs of low- and moderate-income and minority District residents;

(3) Assist in expanding support for small, minority, or women-owned businesses; and

(4) Market the community development program and publicize the community development program to the applicant's employees and to individuals and businesses located in areas which the applicant will serve.

(b) To the extent considered appropriate by the Superintendent [Commissioner], the Superintendent [Commissioner] shall require that an applicant seeking to make an acquisition under § 26-1202 or seeking to branch under § 26-1203 provide the following:

(1) A description of the local community, including low- and moderate-income neighborhoods where the applicant intends to provide credit and services and from which the applicant intends to draw deposits or customers;

(2) A description of the business services which the applicant will offer to low- and moderate-income persons, and a description of the services which the applicant will offer, at a minimum cost, to these persons;

(3) The applicant's agreement to cash checks issued by the District and the United States governments at branch offices within target development areas upon verification, according to normal and prudent industry practices, that an individual who presents the check at the branch office is legally entitled to payment, even though the bearer of the check does not maintain an account at the branch office;

(4) A description of the applicant's intended dividend policies;

(5) A description of the applicant's intended underwriting policies;

(6) A description of the applicant's loan policy, including the loan rates and the percentage of the total loans which will be made in low- and moderate-income areas. For purposes of determining compliance with the requirements of this subsection, loans may include permanent mortgage financing for the purchase and rehabilitation of 1 to 4 unit owner-occupied buildings or multi-family residential buildings, home improvement loans for single-family homes, or interim loans for construction, rehabilitation, or projects qualifying for permanent financing;

(7) A description of any technical assistance that the applicant will offer to individuals and businesses in low- and moderate-income areas;

(8) A description of the applicant's plans to use District-based minority firms to meet the applicant's procurement needs, including goods and professional services;

(9) A description of the applicant's plans to cooperate with the District's Department of Employment Services ("DOES") to identify District residents as potential employees for the applicant's District offices;

(10) A description of the applicant's plan to assure the retention of existing jobs held by District residents;

(11) A description of the applicant's plans to designate a senior lending officer to review specifically the needs of small, minority, or women-owned businesses and community development organizations;

(12) A description of the applicant's plans to use its best efforts to increase the number of minority and female representatives on the applicant's board of directors and, if applicable, on the board of any of the applicant's District-based association subsidiaries;

(13) A description of the applicant's plans to establish a training program for employees at all levels of the association's, and, if applicable, the savings and loan holding company's operations;

(14) A description of the applicant's plans for branching or operating new offices, and, where appropriate, a description of how those plans will aid the applicant in achieving the objectives of the community development program;

(15) A description of the applicant's plans to sell food coupons, pursuant to 7 U.S.C. § 2011 et seq. ("Food Stamp Act"), in branch offices located in the District;

(16) The applicant's agreement to submit an annual report to the Superintendent [Commissioner] updating any information submitted to the Superintendent [Commissioner] with regard to the community development program; and

(17) Any other information that the Superintendent [Commissioner] considers appropriate.

(c) For purposes of determining compliance with the requirements of this section, loans may include:

(1) Permanent mortgage financing for the purchase and rehabilitation of 1 to 4 unit owner-occupied buildings or multi-family residential buildings;

(2) Home improvement loans for single-family homes, or interim loans for construction, rehabilitation, or projects qualifying for permanent financing;

(3) Federal Housing Administration ("FHA") insured and Veterans Administration ("VA") guaranteed mortgage financing, including FHA title 1 home improvement loans;

(4) Blanket and share loans for the purchase and rehabilitation of cooperatively-owned residential properties;

(5) Loans made pursuant to programs established pursuant to § 47-848, or a similar homesteading program established by the District;

(6) Participation with nonprofit developers of housing;

(7) Term loans for small, minority, or women-owned businesses for building construction, building improvement, inventory or fixed asset financing; or

(8) Working capital.

(d)(1) If an applicant filing an application pursuant to § 26-1202 or § 26-1203 has made in connection with that application any express written commitments to the Superintendent [Commissioner] with respect to subjects set forth in subsections (a), (b), or (c) of this section, the Superintendent [Commissioner] may, at any time, review the activities of the applicant to determine whether the applicant has fulfilled the express written commitments. The Superintendent [Commissioner] may require an applicant to supply information and to submit any report the Superintendent [Commissioner] considers necessary to make a determination under this paragraph.

(2) Upon the determination of the Superintendent [Commissioner] that an applicant filing an application pursuant to § 26-1202 or § 26-1203 has failed to fulfill express written commitments that the applicant made with respect to subjects set forth in subsections (a), (b), or (c) of this section, the Superintendent [Commissioner] may order the applicant to take steps to comply with all the commitments within a reasonable period of time.

(3) If the Superintendent [Commissioner] believes, at any time, that an applicant, subject to an order issued under paragraph (2) of this subsection, has failed to comply with the order within the period specified in the order, the Superintendent [Commissioner] may conduct a hearing in accordance with § 2-509, on the issue of whether the applicant has fulfilled any express written commitments that the applicant made with respect to subjects set forth in subsections (a), (b), or (c) of this section.

(4) If, after a hearing as specified in paragraph (3) of this subsection, the Superintendent [Commissioner] determines that an applicant has failed to fulfill express written commitments made with respect to subjects set forth in subsections (a), (b), or (c) of this section, the Superintendent [Commissioner] may:

(A) Order the applicant to divest itself of control of all District associations and District savings and loan holding companies and of all District branches of any other subsidiary association within a reasonable period of time if the applicant has acquired a District association or District savings and loan holding company pursuant to § 26-1202. If the Superintendent [Commissioner] orders divestiture pursuant to this subparagraph, the divestiture shall be completed within 1 year after the date on which the Superintendent's [Commissioner's] order becomes final; or

(B) Order the revocation of the certificate of authority and a cessation of operations under the certificate within a reasonable period of time if the applicant is branching pursuant to § 26-1203; if the Superintendent [Commissioner] orders the cessation of business being conducted under the certificate, the cessation of business shall be completed within 1 year after the date on which the Superintendent's [Commissioner's] order becomes final.

(5) The Superintendent's [Commissioner's] decision in a case initiated under paragraph (3) of this subsection shall be subject to judicial review by the District of Columbia Court of Appeals in accordance with § 2-510.

(6) The Superintendent [Commissioner] shall initiate any case under paragraph (3) of this subsection of the issue of whether an association or

savings and loan holding company has failed to fulfill express written commitments that the association or savings and loan holding company made with respect to subjects set forth in subsections (a), (b), or (c) of this section within 4 years of the date of the acquisition of the District association or District savings and loan holding company subject to the express written commitments.

(e) The Superintendent [Commissioner] shall rule on any application submitted under §§ 26-1202 and 26-1203 no later than 90 days following the date of submission of a complete application, but the ruling may be conditioned upon approval by federal regulatory authorities or contain other appropriate conditions. The Superintendent [Commissioner] may extend the 90-day period for up to 30 days. If the Superintendent [Commissioner] fails to rule on the application within the 90-day period, or any extension, the application shall be deemed approved.

(f) For purposes of § 26-1202(a)(1) through (3) and § 26-1202(c)(1) and (2), a District association shall be treated as if it were a District savings and loan holding company if the laws of the state where the acquiring association or savings and loan holding company has its principal place of business would permit the regional association or a regional savings and loan holding company to be acquired by a District savings and loan holding company, but not by a District association.

(Oct. 12, 1988, D.C. Law 7-175, § 5, 35 DCR 6133.)

Section references. — This section is referred to in §§ 26-1206 and 26-1215.

Prior Codifications. — 1981 Ed., § 26-904.

Legislative history of Law 7-175. — For

legislative history of D.C. Law 7-175, see Historical and Statutory Notes following § 26-1201.

§ 26-1205. Authorization of nonregional acquisitions.

(a) Ninety days after October 12, 1988, a nonregional association or a nonregional savings and loan holding company may acquire, on the approval of the Superintendent [Commissioner]:

(1) A District association that has been in existence on January 1, 1988, and continuously operating for at least 2 years prior to that date or a District savings and loan holding company, all of the District association subsidiaries of which were in existence on January 1, 1988, and continuously operating for at least 2 years prior to that date; or

(2) A District association or District savings and loan holding company organized solely for the purpose of facilitating the acquisition of a District association that was in existence on January 1, 1988, and continuously operating for at least 2 years prior to that date or a District savings and loan holding company, all of the District association subsidiaries of which were in existence on January 1, 1988, and continuously operating for at least 2 years prior to that date.

(b) Before granting approval, the Superintendent [Commissioner] shall determine that:

(1) The applicant will make loans and extend credit to a target economic

development project in the District for an amount equal to or greater than .0625% of the applicant's total assets within 3 years following the date of the acquisition of a District association or a District savings and loan holding company.

(2) The applicant will establish at least 2 branch offices in target development areas, in addition to any acquired branch offices, within 3 years following the date of acquisition of a District association or savings and loan holding company.

(3) The applicant will cash checks issued by the District and the United States governments at branch offices within target development areas upon verification, according to normal and prudent industry practices, that the individual who presents the check at the branch office is legally entitled to payment even though the bearer of the check does not maintain an account at the branch office.

(4) The applicant will sell food coupons pursuant to 7 U.S.C. § 2011 et seq.

(5) The applicant will employ District residents, according to a sliding scale based upon total assets to be developed by the Superintendent [Commissioner], in positions located in the District that were not located in the District prior to approval of the acquisition within 3 years following the date of acquisition of a District association or District savings and loan holding company.

(c) Once an area has been designated as a "target development area" or once a project has been determined to be a "target economic development project" and identified by an applicant in an application that is approved pursuant to this section, that designation or determination is final for the applicant and any future revision in the designation of target development areas or target economic development projects shall have no effect on the applicant.

(d)(1) Except as provided in paragraph (2) of this subsection, an applicant shall submit with its application an irrevocable and confirmed letter of credit from an acceptable bank or association, as determined by the Superintendent [Commissioner]. The letter of credit shall name the District as the beneficiary and provide that the District of Columbia Treasurer receive a sum set by the Superintendent [Commissioner] upon presentation to the issuer by the Superintendent [Commissioner] of a decision and final order reached pursuant to subsection (g) of this section. The letter of credit shall be established on the date when the applicant submits its application to the Superintendent [Commissioner].

(2) In place of an irrevocable and confirmed letter of credit, the Superintendent [Commissioner] may authorize the use of any other financial instrument that would assure payment of fines assessed pursuant to subsection (g) of this section.

(e) The Superintendent [Commissioner] may reduce or extend the time within which an association or savings and loan holding company shall satisfy any commitment made in connection with an application filed pursuant to this section if the Superintendent [Commissioner] finds that the commitment was contingent upon certain action to be taken by the District that the District has

not taken or the economic or financial conditions of the association or savings and loan holding company justify the action and the savings and loan holding company justifies the action.

(f) Any District association or District savings and loan holding company may elect not to be acquired pursuant to this section by passing a resolution to that effect by its board of directors and shareholders or board of directors and members. The resolution shall be forwarded to the Superintendent [Commissioner] within 60 days after its adoption. No acquisition of an association or savings and loan holding company, which has timely filed a resolution, shall be allowed by the Superintendent [Commissioner], unless notice is given to the Superintendent [Commissioner], at the time an application is filed, that the resolution has been withdrawn or reversed by vote of the board of directors and shareholders or board of directors and members.

(g)(1) The Superintendent [Commissioner] may, at any time, review the activities of a nonregional association or a nonregional savings and loan holding company making an acquisition under this section and its District association subsidiaries to determine whether the nonregional association or nonregional savings and loan holding company is fulfilling the commitments set forth in subsection (b) of this section. At the end of 3 years following the acquisition of a District association or a District savings and loan holding company by a nonregional association or a nonregional savings and loan holding company under this section, the Superintendent [Commissioner] shall review the activities of the nonregional association or the nonregional savings and loan holding company and its District association subsidiaries and shall determine whether the nonregional association or nonregional savings and loan holding company has fulfilled and is continuing to fulfill the commitments set forth in subsection (b) of this section. The Superintendent [Commissioner] shall complete the review and make the determination no later than 39 months after the acquisition of a District association or District savings and loan holding company by the nonregional association or nonregional savings and loan holding company. The Superintendent [Commissioner] may require a nonregional association or a nonregional savings and loan holding company making an acquisition under this section and its District association subsidiaries to supply information and to submit any report the Superintendent [Commissioner] considers necessary to make a determination under this subsection.

(2) Upon the determination of the Superintendent [Commissioner] that an association or savings and loan holding company has failed to comply with any commitment made in connection with an application filed pursuant to this section, the Superintendent [Commissioner] shall order the association or savings and loan holding company to take steps to comply with the commitment within a specified reasonable period of time. The Superintendent [Commissioner] may extend this specified reasonable period of time.

(3) If, 30 days after the date specified for compliance with an order issued pursuant to paragraph (2) of this subsection, including any extension, the Superintendent [Commissioner] determines that the association or savings and loan holding company has not complied with the order, the Superintendent

[Commissioner] shall hold a hearing pursuant to § 2-509 to determine whether the association or savings and loan holding company has failed to comply with the order. The hearing shall be subject to judicial review by the District of Columbia Court of Appeals pursuant to § 2-510.

(4) If, after the hearing and final order issued upon the completion of all appeals, the Superintendent [Commissioner] concludes that the association or savings and loan holding company has not complied with the order issued by the Superintendent [Commissioner] pursuant to paragraph (2) of this subsection within the specified period of time, including any extension, the Superintendent [Commissioner] shall either:

(A) Order the association or savings and loan holding company to divest itself of control of all District associations and all District branches of any other subsidiary association within a reasonable period of time. If the Superintendent [Commissioner] orders divestiture pursuant to this paragraph, the divestiture shall be completed within 1 year after the date on which the Superintendent's [Commissioner's] order became final; or

(B) Fine the association or savings and loan holding company not more than \$1,000 a day and present the decision, final order, and letter of credit or other financial assurance required in subsection (d) of this section to the insurer and call upon the issuer to honor the letter of credit or other financial assurance for payment equal to the amount of the fine assessed pursuant to this paragraph.

(5) When determining whether to order divestiture or to impose a fine and the amount, the Superintendent [Commissioner] shall consider the efforts made by the association or savings and loan holding company to comply with the Superintendent's [Commissioner's] order and whether the association or savings and loan holding company has substantially completed its commitment pursuant to subsection (b) of this section.

(6) The Superintendent [Commissioner] shall exercise his or her authority under paragraphs (3), (4), and (5) of this subsection within 4 years of the date of the acquisition of a District savings and loan holding company or District association, plus any extensions and any period during which a hearing and its appeals are pending pursuant to this subsection.

(7) The Superintendent [Commissioner] shall submit a written report of any actions that the Superintendent [Commissioner] takes pursuant to this subsection to the Council and to the appropriate state or federal regulatory authority.

(h) Subject to the provisions of this section, a District association organized under the laws of the District may consolidate or merge with, transfer all or substantially all of its assets to, or effect a statutory merger with a nonregional association.

(i) The Superintendent [Commissioner] shall list applications for acquisitions pursuant to this section in the Superintendent's [Commissioner's] periodic bulletin published in the District of Columbia Register.

(Oct. 12, 1988, D.C. Law 7-175, § 6, 35 DCR 6133; Apr. 9, 1997, D.C. Law 11-255, § 25, 44 DCR 1271.)

Section references. — This section is referred to in §§ 26-1206 and 26-1215.

Prior Codifications. — 1981 Ed., § 26-905. 1981 Ed., § 26-905.

Legislative history of Law 7-175. — For legislative history of D.C. Law 7-175, see Historical and Statutory Notes following § 26-1201.

Legislative history of Law 11-255. — Law 11-255, the “Second Technical Amendments Act

of 1996,” was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

§ 26-1206. Review of applications.

(a) Prior to deciding whether to grant approval of the application under § 26-1202, § 26-1203, or § 26-1205, the Superintendent [Commissioner] shall accept public comment on the application and shall hold a public hearing on the application, according to procedures established by rules issued by the Superintendent [Commissioner].

(b) The Superintendent [Commissioner] shall make either a favorable or unfavorable recommendation on the application, explain the reasons for his or her recommendation, and submit to the Council his or her recommendation and explanation, a copy of the application, and any other relevant information or submissions within 90 days after receipt of the application. The Superintendent [Commissioner] may extend this 90-day period for up to an additional 60 days. No application required by § 26-1202, § 26-1203, or § 26-1205, shall be complete unless it is accompanied by an application fee in an amount to be established by the Superintendent [Commissioner] and made payable to the District of Columbia Treasurer. No entity required to obtain issuance shall commence operations until the applicant has submitted evidence that the insurance has been obtained.

(c) The Council may adopt a resolution disapproving the Superintendent’s [Commissioner’s] recommendation within 45 days, excluding Saturdays, Sundays, legal holidays, and days of Council recess, after receipt of the Superintendent’s [Commissioner’s] recommendation.

(d) If the Council fails to adopt a resolution disapproving the Superintendent’s [Commissioner’s] recommendation within the 45-day period, the Superintendent’s [Commissioner’s] recommendation shall be deemed approved.

(Oct. 12, 1988, D.C. Law 7-175, § 7, 35 DCR 6133.)

Prior Codifications. — 1981 Ed., § 26-906.

Legislative history of Law 7-175. — For legislative history of D.C. Law 7-175, see His-

torical and Statutory Notes following § 26-1201.

§ 26-1207. Prohibitions.

(a) Except as otherwise expressly permitted by this chapter or other applicable District or federal law, an association or savings and loan holding company that is not a District association or District savings and loan holding company or is not a regional association or regional savings and loan holding company:

(1) May not acquire a District association or savings and loan holding company; and

(2) May not acquire a regional association or regional savings and loan holding company that controls a District association or District savings and loan holding company.

(b)(1) Except as provided under paragraph (2) of this subsection, if a District association or District savings and loan holding company or regional association or regional savings and loan holding company ceases to be a District association, District savings and loan holding company, regional association, or regional savings and loan holding company, the association or savings and loan holding company shall, within 2 years, divest itself of all District associations and District savings and loan holding companies and all District branches of any other subsidiary association.

(2) A regional savings and loan holding company, regional association, District savings and loan holding company, or District association may not be required to divest its District associations, District savings and loan holding companies, or District branches if:

(A) An institution in another state, not within the region, was or is acquired pursuant to an emergency supervisory acquisition under federal law;

(B) An association having branches in a state other than within the region was or is acquired in the regular course of securing or collecting a debt previously contracted in good faith and the association or savings and loan holding company divests the association or branches acquired outside of the region within 2 years of the date of the acquisition;

(C) An increase in deposits in branches or association subsidiaries, not within the region, is the result of an occurrence other than de novo branching or the acquisition of an association or savings and loan holding company; or

(D) The change in status results from an acquisition authorized by this chapter.

(Oct. 12, 1988, D.C. Law 7-175, § 8, 35 DCR 6133.)

Prior Codifications. — 1981 Ed., § 26-907. **Legislative history of Law 7-175.** — For torical and Statutory Notes following § 26-1201. legislative history of D.C. Law 7-175, see His-

§ 26-1208. District status.

(a) A District association that is controlled by a savings and loan holding company other than a District savings and loan holding company shall be subject and entitled to the benefit of all laws of the District and the rules promulgated pursuant to laws relating to the acquisition, ownership, affiliations, branching, and operations of District associations controlled by District savings and loan holding companies.

(b) Any restrictions, limitations, prohibitions, or requirements pursuant to this section pertaining to the conduct of business in the District by an association or savings and loan holding company shall not apply to corporate, business, investment, or other activities of the association or savings and loan holding company outside the District.

(c) An association or a savings and loan holding company that controls an association or branches located in the District shall file with the Superintendent [Commissioner]:

(1) Copies of all regular and periodic reports that the savings and loan association or savings and loan holding company is required to file under §§ 13 and 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78m and 78o(d)), excluding any portions not required to be made available to the public; and

(2) Any other information regarding the District association or branches that the Superintendent [Commissioner] shall require by rule.

(d) The Superintendent [Commissioner] shall promptly notify the Council of any regional or nonregional associations and savings and loan holding companies that control District associations or have District association subsidiaries that fail or refuse to submit information as required in subsection (c) of this section.

(Oct. 12, 1988, D.C. Law 7-175, § 9, 35 DCR 6133.)

Prior Codifications. — 1981 Ed., § 26-908. torical and Statutory Notes following § 26-1201.
Legislative history of Law 7-175. — For legislative history of D.C. Law 7-175, see His-

§ 26-1209. Rules.

The Superintendent [Commissioner] shall, pursuant to subchapter I of Chapter 5 of Title 2, issue proposed rules to implement the provisions of this chapter. The proposed rules shall be submitted to the Council for a 45-day review period, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution within this 45-day review period, the proposed rules shall be deemed approved. Nothing in this section shall affect the requirements imposed upon the Mayor by subchapter I of Chapter 5 of Title 2.

(Oct. 12, 1988, D.C. Law 7-175, § 10, 35 DCR 6133.)

Prior Codifications. — 1981 Ed., § 26-909. torical and Statutory Notes following § 26-1201.
Legislative history of Law 7-175. — For legislative history of D.C. Law 7-175, see His-

§ 26-1210. Continued operations of existing associations and savings and loan holding companies.

(a) This chapter shall not be construed to require divestiture by an association or a savings and loan holding company that acquired its subsidiary District association or District savings and loan holding company prior to October 12, 1988.

(b) This chapter shall not require a regional association that, on October 12, 1988, has branch offices in the District and conducts business in the District to divest itself of any branch offices or to cease or otherwise limit its business or branching activities in the District.

(Oct. 12, 1988, D.C. Law 7-175, § 11, 35 DCR 6133.)

Prior Codifications. — 1981 Ed., § 26-910. **Legislative history of Law 7-175.** — For torical and Statutory Notes following § 26-1201. legislative history of D.C. Law 7-175, see His-

§ 26-1211. Status after conversion.

(a) An association's status as a regional association shall not be affected by the association's conversion, after October 12, 1988, from a federal charter to a charter issued by a state in the region or by the association's conversion from a state charter to a federal charter, so long as the association otherwise continues to qualify as a regional association under the provisions of § 26-1201(19).

(b) An association's status as a District association or a regional association may not be affected by the association's conversion, after October 12, 1988, from an association insured by the Federal Deposit Insurance Corporation to an association insured by the Federal Savings and Loan Insurance Corporation or by the association's conversion from an association insured by the Federal Savings and Loan Insurance Corporation to an association insured by the Federal Deposit Insurance Corporation so long as the association continues to be a District association or a regional association as defined in § 26-1201(8) or § 26-1201(19).

(Oct. 12, 1988, D.C. Law 7-175, § 12, 35 DCR 6133.)

Prior Codifications. — 1981 Ed., § 26-911. **Legislative history of Law 7-175.** — For legislative history of D.C. Law 7-175, see Historical and Statutory Notes following § 26-1201.

References in text. — The "Federal Savings and Loan Insurance Corporation", referred

to in (b), has been abolished. For provisions relating to the abolition of the Federal Savings and Loan Insurance Corporation and the transfer of functions, personnel and property of that agency, see §§ 401 to 406 of Pub. L. 101-73, set out as a note under 12 U.S.C. § 1437.

§ 26-1212. Insurance.

Following an acquisition pursuant to this chapter, the deposits of any resulting association doing business in the District shall be insured by either the Federal Deposit Insurance Corporation pursuant to 12 U.S.C. § 1811 et seq., or the Federal Savings and Loan Insurance Corporation pursuant to 12 U.S.C. § 1724 et seq. [repealed].

(Oct. 12, 1988, D.C. Law 7-175, § 13, 35 DCR 6133.)

Prior Codifications. — 1981 Ed., § 26-912. **Legislative history of Law 7-175.** — For legislative history of D.C. Law 7-175, see Historical and Statutory Notes following § 26-1201.

References in text. — "12 U.S.C. § 1724 et seq.", referred to in this section, was repealed by Pub. L. 101-73, title IV, § 407, August 9, 1989, 103 Stat. 363.

The "Federal Savings and Loan Insurance Corporation", referred to in this section, has been abolished. For provisions relating to the abolition of the Federal Savings and Loan Insurance Corporation and the transfer of functions, personnel and property of that agency, see §§ 401 to 406 of Pub. L. 101-73, set out as a note under 12 U.S.C. § 1437.

§ 26-1213. Federal exclusion.

This chapter shall not be construed to:

(1) Grant the Superintendent [Commissioner] or any other District agency jurisdiction over a federal association or any merger or consolidation of a federal association in which an association chartered by the District is not a party; or

(2) Subject any federal association to any law or rule of the District or its agencies to which it is not otherwise subject.

(Oct. 12, 1988, D.C. Law 7-175, § 14, 35 DCR 6133.)

Prior Codifications. — 1981 Ed., § 26-913. torical and Statutory Notes following § 26-
Legislative history of Law 7-175. — For 1201.
 legislative history of D.C. Law 7-175, see His-

§ 26-1214. Cooperative agreements and examinations.

(a) The Superintendent [Commissioner] shall examine all nonfederal District associations controlled by an association or savings and loan holding company and all District branches controlled by an association or savings and loan holding company.

(b) The Superintendent [Commissioner] may enter into cooperative agreements with any other savings and loan regulatory agency to facilitate the regulation and examination of any savings and loan association or savings and loan holding company doing business in the District.

(c) The Superintendent [Commissioner] may accept a report of an examination or other records from any other regulatory unit instead of conducting its own examinations of interstate associations or associations controlled by savings and loan holding companies located in other jurisdictions.

(d) The Superintendent [Commissioner] may take any action jointly with any other regulatory agency having concurrent jurisdiction over savings and loan associations and savings and loan holding companies in the District or may take action independently to carry out the responsibilities of the Superintendent [Commissioner].

(Oct. 12, 1988, D.C. Law 7-175, § 15, 35 DCR 6133.)

Prior Codifications. — 1981 Ed., § 26-914. torical and Statutory Notes following § 26-
Legislative history of Law 7-175. — For 1201.
 legislative history of D.C. Law 7-175, see His-

§ 26-1215. Remedies.

(a) The Superintendent [Commissioner] shall report violations of any provision of this chapter to the Corporation Counsel. The Corporation Counsel may institute a civil action on behalf of the District for equitable or any other appropriate relief, including the imposition of civil fines provided in this section, unless different procedures or means of obtaining relief are specified in this chapter for the violation.

(b) Any person violating any provision of this chapter or any rule issued

pursuant to this chapter shall be subject to a civil fine of not more than \$1,000 per day for each day the violation continues, up to a maximum of \$30,000 for a single violation, unless a different penalty is specified in § 26-1204(d)(4)(A), § 26-1204(d)(4)(B) or § 26-1205(g)(4)(B) for the violation, in which case the specified penalty shall apply.

(c) Any person who wilfully violates this chapter or any rule issued pursuant to this chapter shall be subject to a civil fine of not more than \$5,000 a day for each day the violation continues, up to a maximum of \$150,000, unless a different penalty is specified in § 26-1204(d)(4)(A), § 26-1204(d)(4)(B) or § 26-1205(g)(4)(B) for the violation, in which case the specified penalty shall apply.

(Oct. 12, 1988, D.C. Law 7-175, § 16, 35 DCR 6133.)

Prior Codifications. — 1981 Ed., § 26-915.

Legislative history of Law 7-175. — For torical and Statutory Notes following § 26-1201.
legislative history of D.C. Law 7-175, see His-

§ 26-1216. Registered agent.

(a) Each association or savings and loan holding company making an application to the Superintendent [Commissioner] under § 26-1202 or § 26-1203 shall include in that application a statement identifying a registered agent and registered office for the association or savings and loan holding company. The registered agent shall be an agent of the association or savings and loan holding company upon whom process may be served. All notices or demands required or permitted by law may be served upon the registered agent. The registered agent and office may be the same as that used by the District association or District savings and loan holding company sought to be acquired. The appointment of a registered agent for purposes of this section shall meet the requirements imposed on a foreign corporation's appointment of a registered agent and office by § 29-101.106.

(b) If the association or savings and loan holding company fails to appoint or maintain a registered agent and office in the District, the Mayor shall serve as the agent of the association or savings and loan holding company upon whom any process, notice, or demand against the association or savings and loan holding company may be served. All matters served upon the Mayor pursuant to this section shall be handled in the same manner as matters served upon the Mayor on behalf of foreign corporations pursuant to § 29-101.108(b) and (d).

(c) The appointment of a registered agent pursuant to this section may not be revoked or modified, except that a new registered agent may be substituted, as long as any liability for the penalties imposed by this chapter remains outstanding against the association or savings and loan holding company. Upon satisfaction of any liability, the appointment may be revoked or otherwise modified, unless the association or savings and loan holding company is otherwise required by law to maintain the registered agent and office.

(Oct. 12, 1988, D.C. Law 7-175, § 17, 35 DCR 6133.)

Prior Codifications. — 1981 Ed., § 26-916. **Legislative history of Law 7-175.** — For legislative history of D.C. Law 7-175, see Historical and Statutory Notes following § 26-1201.

§ 26-1217. Use of minority-owned savings and loan associations.

(a) Recipients of the District of Columbia government contracts are encouraged to use federally and District chartered minority-owned savings and loan associations certified by the Small and Local Business Opportunity Commission in accordance with subchapter IX-A of Chapter 2 of Title 2.

(b) The Mayor shall, pursuant to subchapter I of Chapter 5 of Title 2, issue rules to implement the provisions of this section within 90 days of March 16, 1989. All rules issued pursuant to this subsection shall be transmitted to the Council for review.

(Oct. 12, 1988, D.C. Law 7-175, § 17a, as added Mar. 16, 1989, D.C. Law 7-187, § 3(b), 35 DCR 8648; October 4, 2000, D.C. Law 13-169, § 7, 47 DCR 5846; Oct. 20, 2005, D.C. Law 16-33, § 2381(b), 52 DCR 7503.)

Cross references. — Banking institutions organized under federal statute, application of District law, see § 26-710.

Prior Codifications. — 1981 Ed., § 26-917.

Effect of amendments. — D.C. Law 13-169 in subsec. (a) substituted for “Minority Business Opportunity Commission in accordance with the District of Columbia Minority Contracting Act of 1976, § 1-1141 et seq.” 1981 Ed. the phrase “District of Columbia Local Business Opportunity Commission in accordance with subchapter II-B of Chapter 11 of Title 1” “[1981 Ed.]”

D.C. Law 16-33, in subsec. (a), substituted “Small and Local Business Opportunity Commission in accordance with subchapter IX-A of Chapter 2 of Title 2” for “District of Columbia Local Business Opportunity Commission in accordance with subchapter IX of Chapter 2 of Title 2”.

Temporary Amendment of Section. — Section 7 of D.C. Law 13-216, in subsec. (a), substituted “District of Columbia Local Business Opportunity Commission in accordance with the Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises Act of 1998” for “Minority Business Opportunity Commission in accordance with the District of Columbia Minority Contracting Act of 1976”.

Section 11(b) of D.C. Law 13-216 provided that the act shall expire after 225 days of its having taken effect.

Emergency legislation. — For temporary (90-day) amendment of section, see § 7 of the Equal Opportunity for Local, Small, or Disadvantaged Business Enterprises Emergency Amendment Act of 2000 (D.C. Act 13-415, August 14, 2000, 47 DCR 7296).

For temporary (90 day) amendment of section, see § 2381(b) of Fiscal Year 2006 Budget Support Emergency Act of 2005 (D.C. Act 16-168, July 26, 2005, 52 DCR 7667).

Legislative history of Law 7-187. — For legislative history of D.C. Law 7-187, see Historical and Statutory Notes following § 26-1201.

Legislative history of Law 13-169. — Law 13-169, the “Equal Opportunity for Local, Small, or Disadvantaged Business Enterprises Amendment Act of 2000,” was introduced in Council and assigned Bill No. 13-241, which was referred to the Committee on Economic Development. The Bill was adopted on first and second readings on April 4, 2000, and June 6, 2000, respectively. Signed by the Mayor on June 26, 2000, it was assigned Act No. 13-373 and transmitted to both Houses of Congress for its review. D.C. Law 13-169 became effective on October 4, 2000.

Legislative history of Law 13-216. — For Law 13-216, see notes following § 26-711.

Legislative history of Law 16-33. — For Law 16-33, see notes following § 26-711.

CHAPTER 13. TRUST, LOAN, MORTGAGE, SAFE DEPOSIT AND TITLE CORPORATIONS.

Subchapter I. General

Sec.	Sec.
26-1301. Manner of formation; purposes.	26-1318. Annual reports — Publication; contents; verification.
26-1302, 26-1303. [Reserved].	26-1319. Annual reports — Liability of directors or trustees.
26-1304. Organization certificate; execution; contents.	26-1320. Wilful false swearing; misappropriation.
26-1305. Charter of incorporation — Power of Council to grant or refuse.	26-1321. Stock deemed personal estate; transfer; contents of certificates.
26-1306. Charter of incorporation — Notice of application.	26-1322. Liability of stockholders.
26-1307. Charter of incorporation — Recording; certificate to be obtained from Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking].	26-1323. Payment of stock to be in money only; exception.
26-1308. Reports to Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking].	26-1324. Election of, and management of company by, directors or trustees.
26-1309. Powers of companies; liability as trustee.	26-1325. Officers; security authorized.
26-1310. Appointment as fiduciary.	26-1326. Power to make bylaws; purposes thereof.
26-1311. Oath as fiduciary.	26-1327. Liability of directors or trustees on declaration of dividends — Conditions.
26-1311.01. Automatic substitution of fiduciaries.	26-1328. Liability of directors or trustees on declaration of dividends — Exemption.
26-1312. Stock, property, and liability to be security when fiduciary.	26-1329. Directors or trustees personally liable when liabilities exceed assets.
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26-1314. Real property held and conveyed by companies.	26-1331. Increase or decrease of capital stock.
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26-1316. Capital stock — Amount; payment; deposit with Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking].	26-1333. Security required for performance of fiduciary duties; liability thereon.
26-1317. Capital stock — Calls; sale on failure to pay money subscribed.	26-1334. Powers of probate court.
	26-1335. Compliance required of foreign corporations or companies.
	26-1336. Right of Congress to amend or repeal chapter; remedies preserved.

Subchapter II. Existing Trust Companies; Perpetual Succession of Trust Companies

26-1351. Existing title insurance companies may become perpetual.
26-1352. Trust companies to have perpetual succession.

Subchapter I. General.

§ 26-1301. Manner of formation; purposes.

Corporations may be formed within the District of Columbia for the purposes hereinafter mentioned in the following manner: Any number of natural persons, citizens of the United States, not less than 25, may associate themselves together to form a company for the purpose of carrying on, in the District of Columbia, any 1 of the 3 classes of business herein specified, to wit: (1) a safe deposit, trust, loan, and mortgage business; (2) a title insurance, loan, and mortgage business; or (3) a security, guarantee, indemnity, loan, and

mortgage business; provided, that the capital stock of any of said companies shall not be less than \$1,000,000 except as otherwise provided in § 31-2502.13, and that any of said companies may also do a storage business when their capital stock amounts to the sum of not less than \$1,200,000.

(Mar. 3, 1901, 31 Stat. 1303, ch. 854, § 715; Apr. 16, 1966, 80 Stat. 121, Pub. L. 89-399, § 1(b); Apr. 9, 1997, D.C. Law 11-255, § 24(a), 44 DCR 1271.)

Section references. — This section is referred to in §§ 26-1304, 26-1309, 26-1310, 26-1313, 26-702.01, and 26-710.

Prior Codifications. — 1981 Ed., § 26-401. 1973 Ed., § 26-301.

Legislative history of Law 11-255. — Law 11-255, the “Second Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to

both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

Transfer of Functions. — Pursuant to Reorganization Plan No. 3 of 1992, effective January 20, 1993, unless another date was designated by the Mayor under Sec V of the Plan, the D.C. Office of Banking and Financial Institutions (“OBFI”) is hereby transferred from the Deputy Mayor for Economic Development (“DMED”) control center to a separate OBFI control center/responsibility center. OBFI will continue to be administered by the Superintendent and will remain a part of the economic development cluster reporting to the Mayor.

§§ 26-1302, 26-1303. [Reserved].

§ 26-1304. Organization certificate; execution; contents.

The persons referred to in § 26-1301 shall, under their hands and seals, execute before some officer in said District competent to take the acknowledgment of deeds, an organization certificate, which shall specifically state:

- (1) The name of the corporation;
- (2) The purposes for which it is formed;
- (3) The term for which it is to exist, which shall not exceed the term of 50 years, and be subject to alteration, amendment, or repeal by Congress at any time;
- (4) The number of its directors and the names and residences of the officers who for the first year are to manage the affairs of the company; and
- (5) The amount of its capital stock and its subdivision into shares.

(Mar. 3, 1901, 31 Stat. 1303, ch. 854, § 716; Apr. 9, 1997, D.C. Law 11-255, § 24(b), 44 DCR 1271.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-404. 1973 Ed., § 26-304.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 26-1301.

§ 26-1305. Charter of incorporation — Power of Council to grant or refuse.

This certificate shall be presented to the Council of the District of Columbia, which shall have power and discretion to grant or refuse to said persons a

charter of incorporation upon the terms set forth in the said certificate and the provisions of this chapter.

(Mar. 3, 1901, 31 Stat. 1303, ch. 854, § 717.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-405. 1973 Ed., § 26-305.

Change in Government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 402(223) of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to the District of Columbia

Council, subject to the right of the Commissioner as provided in § 406 of the Plan. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

§ 26-1306. Charter of incorporation — Notice of application.

Previous to the presentation of the said certificate to the said Council of the District of Columbia, notice of the intention to apply for such charter shall be inserted in 2 newspapers of general circulation, printed in the District of Columbia, at least 4 times a week for 3 weeks, setting forth briefly the name of the proposed company, its character and object, the names of the proposed incorporators, and the intention to make application for a charter on a specified day; and the proof of such publication shall be presented with said certificate when presentation thereof is made to said Council.

(Mar. 3, 1901, 31 Stat. 1303, ch. 854, § 718.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-406. 1973 Ed., § 26-306.

Change in Government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 402(223) of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to the District of Columbia

Council, subject to the right of the Commissioner as provided in § 406 of the Plan. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

§ 26-1307. Charter of incorporation — Recording; certificate to be obtained from Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking].

If the charter be granted as aforesaid, it, together with the certificate of the Council of the District of Columbia granting the same indorsed thereon, shall be filed for record in the Office of the Recorder of Deeds for the District of Columbia, and shall be recorded by him. On the filing of the said certificate with the said Recorder of Deeds as herein provided, approved as aforesaid by the said Council, the persons named therein and their successors shall thereupon and thereby be and become a body corporate and politic, and as such shall be vested with all the powers and charged with all the liabilities conferred upon and imposed by this chapter upon companies organized under the provisions hereof; provided, however, that no corporation created and organized under the provisions hereof, or availing itself of the provisions hereof as contained in § 26-1313, shall be authorized to transact the business of a trust company, or any business of a fiduciary character, until it shall have filed with the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] a copy of its certificate of organization and charter, and shall have obtained from him and filed the same for record with the said Recorder of Deeds, a certificate that the said capital stock of said company has been paid in and the deposit of securities made with said Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] in the manner and to the extent required by this chapter.

(Mar. 3, 1901, 31 Stat. 1304, ch. 854, § 719; Nov. 23, 1985, D.C. Law 6-63, § 106(a)(6), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-407. 1973 Ed., § 26-307.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-403.

Change in Government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 402(223) of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of

the functions of the Board of Commissioners under this section to the District of Columbia Council, subject to the right of the Commissioner as provided in § 406 of the Plan. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-207.11), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-207.14(a)), appropriate changes in terminology were made in this section.

§ 26-1308. Reports to Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking].

All companies organized under this chapter, or which shall, under the provisions of this chapter, become entitled to transact the business of a trust company, shall report to the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] pursuant to subchapter I of Chapter 7 of this title.

(Mar. 3, 1901, 31 Stat. 1304, ch. 854, § 720; Nov. 23, 1985, D.C. Law 6-63, § 106(a)(7), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-408. 1973 Ed., § 26-308.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-1352.

CASE NOTES

Nature and purpose of statute.

Purpose of District of Columbia statute requiring that trust companies and banks file reports in like form as national banks, be examined by national bank examiners, and subject to visitorial powers of comptroller when insolvent for reasons and in manner and to

same extent as national banks, was to make state incorporated banks doing business in District of Columbia subject to authority of comptroller in operation and insolvency. Code of Laws D.C.1901, § 720. *Dunn v. O'Connor*, 89 F.2d 820, 1937 U.S. App. LEXIS 3598 (1937).

§ 26-1309. Powers of companies; liability as trustee.

All companies organized under this chapter are hereby declared to be corporations possessed of the powers and functions of corporations generally, and shall have power:

- (1) To make contracts;
- (2) To sue and be sued, plead and be impleaded, in any court as fully as natural persons;
- (3) To make and use a common seal and alter the same at pleasure;
- (4) To loan money; and
- (5) When organized under clause (1) of § 26-1301, to accept and execute trusts of any and every description which may be committed or transferred to them, and to accept the office and perform the duties of receiver, assignee, personal representative, special administrator, guardian of the estate of minors with the consent of the guardian of the person of such minor, and committee of the estates of people with mental illness or mental retardation whenever any trusteeship or any such office or appointment is committed or transferred to them, with their consent, by any person, body politic or corporate, or by any court in the District of Columbia; and all such companies organized under clause (1) of § 26-1301 are further authorized to accept deposits of money for the purposes designated herein, upon such terms as may

be agreed upon from time to time with depositors, and to act as agent for the purpose of issuing or countersigning the bonds or obligations of any corporation, association, municipality, or state, or other public authority, and to receive and manage any sinking fund on any such terms as may be agreed upon, and shall have power to issue its debenture bonds upon deeds of trust or mortgages of real estate to a sum not exceeding the face value of said deeds of trust or mortgages, and which shall not exceed 50 percent of the fair cash value of the real estate covered by said deeds or mortgages, to be ascertained by the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking]; but no debenture bonds shall be issued until the securities on which the same are based have been placed in the actual possession of the trustee named in the debenture bonds, who shall hold said securities until all of said bonds are paid; and when organized under clause (2) of § 26-1301 said company is authorized to insure titles to real estate and to transact generally the business mentioned in said clause; and when organized under clause (3) of § 26-1301 said company is hereby authorized, in addition to the loan and mortgage business therein mentioned, to secure, guarantee, and insure individuals, bodies politic, associations, and corporations against loss by or through trustees, agents, servants, or employees, and to guarantee the faithful performance of contracts and obligations of whatever kind entered into by or on the part of any person or persons, association, corporation, or corporations, and against loss of every kind; provided, that any corporations formed under the provisions of this chapter when acting as trustee shall be liable to account for the amounts actually earned by the moneys held by it in trust in addition to the principal so held; but such corporation may be allowed a reasonable compensation for services performed in the care of the trust estate.

(Mar. 3, 1901, 31 Stat. 1304, ch. 854, § 721; June 24, 1980, D.C. Law 3-72, § 207(a), 27 DCR 2155; Nov. 23, 1985, D.C. Law 6-63, § 106(a)(8), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168; Apr. 9, 1997, D.C. Law 11-255, § 24(c), 44 DCR 1271; Apr. 24, 2007, D.C. Law 16-305, § 38, 53 DCR 6198.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-409. 1973 Ed., § 26-309.

Effect of amendments. — D.C. Law 16-305, in par. (5), substituted "people with mental illness or mental retardation" for "lunatics and idiots".

Legislative history of Law 3-72. — Law 3-72, the "District of Columbia Probate Reform Act of 1980," was introduced in Council and assigned Bill No. 3-91, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on April 1, 1980 and April 22, 1980, respectively. Signed by the Mayor on May 7, 1980, it was assigned Act No. 3-181 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-107. — For

legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-1352.

Legislative history of Law 11-255. — For legislative history of D.C. Law 11-255, see Historical and Statutory Notes following § 26-1301.

Legislative history of Law 16-305. — Law 16-305, the "People First Respectful Language Modernization Act of 2006", was introduced in Council and assigned Bill No. 16-664, which was referred to Committee on the Whole. The Bill was adopted on first and second readings on June 20, 2006, and July 11, 2006, respectively. Signed by the Mayor on July 17, 2006, it was assigned Act No. 16-437 and transmitted to both Houses of Congress for its review. D.C. Law 16-305 became effective on April 24, 2007.

§ 26-1310. Appointment as fiduciary.

In all cases in which application shall be made to any court in the District of Columbia, or wherever it becomes necessary or proper for said court to appoint a trustee, receiver, personal representative, special administrator, guardian of the estate of a minor, or committee of the estate of a person with mental illness, it shall and may be lawful for said court (but without prejudice to any preference in the order of any such appointments required by law) to appoint any such company organized under clause (1) of § 26-1301, with its assent, such trustee, receiver, personal representative, special administrator, committee, or guardian, with the consent of the guardian of the person of such minor; provided, however, that no court or judge who is an owner of or in any manner financially interested in the stock or business of such corporation shall commit by order or decree to any such corporation any trust or fiduciary duty.

(Mar. 3, 1901, 31 Stat. 1305, ch. 854, § 722; June 24, 1980, D.C. Law 3-72, § 207(b), 27 DCR 2155; Apr. 24, 2007, D.C. Law 16-305, § 39(a), 53 DCR 6198.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-410. 1973 Ed., § 26-310.

Effect of amendments. — D.C. Law 16-305 substituted “person with mental illness” for “lunatic”.

Legislative history of Law 3-72. — For legislative history of D.C. Law 3-72, see Historical and Statutory Notes following § 26-1309.

Legislative history of Law 16-305. — For Law 16-305, see notes following § 26-1309.

§ 26-1311. Oath as fiduciary.

Whenever any corporation operating under this Code shall be appointed such trustee, personal representative, special administrator, receiver, assignee, guardian, or committee, as aforesaid, the president, vice-president, secretary, or treasurer of said company shall take the oath or affirmation required by law to be made by any trustee, personal representative, special administrator, receiver, assignee, guardian, or committee.

(Mar. 3, 1901, 31 Stat. 1305, ch. 854, § 723; June 24, 1980, D.C. Law 3-72, § 207(c), 27 DCR 2155.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-411. 1973 Ed., § 26-311.

Legislative history of Law 3-72. — For

legislative history of D.C. Law 3-72, see Historical and Statutory Notes following § 26-1309.

References in text. — “Code” means An Act To establish a code of law for the District of Columbia, ch. 854, §§ 1 through 1642.

§ 26-1311.01. Automatic substitution of fiduciaries.

(a) For the purpose of this section, the term:

(1) “Affiliate” means a company that is affiliated with a bank or bank holding company because the bank or bank holding company has the power to vote 5% or more of the outstanding voting securities of the company.

(2) “Bank” means a bank as defined in § 2(c)(1) of the Bank Holding Companies Act (12 U.S.C. § 1841(c)(1)).

(3) "Bank holding company" means a bank holding company as defined in § 2(a) of the Bank Holding Companies Act (12 U.S.C. § 1841(a)).

(4) "Beneficiary" means a person who is currently receiving or is entitled to receive a current distribution of principal or income from a trust, estate, or fund from a fiduciary that is subject to this section. The term "beneficiary" shall include:

(A) A minor beneficiary's natural or legal guardian; and

(B) Any person acting on behalf of an incompetent beneficiary under a court ordered guardianship, conservatorship, or committee.

(5) "District" means the District of Columbia.

(6) "Fiduciary" means a trustee, personal representative, executor, executrix, receiver, special administrator, guardian, conservator, committee, custodian, or any other term denoting a fiduciary relationship.

(7) "Trust company" means a corporation organized under the laws of the District to carry on a trust business or a national association organized under the laws of the United States that is authorized to transact trust business in the District and meets the criteria of § 2(2)(d) of the Bank Holding Companies Act (12 U.S.C. § 1841(c)(2)(D)).

(b) Notwithstanding any other provision of law, the successor bank, trust company, or subsidiary shall be automatically substituted as the successor fiduciary if:

(1) A bank that is qualified to administer trusts merges into, is consolidated with, or purchases the assets of a trust company or a bank that is qualified to administer trusts;

(2) A trust company merges into, is consolidated with, or purchases the assets of another trust company or a bank that is qualified to administer trusts;

(3) A bank or bank holding company causes a subsidiary that is qualified to administer trusts to succeed to part or all of the trust business of the bank or bank holding company; or

(4) A bank or bank holding company causes a subsidiary to succeed to part or all of the trust business of another subsidiary of the bank or bank holding company.

(c) The substitution of one fiduciary for another fiduciary pursuant to this section shall be effective 60 days after closing pursuant to the acquisition or merger agreement, without any order or approval of any court or public officer. The successor fiduciary shall have all the rights and duties of the predecessor fiduciary. Unless otherwise provided in the document or instrument, the successor fiduciary shall be automatically named as fiduciary in all writings, wills, trusts, court orders, or similar documents or instruments that name the predecessor fiduciary as fiduciary, whether signed before or after the successor fiduciary is created or succeeds to the trust business of the predecessor fiduciary.

(d) For the purposes of qualification as a fiduciary or a successor fiduciary under any requirement contained in any document creating or relating to a fiduciary capacity, the successor bank, trust company, bank holding company, or subsidiary trust company is considered to have capital and surplus equal to

its capital and surplus plus the capital and surplus of its owning bank, bank holding company, and their affiliates.

(e) Not less than 30 days before the succession becomes effective under this section, the successor fiduciary shall publish notice of the succession in a newspaper of general circulation in the District and shall mail the notice to each co-fiduciary of the successor fiduciary, to each surviving settlor of a trust, to each person who alone or in conjunction with others has the power to remove the fiduciary, to each beneficiary of a trust, estate, or fund, and to the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] of the District of Columbia. In the case of a trust described in chapter 736 of the Internal Revenue Code of 1986 (26 U.S.C. § 401(a)), notice shall be mailed to the employer, employee organization, or both, responsible for the maintenance of the trust. Notice shall be sent by certified mail to the last known address of the addressee and shall contain the name of the predecessor fiduciary, the name of the successor fiduciary, and the effective date of the assumption of fiduciary responsibilities by the successor fiduciary.

(f) Within 180 days after succession under this section, a co-fiduciary, settlor of a trust, beneficiary, guardian, conservator, committee, or any other person authorized to remove a fiduciary, may apply to the Superior Court of the District of Columbia ("Court") for the appointment of a new fiduciary to replace the successor fiduciary. The Court may appoint a new fiduciary to replace the successor fiduciary if it finds, after notice to all parties in interest and a hearing, that the successor fiduciary will adversely affect the administration of the fiduciary account and that the appointment of a new fiduciary will be in the best interest of the petitioner and all interested parties. This provision shall be in addition to any other provision of law governing the removal of a fiduciary and shall be subject to the terms upon which the original fiduciary was designated as fiduciary.

(Mar. 3, 1901, ch. 854, § 723a, as added June 16, 1989, D.C. Law 8-10, § 2, 36 DCR 3364.)

Prior Codifications. — 1981 Ed., § 26-411.1.

Legislative history of Law 8-10. — Law 8-10, the "Automatic Substitution of Fiduciaries Amendment Act of 1989," was introduced in Council and assigned Bill No. 8-141, which was

referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on April 4, 1989 and April 18, 1989, respectively. Signed by the Mayor on April 27, 1989, it was assigned Act No. 8-26 and transmitted to both Houses of Congress for its review.

§ 26-1312. Stock, property, and liability to be security when fiduciary.

When any court shall appoint the said company a trustee, receiver, personal representative, special administrator, or such guardian or committee, or shall order the deposit of money or other valuable with said company, or where any individual or corporation shall appoint any of said companies a trustee, executor, assignee, or such guardian, the capital stock of said company subscribed for or taken, and all property owned by said company, together with the liability of the stockholders and officers as herein provided, shall be taken

and considered as the security required by law for the faithful performance of its duties, and shall be absolutely liable in case of any default whatever.

(Mar. 3, 1901, 31 Stat. 1305, ch. 854, § 724; June 24, 1980, D.C. Law 3-72, § 207(d), 27 DCR 2155.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-412. 1973 Ed., § 26-312.

Legislative history of Law 3-72. — For legislative history of D.C. Law 3-72, see Historical and Statutory Notes following § 26-1309.

§ 26-1313. Existing companies; certificate of intention to comply with provisions.

Any safe deposit company, trust company, surety or guaranty company, or title insurance company incorporated on or before January 1, 1902, and operating under the laws of the United States in the District of Columbia or of any of the states, and doing business in said District on or before January 1, 1902, may avail itself of the provisions of this chapter on filing in the Office of the Recorder of Deeds of the District of Columbia, or with the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking], a certificate of its intention to do so, which certificate shall specify which one of the 3 classes of business set out in § 26-1301 it will carry on, and shall be verified by the oath of its president to the effect that it has in every respect complied with the requirements of existing law, especially with the provisions of this chapter, that its capital stock is paid in as provided in § 26-1323 and is not impaired; and thereafter such company may exercise all powers and perform all duties authorized by any 1 of the clauses of § 26-1301 in addition to the powers lawfully exercised by such company on January 1, 1902.

(Mar. 3, 1901, 31 Stat. 1306, ch. 854, § 725; Nov. 23, 1985, D.C. Law 6-63, § 106(a)(9), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in §§ 26-1307, 26-1322, and 26-710.

Prior Codifications. — 1981 Ed., § 26-413. 1973 Ed., § 26-313.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-1352.

§ 26-1314. Real property held and conveyed by companies.

Any company operating under this chapter may lease, purchase, hold, and convey real property in which the offices of the company are located not to exceed in value the capital and surplus of the company, and such in addition as it may acquire in satisfaction of debts due the corporation under sales, decrees, judgments, and mortgages. But no such association shall hold the possession of any real estate under foreclosure of mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than 5 years.

(Mar. 3, 1901, 31 Stat. 1306, ch. 854, § 726; Apr. 19, 1920, 41 Stat. 566, ch. 153.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-414. 1973 Ed., § 26-314.

§ 26-1315. Duration of charter.

The charters for incorporations named in this chapter and granted before April 11, 1986, may be made perpetual, or may be limited in time by their provisions, subject to the approval of Congress.

(Mar. 3, 1901, 31 Stat. 1306, ch. 854, § 727; Nov. 23, 1985, D.C. Law 6-63, § 106(a)(10), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in § 26-710.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-1352.

Prior Codifications. — 1981 Ed., § 26-415. 1973 Ed., § 26-315.

§ 26-1316. Capital stock — Amount; payment; deposit with Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking].

The capital stock of every such company shall be at least \$1,000,000, and at least 50 percent thereof must have been paid in, in cash or by the transfer of assets as hereinafter provided in § 26-1323, before any such company shall be entitled to transact business as a corporation, except with its own members, and before any company organized hereunder shall be entitled to transact the business of a trust company, or to become and act as a personal representative, guardian of the estate of a minor, or undertake any other kindred fiduciary duty, it shall deposit, either in money or in bonds, mortgages, deeds of trust, or other securities equal in actual value to one-fourth of the capital stock paid in, with the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking], to be kept by him upon the trust and for the purposes hereinafter provided; and the said Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] may from time to time require an additional deposit from any such company, to be held upon and for the same trust and purposes, not exceeding, however, in value one-half the paid-in capital stock; and the said Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] shall not issue to any corporation the certificate heretofore provided for until said deposit with him of securities required by this section. Within 1 year after the organization of any corporation under the provisions of this chapter, or after any corporation existing prior to January 1, 1902, shall have availed itself of the powers and rights given by this chapter in the manner herein provided for, its entire capital stock shall have been paid in.

(Mar. 3, 1901, 31 Stat. 1306, ch. 854, § 728; June 24, 1980, D.C. Law 3-72, § 207(e), 27 DCR 2155; Nov. 23, 1985, D.C. Law 6-63, § 106(a)(11), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in §§ 26-1317 and 26-710.

Prior Codifications. — 1981 Ed., § 26-416. 1973 Ed., § 26-316.

Legislative history of Law 3-72. — For legislative history of D.C. Law 3-72, see Historical and Statutory Notes following § 26-1309.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-1352.

§ 26-1317. Capital stock — Calls; sale on failure to pay money subscribed.

It shall be lawful for such company to call for and demand from the stockholders, respectively, all sums of money by them subscribed, at such time and in such proportions as its board of directors shall deem proper, within the time specified in § 26-1316, and it may enforce payment by all remedies provided by law; and if any stockholder shall refuse or neglect to pay any instalment, as required by a resolution of the board of directors, after 30 days notice of the same, the said board of directors may sell at public auction to the highest bidder so many shares of said stock as shall pay said installment, under such general regulations as may be adopted in the bylaws of said company, and the highest bidder shall be taken to be the person who offers to purchase the least number of shares for the assessment due.

(Mar. 3, 1901, 31 Stat. 1306, ch. 854, § 729; June 20, 1938, 52 Stat. 780, ch. 527; Sept. 10, 1985, D.C. Law 6-34, § 2, 32 DCR 3776; Mar. 12, 1986, D.C. Law 6-91, § 2, 33 DCR 310.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-417. 1973 Ed., § 26-317.

Legislative history of Law 6-34. — Law 6-34, the “District of Columbia Trust, Loan, Mortgage, Safe Deposit and Title Corporations Act Amendment Temporary Act of 1985,” was introduced in Council and assigned Bill No. 6-241, which was retained by Council. The Bill was adopted on first and second readings on May 28, 1985, and June 11, 1985, respectively. Signed by the Mayor on June 14, 1985, it was assigned Act No. 6-49 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-91. — Law 6-91, the “District of Columbia Trust, Loan, Mortgage, Safe Deposit and Title Corporations Act of 1985,” was introduced in Council and assigned Bill No. 6-242, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on December 3, 1985, and December 17, 1985, respectively. Signed by the Mayor on December 30, 1985, it was assigned Act No. 6-119 and transmitted to both Houses of Congress for its review.

CASE NOTES

ANALYSIS

Acceptance of subscription offer.
Law governing.
Time and manner of payment.

When subscription agreement becomes binding.

Acceptance of subscription offer.

Letter which was sent by stock committee of

national bank being organized and which advised subscriber that 2500 shares of stock had been allocated to him constituted acceptance of subscriber's subscription by organizers. *Brown v. United Community Nat'l Bank*, 282 F. Supp. 781, 1968 U.S. Dist. LEXIS 12620 (D.D.C.1968).

Law governing.

In absence of applicable federal law, questions as to nature and construction of agreement to subscribe to stock in national bank are governed by law of place where bank was formed and subscription entered into. *National Banking Act*, 12 U.S.C. § 21 et seq. *Brown v. United Community Nat'l Bank*, 282 F. Supp. 781, 1968 U.S. Dist. LEXIS 12620 (D.D.C.1968).

Time and manner of payment.

Where stock subscription had been accepted by organizers of national bank prior to bank's actual existence and after bank came into being it notified subscriber that payment for his shares was due on or before certain date, buyer who mailed check which was not received by bank until day after specified date forfeited his rights under subscription agreement. *D.C. Code* §§ 26-317, 29-903, 29-908b. *Brown v.*

United Community Nat'l Bank, 282 F. Supp. 781, 1968 U.S. Dist. LEXIS 12620 (D.D.C.1968).

Evidence did not establish that officer of bank who was subscriber to stock in new bank and who had been advising organizers of new bank was agent of new bank to accept payment for stock of new bank. *Brown v. United Community Nat'l Bank*, 282 F. Supp. 781, 1968 U.S. Dist. LEXIS 12620 (D.D.C.1968).

When subscription agreement becomes binding.

A "subscription to stock" in proposed corporation constitutes a continuing offer to corporation which cannot become binding agreement until corporation comes into existence and adopts, expressly or impliedly, offer secured by its promoters or organizers. *Brown v. United Community Nat'l Bank*, 282 F. Supp. 781, 1968 U.S. Dist. LEXIS 12620 (D.D.C.1968).

Even though stock subscription agreement had been accepted by stock committee of national bank in organization, subscriber did not have binding enforceable subscription contract until bank came into being and accepted subscriber's offer. 12 U.S.C. § 24. *Brown v. United Community Nat'l Bank*, 282 F. Supp. 781, 1968 U.S. Dist. LEXIS 12620 (D.D.C.1968).

§ 26-1318. Annual reports — Publication; contents; verification.

Every such company shall annually, within 20 days after the 1st of January of each year, make a report to the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking], which shall be published in a newspaper in the District, which shall state the amount of capital and of the proportion actually paid, the amount of debts, and the gross earnings for the year ending December 31st then next previous, together with their expenses, which report shall be signed by the president and a majority of the directors or trustees, and shall be verified by the oath of the president, secretary, and at least 3 of the directors or trustees; provided, however, that trust companies which are required to file and to publish reports under the provisions of § 161 of Title 12, United States Code, as amended, shall not be required to make or publish the annual report required under this section.

(Mar. 3, 1901, 31 Stat. 1307, ch. 854, § 730; July 1, 1902, 32 Stat. 619, ch. 1352, § 6(5); Nov. 30, 1945, 59 Stat. 588, ch. 499; Nov. 23, 1985, D.C. Law 6-63, § 106(a)(12), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in §§ 26-1319 and 26-710.

Prior Codifications. — 1981 Ed., § 26-418. 1973 Ed., § 26-318.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-1352.

§ 26-1319. Annual reports — Liability of directors or trustees.

If any company fails to comply with the provisions of § 26-1318, all the directors or trustees of such company shall be jointly and severally liable for the debts of the company then existing and for all that shall be contracted before such report shall be made; provided, that in case of failure of the company in any year to comply with the provisions of § 26-1318, and any of the directors shall, on or before January 15th of such year, file his written request for such compliance with the secretary of the company, the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking], and the Recorder of Deeds of the District of Columbia, such director shall be exempt from the liability prescribed in this section.

(Mar. 3, 1901, 31 Stat. 1307, ch. 854, § 731; Nov. 23, 1985, D.C. Law 6-63, § 106(a)(13), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-419.
1973 Ed., § 26-319.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-1352.

§ 26-1320. Wilful false swearing; misappropriation.

Any wilful false swearing in regard to any certificate or report or public notice required by the provisions of this chapter shall be perjury and shall be punished as such according to the laws of the District of Columbia. Any misappropriation of any of the money of any corporation or company formed under this chapter, or of any money, funds, or property intrusted to it, shall be held to be theft, and shall be punished as such under the laws of said District.

(Mar. 3, 1901, 31 Stat. 1307, ch. 854, § 732; Dec. 1, 1982, D.C. Law 4-164, § 601(h), 29 DCR 3976.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-420.
1973 Ed., § 26-320.

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act of 1982," was introduced in Council and assigned Bill No. 4-133,

which was referred to the Committee on the Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

§ 26-1321. Stock deemed personal estate; transfer; contents of certificates.

The stock of such company shall be deemed personal estate, and shall be transferable only on the books of such company in such manner as shall be prescribed by the bylaws of the company; but no shares shall be transferable until all previous calls thereon shall have been fully paid. All certificates of the

stock of any company organized under this chapter shall show upon their face the par value of each share and the amount paid thereon.

(Mar. 3, 1901, 31 Stat. 1307, ch. 854, § 733; July 1, 1902, 32 Stat. 619, ch. 1352, § 6(5).)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-421. 1973 Ed., § 26-321.

§ 26-1322. Liability of stockholders.

All stockholders of every company incorporated under this chapter, or availing itself of its provisions under § 26-1313 shall be severally and individually liable to the creditors of such company to an amount equal to and in addition to the amount of stock held by them respectively for all debts and contracts made by such company.

(Mar. 3, 1901, 31 Stat. 1307, ch. 854, § 734.)

Section references. — This section is referred to in §§ 26-105 and 26-710.

Prior Codifications. — 1981 Ed., § 26-422. 1973 Ed., § 26-322.

CASE NOTES

ANALYSIS

Enforcement of liability.

Law governing.

Nature and extent of liability.

Enforcement of liability.

Injunction against enforcement of assessment of stockholders' double liability against District of Columbia bank and trust company held properly refused where record sufficiently showed insolvency regardless of whether insolvency was large or small. Code of Laws D.C.1901, § 715 et seq.; 12 U.S.C. § 63. Dunn v. O'Connor, 89 F.2d 820, 1937 U.S. App. LEXIS 3598 (1937).

District of Columbia statute subjecting trust companies to same control of comptroller as that exercised over national banks embraces by reference provision of National Bank Act authorizing receiver under direction of comptroller to enforce individual liability of stockholders, and hence provision of District of Columbia statute for stockholders' liability to creditors does not create independent and direct property right of creditors enforceable only by them in equity suit, but is right which accrues to comptroller and through him to his receiver, by whom alone it is enforceable in administration of trust es-

tate. Code of Laws D.C.1901, § 715 et seq.; 12 U.S.C. § 63. Dunn v. O'Connor, 89 F.2d 820, 1937 U.S. App. LEXIS 3598 (1937).

Law governing.

Liability of stockholder is determined by charter and by laws of state in which incorporation is had, but law of another place will control if parties have that law in view in making contract. Hamilton v. Offutt, 78 F.2d 735, 1935 U.S. App. LEXIS 3843 (1935).

Nature and extent of liability.

Statutory double liability of stockholders in District of Columbia trust companies is asset of creditors and not of the corporation. Code of Laws D.C.1901, § 720; 12 U.S.C. § 63. Dunn v. O'Connor, 89 F.2d 820, 1937 U.S. App. LEXIS 3598 (1937).

Statute authorizing Comptroller to take possession of bank doing business in District of Columbia for same reasons and to same extent as in case of national banks held not to impose double liability on stockholders of bank, where laws of state of bank's incorporation imposed no such liability. D.C. Code 1929, T. 5, §§ 298, 361; 12 U.S.C. § 63 and note; §§ 64, 87, 143, 191. Hamilton v. Offutt, 78 F.2d 735, 1935 U.S. App. LEXIS 3843 (1935).

§ 26-1323. Payment of stock to be in money only; exception.

Nothing but money shall be considered as payment of any part of the capital

stock, except that in the case of any company doing business on January 1, 1902, in the District of Columbia in any of the classes herein provided for, or under any act of Congress, or by virtue of the laws of any of the states, and which company had on that date actually received full payment in money of at least 50% of the capital stock required by this chapter, and which company desires to obtain a charter under this chapter, all the assets or property may be received and considered as money at a value to be appraised and fixed by the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking]; provided, that all such assets and property are also transferred to and are thereafter owned by the company organized under this chapter.

(Mar. 3, 1901, 31 Stat. 1308, ch. 854, § 735; Nov. 23, 1985, D.C. Law 6-63, § 106(a)(14), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in §§ 26-1313, 26-1316, and 26-710.

Prior Codifications. — 1981 Ed., § 26-423. 1973 Ed., § 26-323.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-1352.

§ 26-1324. Election of, and management of company by, directors or trustees.

The stock, property, and concerns of such company shall be managed by not less than 9 nor more than 30 directors or trustees, who shall, respectively, be stockholders, and citizens of the United States, and at least two-thirds of whom shall reside in the District of Columbia or within 100 miles of the location of the principal office of the company, and shall, except the first year, be annually elected by the stockholders at such time and place and after such published notice as shall be determined by the bylaws of the company, and said directors or trustees shall hold until their successors are elected and qualified.

(Mar. 3, 1901, 31 Stat. 1308, ch. 854, § 736; Aug. 28, 1957, 71 Stat. 474, Pub. L. 85-199, § 1.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-424. 1973 Ed., § 26-324.

§ 26-1325. Officers; security authorized.

There shall be a president of the company, who shall be a director, also a secretary and a treasurer, all of whom shall be chosen by the directors or trustees; provided, that only 1 of the above named offices shall be held by the same person at the same time. Subordinate officers may be appointed by the directors or trustees, and all such officers may be required to give such security for the faithful performance of the duties of their offices as the directors or trustees may require.

(Mar. 3, 1901, 31 Stat. 1308, ch. 854, § 737.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-425. 1973 Ed., § 26-325.

§ 26-1326. Power to make bylaws; purposes thereof.

The directors or trustees shall have power to make such bylaws as they deem proper for the management or disposal of the stock and business affairs of such company, not inconsistent with the provisions of this chapter, and prescribing the duties of officers and servants that may be employed, for the appointment of all officers, and for carrying on all kinds of business within the objects and purposes of such company.

(Mar. 3, 1901, 31 Stat. 1308, ch. 854, § 738.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-426. 1973 Ed., § 26-326.

§ 26-1327. Liability of directors or trustees on declaration of dividends — Conditions.

If the directors or trustees of any company shall declare or pay any dividend the payment of which would render it insolvent, or which would create a debt against such company, they shall be jointly and severally liable as guarantors for all the debts of the company then existing, and for all that shall be thereafter contracted while they shall, respectively, remain in office.

(Mar. 3, 1901, 31 Stat. 1308, ch. 854, § 739.)

Section references. — This section is referred to in §§ 26-1328 and 26-710.

Prior Codifications. — 1981 Ed., § 26-427. 1973 Ed., § 26-327.

§ 26-1328. Liability of directors or trustees on declaration of dividends — Exemption.

If any of the directors or trustees shall object to declaring such dividends or the payment of the same, and shall at any time before the time fixed for the payment thereof file a certificate of their objection in writing with the secretary of the company and with the Recorder of Deeds of the District, they shall be exempt from the liability prescribed in § 26-1327.

(Mar. 3, 1901, 31 Stat. 1308, ch. 854, § 740.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-428. 1973 Ed., § 26-328.

§ 26-1329. Directors or trustees personally liable when liabilities exceed assets.

If the liabilities of any company shall at any time exceed the amount of the fair cash value of the assets, the directors or trustees of such company assenting thereto shall be personally and individually liable for such excess to

the creditors of the company, after the additional liability of the stockholders has been enforced.

(Mar. 3, 1901, 31 Stat. 1308, ch. 854, § 741.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-429. 1973 Ed., § 26-329.

§ 26-1330. Fiduciary not liable as stockholder; liability of estate and funds.

No person holding stock in such company as personal representative, guardian, or trustee shall be personally subject to any liability as stockholder of such company, but the estate and funds in the hands of such personal representative, guardian, or trustee shall be liable in like manner and to the same extent as the testator or intestate or the ward or the person interested in such trust fund would have been if he had been living and competent to act and hold the stock in his own name.

(Mar. 3, 1901, 31 Stat. 1308, ch. 854, § 742; June 24, 1980, D.C. Law 3-72, § 207(f), 27 DCR 2155.)

Section references. — This section is referred to in § 26-710.

Legislative history of Law 3-72. — For legislative history of D.C. Law 3-72, see Historical and Statutory Notes following § 26-1309.

Prior Codifications. — 1981 Ed., § 26-430. 1973 Ed., § 26-330.

§ 26-1331. Increase or decrease of capital stock.

(a) Any corporation which may be formed under this chapter may increase its capital stock by complying with the provisions of this chapter to any amount which may be deemed sufficient and proper for the purposes of the corporation.

(b) Any company transacting the business of a trust company heretofore or hereafter organized or operating under the provisions of this chapter may by the vote of shareholders owning two-thirds of its capital stock reduce its capital to any sum not below the amount required by this chapter; but no such reduction shall be made until the amount of the proposed reduction has been reported to the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] and such reduction has been approved by said Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking], and no shareholder shall be entitled to any distribution of cash or other assets by reason of any reduction of the common capital of any such corporation unless such distribution shall have been approved by the Superintendent of Banking and Financial Institutions [Commissioner of the Department of Insurance, Securities, and Banking] and by the affirmative vote of at least two-thirds of the shares of stock outstanding.

(Mar. 3, 1901, 31 Stat. 1309, ch. 854, § 743; June 20, 1938, 52 Stat. 780, ch. 527; Nov. 23, 1985, D.C. Law 6-63, § 106(a)(15), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-431. 1973 Ed., § 26-331.

Legislative history of Law 6-107. — For legislative history of D.C. Law 6-107, see Historical and Statutory Notes following § 26-1352.

§ 26-1332. Copy of certificate as evidence.

A copy of any certificate of incorporation filed in pursuance of this chapter, certified by the Recorder of Deeds to be a true copy and the whole of such certificate, shall be received in all courts and places as presumptive legal evidence of the facts therein stated.

(Mar. 3, 1901, 31 Stat. 1309, ch. 854, § 744.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-432. 1973 Ed., § 26-332.

§ 26-1333. Security required for performance of fiduciary duties; liability thereon.

No bond or other collateral security, except as hereinafter stated, shall be required from any trust company incorporated under this chapter for and in respect to any trust, nor when appointed trustee, guardian, receiver, personal representative, special administrator, committee of the estate of a person with a mental illness or mental retardation, or other fiduciary appointment; but the capital stock subscribed for or taken, and all property owned by said company and the amount for which said stockholders shall be liable in excess of their stock, shall be taken and considered as the security required by law for the faithful performance of its duties, and shall be absolutely liable in case of any default whatever; and in case of the insolvency or dissolution of said company, the debts due from the said company as trustee, guardian, receiver, personal representative, special administrator, or committee of the estate of a person with mental illness or mental retardation or any other fiduciary appointment shall have a preference.

(Mar. 3, 1901, 31 Stat. 1309, ch. 854, § 745; June 24, 1980, D.C. Law 3-72, § 207(g), 27 DCR 2155; Apr. 24, 2007, D.C. Law 16-305, § 39(b), 53 DCR 6198.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-433. 1973 Ed., § 26-333.

Effect of amendments. — D.C. Law 16-305 substituted “person with mental illness or mental retardation” for “lunatic or idiot” and “lunatics, idiots”.

Legislative history of Law 3-72. — For legislative history of D.C. Law 3-72, see Historical and Statutory Notes following § 26-1309.

Legislative history of Law 16-305. — For Law 16-305, see notes following § 26-1309.

§ 26-1334. Powers of probate court.

The court having probate jurisdiction, or any judge thereof, shall have power to make orders respecting such company whenever it shall have been appointed trustee, guardian, receiver, personal representative, special adminis-

trator, committee of the estate of a person with mental illness or mental retardation or any other fiduciary, and require the said company to render all accounts which might lawfully be made or required by any court or any judge thereof if such trustee, guardian, receiver, personal representative, special administrator, committee of the estate of a person with mental illness or mental retardation or fiduciary were a natural person. And said court, or any judge thereof, at any time, on application of any person interested, may appoint some suitable person to examine into the affairs and standing of such companies, who shall make a full report thereof to the court, and said court, or any judge thereof, may at any time, in its discretion, require of said company a bond with sureties or other security for the faithful performance of its obligations, and such sureties or other security shall be liable to the same extent and in the same manner as if given or pledged by a natural person.

(Mar. 3, 1901, 31 Stat. 1309, ch. 854, § 746; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 991, ch. 646, § 32(a), (b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; July 29, 1970, 84 Stat. 576, Pub. L. 91-358, title I, § 158(c)(4); June 24, 1980, D.C. Law 3-72, § 207(h), 27 DCR 2155; Apr. 24, 2007, D.C. Law 16-305, § 39(c), 53 DCR 6198.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-434. 1973 Ed., § 26-334.

Effect of amendments. — D.C. Law 16-305 substituted “person with mental illness or mental retardation” for “lunatic, idiot,” and “lunatic or idiot.”.

Legislative history of Law 3-72. — For legislative history of D.C. Law 3-72, see Historical and Statutory Notes following § 26-1309.

Legislative history of Law 16-305. — For Law 16-305, see notes following § 26-1309.

§ 26-1335. Compliance required of foreign corporations or companies.

No corporation or company organized by virtue of the laws of any of the states of this Union shall carry on in the District of Columbia any of the kinds of business named in this chapter without strict compliance in all particulars with the provisions of this chapter for the government of such corporations formed under it, and each one of the officers of the corporation or company so offending shall be punished by a fine not exceeding \$1,000 or imprisonment not exceeding 1 year, or by both fine and imprisonment, in the discretion of the court.

(Mar. 3, 1901, 31 Stat. 1309, ch. 854, § 747; Mar. 4, 1933, 47 Stat. 1567, ch. 274, § 5.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-435. 1973 Ed., § 26-335.

§ 26-1336. Right of Congress to amend or repeal chapter; remedies preserved.

Congress may at any time alter, amend, or repeal this chapter, but any such

amendment or repeal shall not, nor shall the dissolution of any company formed under this chapter, take away or impair any remedy given against such corporation, its stockholders, or officers for any liability or penalty which shall have been previously incurred.

(Mar. 3, 1901, 31 Stat. 1309, ch. 854, § 748.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-436. 1973 Ed., § 26-336.

Subchapter II. Existing Trust Companies; Perpetual Succession of Trust Companies.

§ 26-1351. Existing title insurance companies may become perpetual.

Any company formed prior to January 1, 1902, agreeably to law, for the purpose of insuring titles to real estate may become perpetual by filing, in the Office of the Recorder of Deeds, a certificate to that effect, in like manner as is provided by law for the filing of the original certificate of incorporation.

(Mar. 3, 1901, 31 Stat. 1289, ch. 854, § 641.)

Section references. — This section is referred to in §§ 26-710, 29-1101, 29-201.09, 29-201.11, 29-201.15, 29-201.23, 29-201.29, 29-201.33, 29-201.34, 29-201.36, and 29-201.37 to 29-201.39.

Prior Codifications. — 1981 Ed., § 26-402. 1973 Ed., § 26-302.

§ 26-1352. Trust companies to have perpetual succession.

Any company transacting the business of a trust company and heretofore or hereafter organized or operating under the provisions of this chapter, but before April 11, 1986, shall have perpetual succession from the date of its organization, or until such time as it be dissolved, or until its franchise shall become forfeited by reason of violation of law, or until terminated by either a general or special act of Congress, or until its affairs be placed in the hands of a receiver and finally wound up by him.

(Mar. 3, 1901, 31 Stat. 1289, ch. 854, § 641; June 24, 1936, 49 Stat. 1898, ch. 743; Nov. 23, 1986, D.C. Law 6-63, § 106(a)(1), as added Apr. 11, 1986, D.C. Law 6-107, § 2(k), 33 DCR 1168.)

Section references. — This section is referred to in § 26-710.

Prior Codifications. — 1981 Ed., § 26-403. 1973 Ed., § 26-303.

Legislative history of Law 6-107. — Law 6-107, the "District of Columbia Regional Interstate Banking Act of 1985 Amendments Act of 1985," was introduced in Council and assigned

Bill No. 6-276, which was referred to the Committee on Housing and Economic Development. The Bill was adopted on first and second readings on January 14, 1986 and January 28, 1986, respectively. Signed by the Mayor on February 14, 1986, it was assigned Act No. 6-136 and transmitted to both Houses of Congress for its review.

CHAPTER 14. UNIVERSAL BANK CERTIFICATION.

Subchapter I. General Provisions

Sec.

- 26-1401.01. Short title.
- 26-1401.02. Definitions.

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- 26-1401.07. Preexisting powers of universal banks.
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- 26-1401.12. Limitations on loan power of universal banks.
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- 26-1401.15. Limits on insurance and securities powers of universal banks.

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- 26-1401.16. Liquidation of universal banks in general.
- 26-1401.17. Commissioner taking possession of universal banks.
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- 26-1401.25. Deposits received while universal bank in conservatorship.
- 26-1401.26. Authority of conservator to borrow money; purpose.
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- 26-1401.29. Acquisitions, mergers and asset purchases.
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Subchapter I. General Provisions.

§ 26-1401.01. Short title.

This chapter may be cited as the “Universal Bank Certification Act of 2000”.
(June 9, 2001, D.C. Law 13-308, § 201, 48 DCR 3244.)

Legislative history of Law 13-308. — Law 13-308, the “21st Century Financial Modernization Act of 2000”, was introduced in Council and assigned Bill No. 13-867, which was referred to the Committee on Economic Development. The Bill was adopted on first and second

readings on November 8, 2000, and December 5, 2000, respectively. Signed by the Mayor on January 26, 2001, it was assigned Act No. 13-597 and transmitted to both Houses of Congress for its review. D.C. Law 13-308 became effective on June 9, 2001.

§ 26-1401.02. Definitions.

For the purposes of this chapter, the term:

- (1) "Affiliate" shall have the same meaning as set forth in § 26-551.02(1).
- (2) "Appropriate federal financial institutions agency" shall have the same meaning as set forth in § 26-551.02(2).
- (3) "Bank holding company" shall have the same meaning as set forth in section 2(a) of the Bank Holding Company Act of 1956, approved May 9, 1956 (70 Stat. 133; 12 U.S.C. § 1841(a)).
- (4) "Capital" shall have the same meaning as set forth in § 26-551.02(6).
- (5) "Capital accounts" means unimpaired capital stock, unimpaired surplus, and undivided profits or retained earnings of a financial institution.
- (6) "Capital stock" means the aggregate of shares of nonwithdrawable capital stock issued.
- (7) "Commissioner" shall have the same meaning as set forth in § 26-551.02(7).
- (8) "Community Reinvestment Act" means the Community Reinvestment Act of 1977, approved October 12, 1977 (91 Stat. 1147; 12 U.S.C. § 2901 et. seq.).
- (9) "Department" shall have the same meaning as set forth in § 26-551.02(9).
- (10) "Director" shall have the same meaning as set forth in § 26-551.02(10).
- (11) "District" means the District of Columbia.
- (12) "District of Columbia Banking Code" shall have the same meaning as set forth in § 26-551.01(14).
- (13) "District savings institution" shall have the same meaning as set forth in § 26-551.02(15).
- (14) "Equity securities" means a security representing an ownership interest in a corporation or independent agency head.
- (15) "Federal agency" shall have the same meaning as set forth in § 26-551.02(17).
- (16) "Federal financial institutions agency" means a federal government agency with regulatory authority over a financial institution.
- (17) "Federally chartered savings institutions" means a financial institution chartered by the Office of Thrift Supervision, or a successor agency to the Office of Thrift Supervision.
- (18) "Financial institution" shall have the same meaning as set forth in § 26-551.02(18).
- (19) "Investment securities" means commercial paper, banker's acceptances, marketable securities in the form of bonds, notes, and debentures, and similar instruments that are regarded as investment securities.
- (20) "Loan" includes a line of credit or other extension of credit.
- (21) "Low-income" means an individual income that is less than 60% of the median individual income for the Washington, D.C. metropolitan area according to the statistics of the United States Department of Housing and Urban Development or a median family income that is less than 60% of the

median family income for the Washington, D.C. metropolitan area according to the statistics of the United States Department of Housing and Urban Development.

(22) "Moderate-income" means an individual income that is at least 60%, and less than 80%, of the median individual income for the Washington, D.C. metropolitan area according to the statistics of the United States Department of Housing and Urban Development, or a median family income that is at least 60%, and less than 80%, of the median family income for the Washington, D.C. metropolitan area according to the statistics of the United States Department of Housing and Urban Development.

(23) "National bank" means a financial institution chartered and supervised by the Office of the Comptroller of the Currency, or a successor agency to the Office of the Comptroller of the Currency.

(24) "Person" shall have the same meaning as set forth in § 26-551.02(21).

(25) "Savings institution" shall have the same meaning as set forth in § 26-551.02(23).

(26) "State bank" means a bank chartered and supervised by a financial institutions agency of a state of the United States.

(27) "State financial institutions agency" means a government agency of a state of the United States authorized to charter and supervise financial institutions.

(28) "Subsidiary" shall have the same meaning as set forth in § 26-551.02(24).

(29) "Superior Court" means the Superior Court of the District of Columbia.

(30) "Universal bank" means a financial institution which is authorized by its articles of incorporation or other organizational documents to act as a financial institution and is certified under this chapter as a universal bank.

(June 9, 2001, D.C. Law 13-308, § 202, 48 DCR 3244; June 11, 2004, D.C. Law 15-166, § 2(e), 51 DCR 2817.)

Effect of amendments. — D.C. Law 15-166 rewrote pars. (7) and (9).

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(e) of Consolidation of Financial Services Emergency Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 26-131.02.

Subchapter II. Application and Certification as a Universal Bank.

§ 26-1401.03. Application to be certified as a universal bank; review and approval or disapproval of application.

(a) A financial institution may apply to be certified as a universal bank by

filing a written application with the Commissioner. The application shall include such information as the Commissioner may require by regulation. The application shall be on such forms, and shall be prepared and filed in accordance with such procedures, as the Commissioner may prescribe by regulation.

(b) An application submitted by a financial institution under subsection (a) of this section shall be approved or disapproved in writing by the Commissioner within 90 days after its submission to the Commissioner. The Commissioner and the financial institution may agree to extend the application period for an additional 60 days.

(c) The Commissioner shall not certify a financial institution as a universal bank unless:

(1) The financial institution is authorized under its articles of incorporation or other organizational documents to act as financial institution;

(2) The financial institution is chartered or organized, regulated, supervised, and examined under the District of Columbia Banking Code and is under the authority and supervision of the Commissioner;

(3) The financial institution is in good standing with the Department and there is no investigatory or enforcement action pending against the financial institution by the Department;

(4) The financial institution is in good standing with appropriate federal and state financial institutions agencies and there is no investigatory or enforcement action pending against the financial institution by an appropriate federal or state financial institutions agency;

(5) The financial institution is well capitalized and has maintained a capital level prior to certification as a universal bank as the Commissioner may require based on safety and soundness consideration;

(6) The financial institution does not exhibit a combination of financial, managerial, operational, and compliance weaknesses that are moderately severe or unsatisfactory, as determined by the Commissioner, based upon the Commissioner's assessment of the financial institution's capital adequacy, adequacy of liquidity, and sensitivity to market risk;

(7) The most recent evaluation prepared under the Community Reinvestment Act, if any, demonstrates that the financial institution has received a rating of "outstanding" or "satisfactory" in meeting the credit needs of its entire community, including low-income and moderate-income neighborhoods, consistent with the safe and sound operation of the financial institution;

(8) The most recent examination which the financial institution has received from its appropriate federal financial institutions agency, if any, indicates that the financial institution is in compliance with applicable federal law and regulations;

(9) The financial institution agrees to comply with applicable regulations and rules promulgated by the Commissioner and any lawful order of the Commissioner;

(10) The financial institution agrees to comply with any conditions imposed by the Commissioner in connection with the approval of an application, including additional requirements that the Commissioner determines are

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necessary for the protection of depositors or shareholders of the financial institution or of the general public.

(11) The financial institution agrees to comply with any written agreement entered into with the Commissioner in connection with the approval of an application;

(12) The Commissioner determines that it is reasonable to believe that the financial institution will act in a safe and sound manner and maintain a safe and sound condition; and

(13) The Commissioner determines that certification of the financial institution as a universal bank will serve the public interest.

(June 9, 2001, D.C. Law 13-308, § 203, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.04. Issuance of certificate of authority.

If the Commissioner approves the application of a financial institution to become certified as a universal bank, the Commissioner shall issue to the financial institution a certificate of authority stating that the financial institution is certified as a universal bank under this chapter.

(June 9, 2001, D.C. Law 13-308, § 204, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.05. Revocation or subsequent limitation of certificate of authority.

If a universal bank fails to maintain the standards and requirements of § 26-1401.03(c), the Commissioner shall, by order, revoke or limit the exercise of the powers of the universal bank.

(June 9, 2001, D.C. Law 13-308, § 205, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.06. Voluntary termination of certification.

A financial institution that is certified as a universal bank under this chapter may elect to terminate its certification by giving 60 days prior written notice of the termination to the Commissioner. A termination under this section shall be effective only with the written approval of the Commissioner. A financial institution shall, as a condition to a termination under this section, terminate its exercise of all powers granted under this chapter before the termination of the certification. The Commissioner's written approval of a financial institu-

tion's termination under this section shall be void if the financial institution fails to satisfy the condition to termination under this section.

(June 9, 2001, D.C. Law 13-308, § 206, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

Subchapter III. Powers and Authority of Universal Banks.

§ 26-1401.07. Preexisting powers of universal banks.

A universal bank may exercise any power that it was authorized to exercise under the District of Columbia Banking Code before its certification as a universal bank.

(June 9, 2001, D.C. Law 13-308, § 207, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.08. Parity of powers of universal bank.

(a) The Commissioner may authorize a universal bank to exercise a power that may be exercised by any other state bank, state or federally chartered savings bank, state or federally chartered savings and loan association, or federally chartered national bank.

(b)(1) A universal bank shall file with the Commissioner a written request to exercise a power under subsection (a) of this section. Within 60 days after receiving a request under this subsection, the Commissioner shall approve the request if the Commissioner determines that:

(A) The power requested by the universal bank may be exercised by a state bank, state or federally chartered savings bank, a state or federally chartered savings and loan association, or a federally chartered national bank; and

(B) The universal bank will exercise the power requested in a safe and sound manner.

(2) The Department and the universal bank may agree to extend the 60-day period under paragraph (1) of this subsection for an additional 60 days.

(c) A universal bank shall exercise a power authorized under this section only through a subsidiary of the universal bank, with the appropriate safeguards to limit the risk exposure of the universal bank and to protect the banking customers of the universal bank.

(June 9, 2001, D.C. Law 13-308, § 208, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.09. Specific powers of universal banks.

(a) Subject to applicable laws, regulations, and any required approval of the Commissioner or other regulators, a universal bank may:

(1) Establish eligibility requirements and the types and terms of deposits that the universal bank may solicit and accept;

(2) Make, sell, purchase, arrange, participate in, invest in, or otherwise deal in a loan or extension of credit for any purpose and invest in debt instruments or debt securities ("make a loan"), subject to § 26-1401.12;

(3) Acquire an equity interest or other form of interest as security in a project funded through a loan made under paragraph (2) of this section, subject to § 26-1401.12;

(4) Acquire an equity interest in a profit-participation project, including a project funded through a loan from the universal bank, subject to § 26-1401.13;

(5) Purchase, sell, underwrite, and hold investment securities, consistent with safe and sound banking practices, subject to § 26-1401.13;

(6) Purchase, sell, underwrite, and hold equity securities, consistent with safe and sound banking practices, subject to § 26-1401.13;

(7) Invest in housing projects, as defined in § 26-1401.13, with the prior written approval of the Commissioner, subject to § 26-1401.13;

(8) Purchase, sell, and invest in such other investments as the Commissioner, by regulation, may provide, consist with safe and sound practices, subject to § 26-1401.13;

(9) Buy and sell securities as an agent or broker, subject to § 26-1401.15;

(10) Buy and sell real estate and interests in real estate as an agent or broker;

(11) Manage real estate and other property;

(12) Sell annuities, subject to § 26-1401.15;

(13) Sell life insurance, accident insurance, health insurance, property insurance, casualty insurance, and any other form of insurance, subject to § 26-1401.15;

(14) Act as a broker-dealer, securities agent, investment adviser, investment adviser representative, insurance agent, or insurance broker, if otherwise qualified, upon obtaining a license from the Department of Insurance and Securities Regulation [Department of Insurance, Securities, and Banking], subject to § 26-1401.15;

(15) Buy and sell commodities as a principal, agent, or broker, with the prior written approval of the Commissioner, subject to § 26-1401.15;

(16) Underwrite and distribute annuities, subject to § 26-1401.15, with the prior written approval of the Commissioner and the appropriate federal financial institutions agency of the universal bank; provided, that the underwriting and distribution shall be conducted only through a non-depository financial institution affiliate of the universal bank unless federal law permits the underwriting and distribution to be conducted through a subsidiary of the financial institution;

(17) Underwrite and distribute life insurance, accident insurance, health insurance, property insurance, casualty insurance, and any other form of

insurance, with the prior written approval of the Commissioner, subject to § 26-1401.15; provided, that the underwriting and distribution shall be conducted only through a non-depository financial institution affiliate of the universal bank unless federal law permits the underwriting and distribution to be conducted through a subsidiary of the financial institution;

(18) Underwrite, deal in, or make a market in securities, with the prior written approval of the Commissioner, subject to § 26-1401.15; provided, that the underwriting, dealing, market-making shall be conducted only through a subsidiary of the universal bank; and

(19) Distribute shares in investment companies, with the prior written approval of the Commissioner, subject to § 26-1401.15; provided, that the distribution shall only be conducted through a subsidiary of the universal bank.

(b) With the approval of the Commissioner, a universal bank may securitize its assets for sale to the public. The Commissioner may establish procedures governing the exercise of authority granted under this subsection.

(June 9, 2001, D.C. Law 13-308, § 209, 48 DCR 3244; June 11, 2004, D.C. Law 15-166, § 2(f), 51 DCR 2817; Apr. 13, 2005, D.C. Law 15-354, § 35(d), 52 DCR 2638.)

Effect of amendments. — D.C. Law 15-166, in the introductory language of subsec. (a), deleted “of the Department of Insurance and Securities Regulation” following “Commissioner”.

D.C. Law 15-354, in subsec. (a)(18), validated a previously made technical correction.

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(f) of

Consolidation of Financial Services Emergency Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 26-131.02.

Legislative history of Law 15-354. — For Law 15-354, see notes following § 26-551.05.

§ 26-1401.10. Necessary or convenient powers.

Unless otherwise prohibited by law or regulation, a universal bank may exercise all powers necessary or convenient to effect the purposes for which the universal bank is organized or to further a business, activity, or operation in which the universal bank is lawfully engaged. The Commissioner may, by rule or order, establish that certain powers shall not be considered necessary or convenient to effect the purposes for which a universal bank is organized or to further a business, activity, or operation in which a universal bank is lawfully engaged.

(June 9, 2001, D.C. Law 13-308, § 210, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.11. Reasonably related and incidental activities.

(a) Subject to any applicable District or federal licensing or regulatory requirements, a universal bank may engage, directly or through a subsidiary,

in activities that are reasonably related or incident to the lawful and authorized purposes, activities, operations, or business of the universal bank.

(b) The following activities shall be considered reasonably related or incident to the lawful and authorized purposes, activities, operations, or business of a universal bank:

(1) An activity that a statute or regulation authorizes a universal bank to engage in;

(2) An activity permitted under the Bank Holding Company Act;

(3) Business services;

(4) Data processing;

(5) E-commerce services, including web hosting, Internet service provider services, and e-commerce logistics and support;

(6) Courier and messenger services;

(7) Credit related activities;

(8) Consumer services;

(9) Real estate-related services, including real estate brokerage services;

(10) Insurance and related services (other than insurance underwriting);

(11) Securities brokerage;

(12) Investment advice;

(13) Securities and bond underwriting;

(14) Mutual fund activities;

(15) Management consulting;

(16) Tax planning and preparation;

(17) Community development and charitable activities; and

(18) Debt cancellation contracts.

(c) The Commissioner may, by rule, prescribe additional activities that shall be considered reasonably related or incident to the purposes, activities, operations, or business of a universal bank.

(d)(1) If the activity is not described in subsection (a) or (b) of this section, a universal bank shall provide written notice to the Commissioner of the universal bank's intent to engage in an activity under this section at least 60 days before the universal bank intends to engage in the activity.

(2) The Commissioner may deny or revoke the authority of a universal bank to engage in an activity for which notice was provided under paragraph (1) of this subsection if the Commissioner determines that:

(A) The activity is not an activity reasonably related or incident to the purposes, activities, operations, or business of a universal bank;

(B) The universal bank is not well-capitalized;

(C) The universal bank is the subject of an enforcement action; or

(D) The universal bank does not have satisfactory management expertise to engage in the activity for which notice was provided.

(e) The Commissioner shall take the following factors into account when determining whether an activity is reasonably related or incidental to the purposes, activities, operations, or business of a universal bank:

(1) Domestic and international competition for banking and other financial services;

(2) The convergence of financial institutions and financial products;

(3) Changes, or reasonably expected changes, in the marketplace in which financial institutions compete;

(4) Changes, or reasonably expected changes, in the technology for delivering banking or related financial services;

(5) Whether such activity is necessary or appropriate to allow universal banks to:

(A) Compete effectively with a company seeking to provide banking or related financial services in the United States;

(B) Use an available or emerging technology in providing financial services, including an application necessary to protect the security or efficacy of systems for the transmission of data related to financial transactions; and

(C) Offer customers an available or emerging technology for using banking or related financial services; and

(6) Whether the activity may pose risks to the continued safety and soundness of a universal bank.

(f) The Commissioner may impose conditions upon a universal bank's engagement in an activity that is reasonably related or incidental to the purposes, activities, operations, or business of a universal bank.

(June 9, 2001, D.C. Law 13-308, § 211, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

Subchapter IV. Limitations, and Exceptions to Limitations, on Powers of Universal Banks.

§ 26-1401.12. Limitations on loan power of universal banks.

(a) A universal bank shall not make loans under § 26-1401.09(a)(2) through the universal bank, or a subsidiary of the universal bank, in an aggregate amount that exceeds 20% of the universal bank's capital; provided, that:

(1) For the purposes of computing this limitation, loans made to a municipal corporation shall not be included; and

(2) A universal bank may make loans under § 26-1401.09(a)(2) through the universal bank, or a subsidiary of the universal bank, in an aggregate amount not to exceed 50% of the universal bank's capital if the loans made under § 26-1401.09(a)(2) are limited to a liability in the form of a note or bond that:

(A) Is secured by not less than an equal amount of bonds or notes of the United States issued since April 24, 1917 or in certificates of indebtedness of the United States;

(B) Is secured or covered by guarantees, commitments, or agreements to take over or purchase the note or bond, and the guarantee, commitment, or agreement is made by a Federal Reserve Bank, the Small Business Administration, the Department of Defense, or the Federal Maritime Commission; or

(C) Is secured by mortgages or deeds of trust insured by the Federal Housing Administration.

(b) A loan made under § 26-1401.09(a)(2) shall require the prior approval of the board of directors or other governing board of the universal bank or its subsidiary.

(c) An equity interest or other form of interest taken as security in a project funded through a loan made under § 26-1401.09(a)(3) shall require the prior approval of the board of directors or other governing board of the universal bank or its subsidiary.

(d) The Commissioner may suspend a universal bank's authority under § 26-1401.09(a)(2) or (3) if the Commissioner determines that the universal bank is not exercising, or will not exercise, authority under § 26-1401.09(a)(2) or (3) in a safe and sound manner or that the condition of the universal bank is not, or will not be, safe and sound. In making a determination to suspend a universal bank's authority under this subsection, the Commissioner shall consider the universal bank's capital adequacy, asset quality, earnings quantity, earnings quality, adequacy of liquidity, and sensitivity to market risk; the ability of the management of the universal bank; and any other factor the Commissioner determines is appropriate. If the Commissioner suspends the authority of a universal bank under this subsection, the Commissioner may specify how the universal bank or its subsidiary shall treat an outstanding loan.

(e) A universal bank shall not purchase foreign bonds unless the Commissioner promulgates a rule authorizing the purchase of foreign bonds by universal banks; provided, that a universal bank may purchase a general obligation bond issued by a foreign national government if the bond is payable in United States funds. The Commissioner shall not promulgate a rule under this subsection authorizing a universal bank to invest in foreign bonds issued by a single issuer in an aggregate amount that exceeds 10% of the universal bank's capital.

(f) A universal bank shall not consider any health information obtained from the records of an affiliate of the universal bank that is engaged in the business of insurance in the universal bank's determination of whether to make a loan under § 26-1401.09(a)(2) or in the determination of whether to make any other loan, unless the person to whom the health information relates consents to the consideration of the health information in the universal bank's determination of whether to make the loan.

(g) A universal bank shall not loan any part of its capital, surplus, or deposits on its own capital stock, notes, or debentures as collateral security; provided, that a universal bank may make a loan secured by its own capital stock, notes, or debentures to the same extent that the universal bank may make a loan secured by the capital stock, notes, and debentures of a holding company for the universal bank.

(h) The restrictions and limits in subsections (a), (e), and (f) of this section shall not apply to a liability:

(1) That is secured by not less than an equal dollar amount of direct obligations of the United States which will mature not more than 18 months after the date on which the liability is incurred;

(2) That is a direct obligation of the United States, the District, or a

federal or District agency and that is fully and unconditionally guaranteed by the United States or the District;

(3) In the form of a note, debenture, or certificate of interest of the Commodity Credit Corporation; or

(4) Created by the discounting of bills of exchange drawn in good faith against actually existing values or the discounting of commercial or business paper actually owned by the person negotiating the commercial or business paper.

(June 9, 2001, D.C. Law 13-308, § 212, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.13. Limitations on investment powers of universal bank.

(a)(1) A universal bank shall not acquire an equity interest in a profit-participation project under § 26-1401.09(a)(4) in an aggregate amount that exceeds 20% of the universal bank's capital; provided, that an investment described in § 26-1401.14 shall not be included computation of this limitation. The Commissioner may suspend a universal bank's authority under § 26-1401.09(a)(4) if the Commissioner determines that the universal bank is not exercising this authority under § 26-1401.09(a)(4), will not exercise the authority in a safe and sound manner, or that the condition of the universal bank is not, or will not be, safe and sound. In making a determination to suspend a universal bank's authority under this subsection, the Commissioner shall consider the universal bank's capital adequacy, asset quality, earnings quantity, earnings quality, adequacy of liquidity, and sensitivity to market risk; the ability of the universal bank's management; and any other factor the Commissioner determines is appropriate. If the Commissioner suspends the authority of a universal bank under this subsection, the Commissioner may specify how the universal bank or its subsidiary shall treat an outstanding investment.

(2) The authority granted to a universal bank under § 26-1401.09(a)(4) shall not authorize a universal bank, or a subsidiary of the universal bank, to underwrite insurance.

(b) A universal bank may purchase, sell, underwrite, and hold investment securities, consistent with safe and sound banking practices, under § 26-1401.09(a)(5) in an amount not to exceed 100% of the universal bank's capital; provided, that:

(1) A universal bank shall not invest an aggregate amount that exceeds 20% of the universal bank's capital in the investment securities of any one obligor or issuer; provided further, that an investment described in § 26-1401.14 shall not be included in the computation of this 20% limitation; and

(2) The underwriting activities of the universal bank shall be conducted through a subsidiary of the universal bank, with the appropriate safeguards to limit the risk exposure of the universal bank and to protect the banking customers of the universal bank;

(c)(1) A universal bank shall not purchase, sell, underwrite, or hold equity securities under § 26-1401.09(a)(6) in an aggregate amount that exceeds 20% of the universal bank's capital; provided, that:

(A) The Commissioner may authorize a universal bank, by written order, to purchase, sell, underwrite, or hold equity securities under § 26-1401.09(a)(6) in an aggregate amount that exceeds 20% of the universal bank's capital if such greater amount is consistent with safe and sound practices and the safe and sound operation and condition of the universal bank; and

(B) An investment described in § 26-1401.14 shall not be included in the computation of the 20% limitation.

(2) The underwriting activities of universal bank under § 26-1401.09(a)(6) shall be conducted through a subsidiary of the universal bank, with the appropriate safeguards to limit the risk exposure of the universal bank and to protect the banking customers of the universal bank.

(d) A universal bank may purchase, sell, underwrite, and hold investment securities or equity securities in other financial institutions under § 26-1401.09(a)(5) or (6); provided, that a universal bank shall not purchase and hold stock in a bank chartered under the District of Columbia Banking Code, a national bank, or in a holding company wholly owning a District-chartered or national bank without the authorization of the Commissioner; provided further, that the Commissioner shall not authorize a universal bank to purchase and hold stock under this subsection in an amount that exceeds 10% of the universal bank's capital.

(e)(1) A universal bank may invest in housing projects under § 26-1401.09(a)(7); provided, that: (1) the aggregate investment in any one housing project shall not exceed 15% of the universal bank's capital and the aggregate investment in all housing projects shall not exceed 50% of the universal bank's capital; and (2) a universal bank shall not invest in a housing project under § 26-1401.09(a)(7) unless the universal bank is in compliance with the capital requirements established by the Commissioner and with the capital maintenance requirements of the universal bank's deposit insurance corporation. An investment described in § 26-1401.14 shall not be included in the computation of the 15% and 50% limitations.

(2) For the purposes of this subsection and of § 26-1401.09(a)(7), the term "housing project" shall mean the development or redevelopment of home sites or housing for sale or rental, including projects for the reconstruction, rehabilitation, or rebuilding of residential properties to meet the minimum standards of health and occupancy, the provision of accommodations for retail stores and other community services that are reasonably related, or incident, to the housing project, and the stock of a corporation that owns a housing project and that is wholly owned by one or more financial institutions.

(f) Except as provided in subsections (b)(1) and (b)(2) of this section, a universal bank may make an investment under § 26-1401.09(a)(3) through (8), directly or through a subsidiary, unless the Commissioner determines that such investment shall be made through a subsidiary or with appropriate safeguards to limit the risk exposure of the universal bank.

(g)(1) A universal bank shall not purchase or hold more than 10% of its own capital stock, notes, or debentures; provided that:

(A) A universal bank may purchase or hold more than 10% of its own capital stock, notes, or debentures, if approved by the Commissioner consistent with safe and sound practices; and

(B) A universal bank may purchase or hold more than 10% of its own capital stock, notes, or debentures if the purchase is necessary to prevent loss upon a debt previously contracted in good faith; provided further, that:

(i) The universal bank shall sell or cancel the stock, notes, or debentures held or purchased under this subparagraph within 12 months of acquisition; and

(ii) Stocks, notes, or debentures held or purchased under this subparagraph shall not be held by the universal bank for more than 6 months if the stock, notes, or debentures can be sold for the amount of the claim of the universal bank against the holder of the debt previously contracted.

(2) Cancellation of stock, notes, or debentures under paragraph (1)(B) of this subsection shall reduce the amount of the universal bank's capital stock, notes, or debentures. If the reduction reduces the universal bank's capital below the minimum level required by the Commissioner, the universal bank shall increase its capital to the amount required by the Commissioner.

(June 9, 2001, D.C. Law 13-308, § 213, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.14. Exceptions to limitations on investment powers of universal banks.

The percentage limitations in § 26-1401.13 shall not apply to, and a universal bank may invest without limitation in, any of the following:

(1) Stocks or obligations of a corporation organized for business development by the District, the United States, or a District or federal agency;

(2) Obligations of an urban renewal investment corporation organized under the laws of the District or of the United States;

(3) An equity interest in an insurance company or an insurance holding company organized to provide insurance for universal banks and for persons affiliated with universal banks to the extent that ownership of the equity interest is a prerequisite to obtaining directors' and officers' insurance or blanket bond insurance for the universal bank through the insurance company;

(4) Shares of stock, whether purchased or otherwise acquired, in a corporation acquiring, placing, and operating remote service units or bank communications terminals;

(5) Equity, debt securities, or debt instruments of a service corporation subsidiary of the universal bank;

(6) Advances of federal funds;

(7) Financial futures transactions, financial options transactions, forward commitments, or other financial products for the purpose of reducing, hedging, or otherwise managing the universal bank's interest rate risk exposure;

provided, that the prior written approval of the Commissioner shall be required to make the investments described in this paragraph;

(8) A subsidiary of the universal bank organized to exercise corporate fiduciary powers under this chapter;

(9) An agricultural credit corporation; provided, that the universal bank shall not own more than 80% of the stock of an agricultural credit corporation and shall not invest more than 20% of the universal bank's capital in agricultural credit corporations;

(10) Deposit accounts or insured obligations of a financial institution, the accounts of which are insured by a deposit insurance corporation;

(11) Obligations of, or obligations that are fully guaranteed by, the United States;

(12) Stocks or obligations of any Federal Reserve Bank, Federal Home Loan Bank, the Student Loan Marketing Association, the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or the Federal Deposit Insurance Corporation; or

(13) Any other investment authorized by the Commissioner.

(June 9, 2001, D.C. Law 13-308, § 214, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.15. Limits on insurance and securities powers of universal banks.

(a)(1) If a universal bank is permitted to engage in the business of insurance or securities under any authority granted by this chapter, the insurance and securities activities of the universal bank shall be subject to the regulation and supervision of the Department and appropriate federal agencies and shall be carried out under all laws, rules, and regulations applicable to insurance and securities; provided, that the Commissioner may exempt a universal bank from a provision of this chapter, or any rule or regulation promulgated under this chapter, which has been preempted by federal law, rule, or regulation.

(2) The Department shall maintain functional regulatory authority over the insurance and securities activities of the insurance or securities subsidiary or holding company affiliate of a universal bank. The regulatory authority of the Department shall include reviewing and taking necessary actions, including approval and disapproval, on applications and other documents or reports concerning a proposed acquisition of, or a change or continuation of control of, an insurer domiciled in the District of Columbia.

(b)(1) A universal bank shall disclose, or cause to be disclosed, to purchasers of, prospective purchasers of, and persons solicited to purchase, an insurance policy of the universal bank that the insurance offered or sold is not a deposit, is not insured by the federal deposit insurance corporation, and is not guaranteed by the universal bank; provided, that this disclosure requirement shall not apply to the solicitation or sale of a credit unemployment insurance policy, group credit life insurance policy, group credit health insurance policy,

group credit accident insurance policy, or group credit health and accident insurance policy, or a similar group credit insurance policy covering the person of the insured.

(2) A person soliciting the purchase of, or selling, insurance on the premises of a universal bank shall disclose, or cause to be disclosed, to purchasers of, prospective purchasers of, and persons solicited to purchase, an insurance policy of the universal bank that the insurance offered or sold is not a deposit, is not insured by the federal deposit insurance corporation, and is not guaranteed by the universal bank; provided, that this disclosure requirement shall not apply to the solicitation or sale of a credit unemployment insurance policy, group credit life insurance policy, group credit health insurance policy, group credit accident insurance policy, or group credit health and accident insurance policy, or a similar group credit insurance policy covering the person of the insured.

(3) A disclosure required under paragraph (1) or (2) of this subsection shall be made in writing and in clear and concise language.

(c) If a person obtains insurance and credit from a universal bank, the expense of the credit and insurance transactions shall be disclosed in separate contractual provisions, and the expense of insurance premiums shall not be included in the primary credit transactions without the express written consent of the person; provided, that this subsection shall not apply if the insurance policy being obtained is a flood insurance policy, a credit unemployment insurance policy, a group credit life insurance policy, a group credit health insurance policy, group credit accident insurance policy, or a group credit health and accident insurance policy, or a similar group credit insurance policy covering the person of the insured.

(d)(1) A universal banks shall not condition the making of a loan, including a loan under § 26-1401.09(a)(2), the lease or sale of property of any kind, or the furnishing of any services to a customer on the requirement that the customer obtain insurance from the universal bank, an affiliate or subsidiary of the universal bank, or a particular insurer, agent, or broker. A universal bank shall not fix or vary the consideration charged to a customer for the making of a loan, including a loan under § 26-1401.09(a)(2), the lease or sale of property of any kind, or the furnishing of any services based on whether the customer obtains insurance from the universal bank, an affiliate or subsidiary of the universal bank, or a particular insurer, agent, or broker.

(2) The prohibitions under paragraph (1) of this subsection shall not prevent a universal bank from informing a person that insurance is required to obtain a loan or credit, that loan or credit approval is contingent upon the person's procurement of acceptable insurance, or that insurance is available from the universal bank; provided, that the universal bank shall also inform the person in writing that his or her choice of insurance provider shall not affect the universal bank's credit decision or credit terms; provided further, that the disclosure shall be given again before or at the time that the universal bank, or the person selling or soliciting the purchase of insurance on the premises of the universal bank, solicits the purchase of insurance from a customer who has applied for a loan or extension of credit.

(e)(1) A universal bank may engage in an activity under § 26-1401.09(a)(6) through (19) directly or indirectly through a subsidiary, unless the Commissioner determines that the activity shall be conducted through a subsidiary; provided that:

(A) An underwriting or distribution of annuities under § 26-1401.09(a)(16) shall be conducted only through a non-depository financial institution affiliate of the universal bank unless federal law permits the underwriting and distribution to be conducted through a subsidiary of the financial institution;

(B) An underwriting or distribution of life insurance, accident insurance, health insurance, property insurance, casualty insurance, or any other form of insurance under § 26-1401.09(a)(17) shall be conducted only through a non-depository financial institution affiliate of the universal bank unless federal law permits the underwriting and distribution to be conducted in a subsidiary of the financial institution;

(C) An underwriting, dealing, or market-making in securities under § 26-1401.09(a)(18) shall be conducted only in a subsidiary of the universal bank; and

(D) A distribution of shares in investment companies under § 26-1401.09(a)(19) shall only be conducted through a subsidiary of the universal bank.

(2) The Commissioner may require that a subsidiary or affiliate of a universal bank engaged in an activity under § 26-1401.09(a)(6) through (19) implement and maintain appropriate safeguards to limit the risk exposure of the universal bank.

(f) The investment in a subsidiary that engages in an activity under § 26-1401.09(a)(6) through (19) shall not exceed 20% of the universal bank's capital; provided, that the Commissioner may authorize a higher percentage, by written order, if the percentage is consistent with safe and sound practices and the safe and sound operation and condition of the universal bank.

(g) The aggregate investment in all subsidiaries that engage in an activity under § 26-1401.09(a)(6) through (19) shall not exceed 50% of the universal bank's capital; provided, that the Commissioner may authorize a higher percentage, by written order, if the percentage is consistent with safe and sound practices and the safe and sound operation and condition of the universal bank.

(h) A subsidiary that engages in an activity under § 26-1401.09(a)(6) through (19) may be owned jointly with one or more persons, including universal banks.

(June 9, 2001, D.C. Law 13-308, § 215, 48 DCR 3244; Oct. 19, 2002, D.C. Law 14-213, § 18(f), 49 DCR 8140; June 11, 2004, D.C. Law 15-166, § 2(g), 51 DCR 2817.)

Effect of amendments. — D.C. Law 14-213, in subsec. (a)(1), validated a previously made technical correction.

D.C. Law 15-166, in subsec. (a), deleted "of Insurance and Securities Regulation" following

"Department", and deleted ", with the approval of the Commissioner of the Department of Insurance and Securities Regulation," following "Commissioner".

Emergency legislation. — For temporary

(90 day) amendment of section, see § 2(g) of Consolidation of Financial Services Emergency Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

Legislative history of Law 14-213. — For Law 14-213, see notes following § 26-131.02.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 26-131.02.

*Subchapter V. Commissioner Possession, Receivership,
Conservatorship, and Liquidation of Universal Banks.*

§ 26-1401.16. Liquidation of universal banks in general.

A universal bank shall not be liquidated except as provided by this chapter or in accordance with the order of a court of competent jurisdiction.

(June 9, 2001, D.C. Law 13-308, § 216, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.17. Commissioner taking possession of universal banks.

(a) Subject to § 26-1401.15 as it relates to the functional regulatory authority of the Commissioner with respect to the liquidation or rehabilitation of an insurance subsidiary or holding company affiliate, the Commissioner may take possession of the business and property of a universal bank if the Commissioner has determined that one or more of the events described in subsection (b) of this section has occurred.

(b) The Commissioner may take possession of the properties or business of a universal bank under subsection (a) of this section if the universal bank:

(1) Has violated a law, rule, regulation, a condition imposed by the Commissioner in connection with the approval of an application, an order or authorized request by the Commissioner, or a term or condition of a written agreement entered into with the Commissioner, and such violation affects the safe and sound condition and operation of the bank or the severity of the violation calls into question the competency of management or the quality of the operation of the bank;

(2) Is conducting its business in an unauthorized or unsafe or unsound manner;

(3) Is in an unsafe and unsound condition to transact its business;

(4) Has an impairment of its capital;

(5) Has suspended payment of its obligations;

(6) Has neglected or refused to comply with the terms of a duly issued order of the Commissioner;

(7) Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the Department;

(8) Has refused to be examined upon oath regarding its affairs; or

(9) Has neglected, refused or failed to take or continue proceedings for voluntary liquidation in accordance with any of the provisions of this chapter.

(c) If the Commissioner takes possession of the property or business of a universal bank under this section, the Commissioner shall inform the universal bank of the universal bank's right to seek review of the Commissioner's action under subsection (e) of this section.

(d) The Commissioner may maintain possession of the property or business of a universal bank until:

(1) The affairs of the universal bank are finally liquidated;

(2) The universal bank, with the written approval of the Commissioner, voluntarily winds up its affairs; or

(3) The Commissioner authorizes the universal bank to resume business under § 26-1401.18.

(e) Within 10 days after the Commissioner takes possession of the property or business of a universal bank under this section, the universal bank may apply to the Superior Court for an order requiring the Commissioner to show cause why the Commissioner should not be enjoined from continuing his or her possession of the property or business. The Superior Court may, upon good cause shown, direct the Commissioner to surrender possession of some or all of the business or property of the universal bank or direct the Commissioner to take, or refrain from taking, any action.

(f) In addition to the authority granted under this section, the Commissioner may appoint a receiver for the universal bank as provided in § 26-1401.19.

(June 9, 2001, D.C. Law 13-308, § 217, 48 DCR 3244; June 11, 2004, D.C. Law 15-166, § 2(h), 51 DCR 2817.)

Effect of amendments. — D.C. Law 15-166, in subsec. (a), deleted "of the Department of Insurance and Securities Regulation" following "authority of the Commissioner".

Emergency legislation. — For temporary (90 day) amendment of section, see § 2(h) of Consolidation of Financial Services Emergency

Amendment Act of 2004 (D.C. Act 15-381, February 27, 2004, 51 DCR 2653).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

Legislative history of Law 15-166. — For Law 15-166, see notes following § 26-131.02.

§ 26-1401.18. Resumption of business by a universal bank.

A universal bank of which the Commissioner takes possession or which is operating under restrictions imposed by the Commissioner may be permitted by the Commissioner to resume business in accordance with the provisions of this chapter and subject to such conditions as may be imposed by the Commissioner.

(June 9, 2001, D.C. Law 13-308, § 218, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.19. Appointment of a receiver for a universal bank.

(a) The Commissioner may petition the Superior Court to appoint a receiver for a universal bank if there is a reasonable basis to believe the universal bank:

(1) Has violated a law, rule, regulation, a condition imposed by the Commissioner in connection with the approval of an application, an order or authorized request by the Commissioner, or a term or condition of a written agreement entered into with the Commissioner, and such violation affects the safe and sound condition and operation of the bank or the severity of the violation calls into question the competency of management or the quality of the operation of the bank;

(2) Has violated a condition imposed by the Commissioner in connection with the approval of an application, an order or authorized request of the Commissioner, or a written agreement entered into with the Commissioner;

(3) Is conducting its business in an unauthorized, unsafe, or unsound manner;

(4) Is in an unsafe and unsound condition;

(5) Has an impairment of its capital;

(6) Has suspended payment of its obligations;

(7) Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the Department;

(8) Has refused to be examined upon oath regarding its affairs; or

(9) Has neglected, refused, or failed to take or continue proceedings for voluntary liquidation in accordance with any of the provisions of this chapter.

(b) If the Commissioner petitions the Superior Court to appoint a receiver for a universal bank, the Commissioner shall request that the Superior Court appoint the Federal Deposit Insurance Corporation as the receiver if any of the deposits in the universal bank are insured by the Federal Deposit Insurance Corporation.

(c) The Superior Court may act upon a petition by the Commissioner for the appointment of a receiver immediately and without notice to any person. The Superior Court may appoint a receiver if the Superior Court determines that a condition set forth in subsection (a) of this section exists and that the bank is operating, or may operate, in an unsafe or unsound manner. The Superior Court may also issue an injunction to require a universal bank to correct any condition set forth in subsection (a) of this section, notwithstanding whether the bank is operating, or may operate, in an unsafe or unsound manner. If the Superior Court appoints a receiver and, after the appointment of a receiver, it appears to the Superior Court that reasons for receivership do not, or no longer, exist, the Superior Court shall dissolve the receivership and terminate any pending proceedings.

(d) Unless otherwise provided by law, a receiver, other than a receiver who is an employee of the Department and acting in his or her official capacity, shall post a bond in an amount to be determined by the Superior Court.

(e) The receiver shall, on a regular basis, report to the Commissioner regarding all matters involving the receivership.

(f) If a universal bank has been closed and placed in receivership, and the Federal Deposit Insurance Corporation pays, or makes available for payment, the insured deposit liabilities of the closed bank, the rights of the Federal Deposit Insurance Corporation, whether or not the Federal Deposit Insurance Corporation is the receiver of the bank, shall be subrogated to all of the rights of the owners of the deposits against the closed universal bank in the same manner and to the same extent as subrogation of the Federal Deposit Insurance Corporation is provided for in section 11(g) of the Federal Deposit Insurance Act, approved September 21, 1950 (64 Stat. 884; 12 U.S.C. § 1821(g)).

(June 9, 2001, D.C. Law 13-308, § 219, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.20. Receiver duties and powers.

(a) Subject to Superior Court approval, a receiver shall:

(1) Take possession of the books, records, and assets of the universal bank and collect all debts, dues, and claims belonging to the universal bank;

(2) Sue, defend, compromise, arbitrate, or otherwise settle all claims involving the universal bank;

(3) Sell all real and personal property;

(4) Exercise all fiduciary functions of the universal bank;

(5) Pay all administrative expenses of the receivership, which expenses shall be a first charge upon the assets of the universal bank and shall be fully paid before a final distribution or payment of dividends to creditors or shareholders;

(6) Pay, ratably, all debts of the universal bank; provided, that debts not exceeding \$500 may be paid in full, but the holders of such debt shall not be entitled to interest on the debt;

(7) Repay, ratably, any amount paid in by a shareholder by reason of an assessment made upon the stock of the universal bank by the Department in accordance with this chapter;

(8) Pay, ratably, to the shareholders of the universal bank, in proportion to the number of shares held and owned by each, the balance of the net assets of the universal bank after payment or provision for payments as provided in this section;

(9) Have all the powers of the directors, officers, and shareholders of the universal bank as necessary to support an action taken on behalf of the universal bank; and

(10) Hold title to all the bank's property, contracts, and rights of action.

(b) Subject to Superior Court approval, a receiver may:

(1) Borrow money as necessary or expedient in aiding the liquidation of the universal bank and secure the borrowed money by the pledge, hypothecation, or mortgage of the assets of the bank;

(2) Employ agents, legal counsel, accountants, appraisers, consultants, and other personnel, including, with the prior written approval of the Com-

missioner, personnel of the Department, that the receiver considers necessary or expedient to assist in the performance of the receiver's duties; provided, that the expense of employing Department personnel shall be an administrative expense of the liquidation that shall be payable to the Department; or

(3) Exercise any other power and duty authorized by the Superior Court.

(June 9, 2001, D.C. Law 13-308, § 220, 48 DCR 3244; Oct. 19, 2002, D.C. Law 14-213, § 18(g), 49 DCR 8140.)

Effect of amendments. — D.C. Law 14-213, in subsec. (a)(7), validated a previously made technical correction.

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

Legislative history of Law 14-213. — For Law 14-213, see notes following § 26-131.02.

§ 26-1401.21. Lien on property or assets; voidable transfer.

(a) Except as provided in subsection (c) of this section, the transfer of, or a lien on, the property or assets of the universal bank shall be voidable by the receiver if the transfer or lien was:

(1) Made or created within one year before the date the universal bank is ordered into receivership if the receiving transferee or lien holder was at the time an affiliate, officer, director, employee, or principal shareholder of the universal bank or an affiliate of the universal bank;

(2) Made or created within 90 days before the date the universal bank is ordered into receivership, with the intent of giving to a creditor or depositor, or enabling a creditor or depositor to obtain, a greater percentage of the creditor's or depositor's debt than is given or obtained by another creditor or depositor of the same class;

(3) Accepted after the universal bank is ordered into receivership by a creditor or depositor having reasonable cause to believe that a preference, as described in subsection (b) of this section, will occur; or

(4) Voidable by the universal bank and the universal bank may recover the property transferred, or its value, from the person to whom it was transferred or from a person who has received it, unless the transferee or recipient was a bona fide holder for value before the date the Commissioner takes possession of the universal bank or the date the universal bank was ordered into receivership or conservatorship.

(b) A preference in a transfer or grant of an interest in the property or assets of a universal bank shall be deemed to occur when:

(1) There is an intent to hinder, delay, or defraud an entity to which, on or after the date that the transfer or grant of interest was made, the universal bank was or became indebted; or

(2) Less than a reasonably equivalent value is obtained by the universal bank in exchange for the transfer or grant of interest if the universal bank was insolvent when the transfer or grant of interest was made or if the universal bank became insolvent as a result of the transfer or grant of interest.

(c) Notwithstanding any other provision of this chapter, the receiver shall not void an otherwise voidable transfer under this section if:

(1) The transfer or lien does not exceed \$1,000 in value;

(2) The transfer or lien was received in good faith by a person who is not a person described in subsection (a)(1) of this section and who gave value in exchange for the transfer or lien; or

(3) The transfer or lien was intended by the universal bank and the transferee or lien holder to be, and in fact substantially was, a contemporaneous exchange for new value given to the universal bank.

(d) A person acting on behalf of the universal bank who knowingly participated in making or implementing a voidable transfer or lien, and each person receiving property or assets, or the benefit of property or assets, of the universal bank as a result of a voidable transfer or lien, shall be personally liable for the property, assets, or benefit received and shall account to the receiver for the benefit of the universal bank.

(June 9, 2001, D.C. Law 13-308, § 221, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.22. Maintenance and disposal of records by receiver.

(a) With the approval of the Superior Court, a receiver may dispose of records of the universal bank in receivership that are obsolete and unnecessary to the continued administration of the receivership.

(b) The receiver may retain the records of the universal bank and the receivership for a period of time that the receiver considers appropriate or for a period of time as ordered by the Superior Court.

(c) The receiver may devise a method for the effective, efficient, and economical maintenance of the records of the universal bank and of the receiver's office, including maintaining the records on any medium approved by the Superior Court.

(d) The receiver may use assets of a universal bank to:

(1) Procure services to maintain the records of a liquidated universal bank; or

(2) Pay fees, as established by the Commissioner, to the Commissioner necessary for the Commissioner to procure services to maintain the records of a liquidated universal bank.

(June 9, 2001, D.C. Law 13-308, § 222, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.23. Conservator; appointment; bond and security; qualifications; expenses.

(a) If any of the grounds under § 26-1401.19 authorizing a request for the appointment of a receiver exist or if the Commissioner determines that it is necessary to conserve the assets of a universal bank for the benefit of the

depositors, investors, or other creditors of the bank or for the benefit of the general public, the Commissioner may petition the Superior Court to appoint a conservator for a universal bank.

(b) The Department shall be reimbursed out of the assets of the conservatorship, as expenses, for all sums expended by the Department in connection with the conservatorship.

(c) All expenses of a conservatorship shall be paid out of the assets of the universal bank upon the approval of the Commissioner, shall be a first charge upon the assets of the universal bank, and shall be paid in full before a final distribution or payment of dividends to creditors or shareholders of the universal bank.

(June 9, 2001, D.C. Law 13-308, § 223, 48 DCR 3244; Oct. 26, 2001, D.C. Law 14-42, § 15, 48 DCR 7612; Mar. 2, 2007, D.C. Law 16-191, § 49, 53 DCR 6794.)

Effect of amendments. — D.C. Law 14-42 substituted “, as expenses,” for “, as expenses” in subsec. (b).

D.C. Law 16-191, in subsec. (a), validated a previously made technical correction.

Emergency legislation. — For temporary (90 day) amendment of section, see § 15 of Technical Amendments Emergency Act of 2001 (D.C. Act 14-108, August 3, 2001, 48 DCR 7622).

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

Legislative history of Law 14-42. — Law

14-42, the “Technical Correction Amendment Act of 2001”, was introduced in Council and assigned Bill No. 14-216, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 5, 2001, and June 26, 2001, respectively. Signed by the Mayor on July 24, 2001, it was assigned Act No. 14-107 and transmitted to both Houses of Congress for its review. D.C. Law 14-42 became effective on October 26, 2001.

Legislative history of Law 16-191. — For Law 16-191, see notes following § 26-702.01.

§ 26-1401.24. Conservator; rights, powers, and privileges.

(a) Subject to the supervision of the Commissioner, the conservator shall take possession of the books, records, and assets of the bank and shall take any action necessary to conserve the assets of the universal bank pending further disposition of the business of the universal bank as provided by law.

(b) Subject to Superior Court approval and under the supervision of the Commissioner, the conservator shall:

(1) Take possession of the books, records, and assets of the universal bank and collect all debts, dues, and claims belonging to the universal bank;

(2) Sue, defend, compromise, arbitrate, or otherwise settle claims involving the universal bank;

(3) Sell real and personal property if necessary to conserve the assets of the bank;

(4) Exercise all fiduciary functions of the universal bank;

(5) Pay all administrative expenses of the conservatorship, which expenses shall be a first charge upon the assets of the universal bank and shall be fully paid before a final distribution or payment of dividends to creditors or shareholders;

(6) Pay the debts of the universal bank if the conservator determines that payment of the debts is in the best interests of the universal bank;

(7) Have all the powers of the directors, officers, and shareholders of the

universal bank as necessary to support an action taken on behalf of the universal bank; and

(8) Hold title to all the bank's property, contracts, and rights of action.

(c) Subject to Superior Court approval and under the supervision of the Commissioner the conservator may:

(1) Employ agents, legal counsel, accountants, appraisers, consultants, and other personnel, including, with the prior written approval of the Commissioner, personnel of the Department, that the conservator considers necessary or expedient to assist in the performance of the conservator's duties; provided, that the expense of employing Department personnel shall be an administrative expense of the liquidation that shall be payable to the Department; or

(2) Exercise any other power and duty authorized by the Superior Court.

(d) Unless otherwise provided by law, a conservator, other than a conservator who is an employee of the Department and acting in his or her official capacity, shall post a bond in an amount to be determined by the Superior Court.

(e) The conservator shall, on a regular basis, report to the Commissioner regarding all matters involving the conservatorship.

(June 9, 2001, D.C. Law 13-308, § 224, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.25. Deposits received while universal bank in conservatorship.

(a) While a universal bank is in conservatorship, the Commissioner may require the conservator to set aside and make available for withdrawal by depositors or investors and payment to other creditors, ratably, amounts that the Commissioner determines may be used safely and soundly for such withdrawals and payments.

(b) The Commissioner may permit the conservator to receive deposits.

(c) Deposits received while the universal bank is in conservatorship shall not be subject to any limitation on payment or withdrawal. The deposits, and any new assets acquired on account of the deposits, shall be segregated and held for the new deposits and shall not be used to liquidate any indebtedness of the universal bank:

(1) Existing at the time that a conservator was appointed for the universal bank; or

(2) Incurred after a conservator was appointed and was incurred for the purpose of liquidating any indebtedness of the universal bank existing at the time that the conservator was appointed.

(d) Deposits received while the universal bank is in conservatorship shall be kept in cash, invested in direct obligations of the United States, or deposited in depository institutions designated by the Commissioner.

(e) The requirements of subsections (c) and (d) of this section shall remain in effect for 15 days following the date that the conservator returns control of

the universal bank to its board of directors, or for such shorter period as the Commissioner may designate.

(f) Before returning control of the universal bank to its board of directors, the conservator shall publish a notice in a paper of general circulation in the District of Columbia in a form approved by the Commissioner, stating the date on which the affairs of the universal bank will be returned to its board of directors and that the provisions of subsection (c) or (d) of this section will not be in effect after 15 days from that date. The conservator shall send a copy of the notice described in the previous sentence to each person who deposited money in the universal bank after the appointment of the conservator and before the time when control of the universal bank is returned to the board of directors.

(June 9, 2001, D.C. Law 13-308, § 225, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.26. Authority of conservator to borrow money; purpose.

(a) With the prior approval of the Commissioner, the conservator of a universal bank may borrow money to aid in the operation, reorganization, or liquidation of the bank, including the payment of liquidating dividends.

(b) With the prior approval of the Commissioner, the conservator may secure money borrowed under subsection (a) of this section by the pledge, hypothecation, or mortgage of the assets of the universal bank.

(June 9, 2001, D.C. Law 13-308, § 226, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.27. Termination of conservatorship.

(a) If the Commissioner determines that termination of the conservatorship and resumption of the transaction of the universal bank's business by the universal bank can be achieved and maintained in a safe and sound manner and is otherwise in the public interest, the Commissioner may petition the Superior Court to terminate a conservatorship and permit the universal bank to resume the transaction of its business, subject to terms, conditions, restrictions, and limitations as the Commissioner determines are appropriate.

(b) If the Superior Court determines that reasons for the conservatorship no longer exist, the Superior Court may dissolve the conservatorship and terminate any pending proceedings.

(c) If the Commissioner determines that it would be in the public interest, the Commissioner may petition the Superior Court for termination of a conservatorship and appointment of a receiver for the universal bank under § 26-1401.20.

(June 9, 2001, D.C. Law 13-308, § 227, 48 DCR 3244.)

§ 26-1401.28 BANKS AND OTHER FINANCIAL INSTITUTIONS

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

Subchapter VI. Miscellaneous Provisions.

§ 26-1401.28. Articles of incorporation and bylaws.

A universal bank may operate under the articles of incorporation and bylaws which were in effect before the universal bank's certification as a universal bank or under subsequently amended articles of incorporation and bylaws which are consistent with the provisions and purposes of this chapter.

(June 9, 2001, D.C. Law 13-308, § 228, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.29. Acquisitions, mergers and asset purchases.

(a) A universal bank may purchase the assets of, merge with, acquire, or be acquired by, a financial institution, or the holding company of a financial institution, only after a written application to the Commissioner and the written approval of the application by the Commissioner.

(b) An application for approval of the Commissioner under subsection (a) of this section shall be submitted on a form, and accompanied by a fee, prescribed by the Commissioner. In reviewing and approving or disapproving an application under this section, the Commissioner shall apply the standards required by the District of Columbia Banking Code, including the applicant's general plan of business, proposed plan of capital investment in the District, and community development program.

(June 9, 2001, D.C. Law 13-308, § 229, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.30. Fees.

The Commissioner may establish fees for the filing of documents, the processing of applications, and other services provided by the Commissioner or the Department under this chapter.

(June 9, 2001, D.C. Law 13-308, § 230, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

§ 26-1401.31. Rulemaking.

The Commissioner may prescribe rules governing the activities of universal

banks and implementing this chapter, pursuant to subchapter I of Chapter 5 of Title 2.

(June 9, 2001, D.C. Law 13-308, § 231, 48 DCR 3244.)

Legislative history of Law 13-308. — For Law 13-308, see notes following § 26-1401.01.

TITLE 27. CIVIL RECOVERY BY MERCHANTS FOR CRIMINAL CONDUCT.

Chapter

1. Merchant's Civil Recovery for Criminal Conduct.

CHAPTER 1. MERCHANT'S CIVIL RECOVERY FOR CRIMINAL CONDUCT.

Sec.

27-101. Definitions.

27-102. Liability and damages.

27-103. Criminal proceedings.

Sec.

27-104. Merchant's options.

27-105. Jurisdiction.

27-106. Attorney's fees.

§ 27-101. Definitions.

For purposes of this chapter, the term:

(1) "Fraud" shall have the same meaning as that term is used in § 22-3221.

(2) "Juvenile" means a person under 18 years of age.

(3) "Merchant" means a person who does or would sell, lease, or transfer, either directly or indirectly, consumer goods or services, or a person who does or would supply the goods or services which are or would be the subject matter of a trade practice.

(4) "Shoplifting" shall have the same meaning as that term has in § 22-3213(a).

(5) "Theft" shall have the same meaning as that term is used in § 22-3211.

(May 16, 1992, D.C. Law 9-98, § 2, 39 DCR 678.)

Prior Codifications. — 1981 Ed., § 3-441.

Temporary Addition of Section. — Temporary addition of chapter: D.C. Law 9-97 enacted this chapter.

Section 8(b) of D.C. Law 9-97 provided that the act shall expire on the 225th day of its having taken effect or upon the effective date of the Merchant's Civil Recovery for Criminal Conduct of 1991, whichever occurs first.

Emergency legislation. — For temporary addition of chapter, see §§ 2-7 of the Merchant's Civil Recovery for Criminal Conduct Emergency Act of 1991 (D.C. Act 9-110, November 25, 1991, 38 DCR 7304).

For temporary addition of chapter, see §§ 2-7 of the Merchant's Civil Recovery for Criminal Conduct Congressional Recess Emergency Act of 1992 (D.C. Act 9-155, February 21, 1992, 39 DCR 1354).

For temporary addition of section, see § 2 of the Merchant's Civil Recovery for Criminal Conduct Emergency Amendment Act of 1992 (D.C. Act 9-205, May 14, 1992, 39 DCR 3649).

Legislative history of Law 9-97. — Law 9-97, the "Merchant's Civil Recovery for Criminal Conduct Temporary Act of 1991," was introduced in Council and assigned Bill No. 9-351. The Bill was adopted on first and second readings on November 5, 1991, and December 3, 1991, respectively. Signed by the Mayor on December 20, 1991, it was assigned Act No. 9-124 and transmitted to both Houses of Congress for its review. D.C. Law 9-97 became effective on May 7, 1992.

Legislative history of Law 9-98. — Law 9-98, the "Merchant's Civil Recovery for Criminal Conduct Act of 1992," was introduced in Council and assigned Bill No. 19-152, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on December 3, 1991, and January 7, 1992, respectively. Signed by the Mayor on January 28, 1992, it was assigned Act No. 9-138 and transmitted to both Houses of Congress for its review. D.C. Law 9-98 became effective on May 16, 1992.

§ 27-102. Liability and damages.

(a) Anyone who commits an offense of fraud, shoplifting, or theft from a merchant shall be civilly liable to the merchant for treble the amount of actual damages; and

(1) The retail value of any goods or merchandise stolen if the goods or merchandise are not recovered;

(2) The loss of value of the goods or merchandise stolen if the goods or merchandise are recovered; or

(3) A minimum of \$50 in damages, whichever is greater.

(b) The parent or guardian shall be liable for any acts or offenses committed by a juvenile under this chapter.

(May 16, 1992, D.C. Law 9-98, § 3, 39 DCR 678.)

Prior Codifications. — 1981 Ed., § 3-442.

Temporary Addition of Section. — See note to § 27-101.

Emergency legislation. — For temporary addition of chapter, see §§ 2-7 of the Merchant's Civil Recovery for Criminal Conduct Emergency Act of 1991 (D.C. Act 9-110, November 25, 1991, 38 DCR 7304).

For temporary addition of chapter, see §§ 2-7 of the Merchant's Civil Recovery for Criminal

Conduct Congressional Recess Emergency Act of 1992 (D.C. Act 9-155, February 21, 1992, 39 DCR 1354).

Legislative history of Law 9-97. — For legislative history of D.C. Law 9-97, see Historical and Statutory Notes following § 27-101.

Legislative history of Law 9-98. — For legislative history of D.C. Law 9-98, see Historical and Statutory Notes following § 27-101.

CASE NOTES

ANALYSIS

Claims.
Standing.

Claims.

Under D.C. Merchant's Civil Recovery For Criminal Conduct Act, as interpreted by the district court, allegations by professional corporation, that it was a merchant and that former bookkeeper committed fraud and theft against it in its capacity as merchant, stated claim against bookkeeper. *Harpole Architects, P.C. v.*

Barlow, 668 F.Supp.2d 68, 2009 U.S. Dist. LEXIS 104043 (2009).

Standing.

Shareholder failed to allege how his interest in selling consumer services was special or distinct from professional corporation's interest, thus shareholder lacked standing under District of Columbia law to sue for violation of D.C. Merchant's Civil Recovery For Criminal Conduct Act. *Harpole Architects, P.C. v. Barlow*, 668 F.Supp.2d 68, 2009 U.S. Dist. LEXIS 104043 (2009).

§ 27-103. Criminal proceedings.

(a) The recovery of damages from the alleged offender shall not prohibit criminal prosecution of the alleged offender.

(b) The recovery of civil damages by a merchant or a finding of liability under this chapter shall not be admissible in a criminal proceeding.

(c) A conviction or plea of guilty of fraud, shoplifting, or theft is not a prerequisite to the maintenance of a civil action authorized by this chapter.

(May 16, 1992, D.C. Law 9-98, § 4, 39 DCR 678; July 22, 1992, D.C. Law 9-132, § 4(a), 39 DCR 4058; Sept. 29, 1992, D.C. Law 9-163, § 5(a), 39 DCR 5705.)

Prior Codifications. — 1981 Ed., § 3-443.
Temporary Amendment of Section. — For D.C. Law 9-97, see note to § 27-101.

Section 4(a) of D.C. Law 9-132 in (a) inserted “not”.

Section 5(b) of D.C. Law 9-132 provided that the act shall expire on the 225th day of its having taken effect.

Emergency legislation. — For temporary addition of chapter, see §§ 2-7 of the Merchant's Civil Recovery for Criminal Conduct Emergency Act of 1991 (D.C. Act 9-110, November 25, 1991, 38 DCR 7304).

For temporary addition of chapter, see §§ 2-7 of the Merchant's Civil Recovery for Criminal Conduct Congressional Recess Emergency Act of 1992 (D.C. Act 9-155, February 21, 1992, 39 DCR 1354).

Legislative history of Law 9-97. — For legislative history of D.C. Law 9-97, see Historical and Statutory Notes following § 27-101.

Legislative history of Law 9-98. — For legislative history of D.C. Law 9-98, see Historical and Statutory Notes following § 27-101.

Legislative history of Law 9-132. — Law 9-132, the “Retired Police Officer Redeployment Temporary Amendment Act of 1992,” was introduced in Council and assigned Bill No. 9-487. The Bill was adopted on first and second readings on April 7, 1992, and May 6, 1992, respectively. Signed by the Mayor on May 28, 1992, it was assigned Act No. 9-217 and transmitted to both Houses of Congress for its review. D.C. Law 9-132 became effective on July 22, 1992.

Legislative history of Law 9-163. — Law 9-163, the “Retired Police Officer Redeployment Amendment Act of 1992,” was introduced in Council and assigned Bill No. 9-498, which was referred to the Committee on Government Operations and reassigned to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 2, 1992, and July 7, 1992, respectively. Signed by the Mayor on July 21, 1992, it was assigned Act No. 9-258 and transmitted to both Houses of Congress for its review. D.C. Law 9-163 became effective on September 29,

§ 27-104. Merchant's options.

(a) A merchant who suffers damages as a result of fraud, shoplifting, or theft, may recover the damages by submitting written demand to the alleged offender or the parent or guardian of a juvenile alleged offender.

(b) The written demand shall:

(1) Be delivered or mailed to the alleged offender, or parent or guardian of a juvenile alleged offender, at least 30 days prior to the filing of any suit for damages;

(2) Specify the alleged criminal conduct and the damages incurred as a result of the conduct;

(3) Specify the amount which the merchant is entitled to receive under this chapter and that if payment of this amount is made in accordance with the written demand or the terms of a written agreement between the merchant and the alleged offender or the parent or guardian of the juvenile alleged offender, within 30 days of the date of service of the demand, the merchant may bring suit for damages; and

(4) Specify that if payment of the specified amount is not made, an agreement of payments is not reached, or payments are not made in accordance with the terms of an agreement, within 30 days of the date of service of the demand, the merchant may bring a suit for damages.

(c) When the merchant receives payment of the specified amount or payment in accordance with the agreement for payments, the merchant shall deliver or mail an acknowledgement of payment letter to the alleged offender within 5 business days of receipt of payment.

(May 16, 1992, D.C. Law 9-98, § 5, 39 DCR 678; July 22, 1992, D.C. Law 9-132, § 4(b), (c), 39 DCR 4058; Sept. 29, 1992, D.C. Law 9-163, § 5(b)-(d), 39 DCR 5705.)

§ 27-105 CIVIL RECOVERY BY MERCHANTS FOR CRIMINAL CONDUCT

Prior Codifications. — 1981 Ed., § 3-444.

Temporary Amendment of Section. — For D.C. Law 9-97, see note to § 27-101.

Section 4(c) of D.C. Law 9-132 added (b)(4).

Section 5(b) of D.C. Law 9-132 provided that the act shall expire on the 225th day of its having taken effect.

Emergency legislation. — For temporary addition of chapter, see §§ 2-7 of the Merchant's Civil Recovery for Criminal Conduct Emergency Act of 1991 (D.C. Act 9-110, November 25, 1991, 38 DCR 7304).

For temporary addition of chapter, see §§ 2-7 of the Merchant's Civil Recovery for Criminal Conduct Congressional Recess Emergency Act

of 1992 (D.C. Act 9-155, February 21, 1992, 39 DCR 1354).

Legislative history of Law 9-97. — For legislative history of D.C. Law 9-97, see Historical and Statutory Notes following § 27-101.

Legislative history of Law 9-98. — For legislative history of D.C. Law 9-98, see Historical and Statutory Notes following § 27-101.

Legislative history of Law 9-132. — For legislative history of D.C. Law 9-132, see Historical and Statutory Notes following § 27-103.

Legislative history of Law 9-163. — For legislative history of D.C. Law 9-163, see Historical and Statutory Notes following § 27-103.

§ 27-105. Jurisdiction.

A suit for damages and penalties may be brought in the Superior Court of the District of Columbia.

(May 16, 1992, D.C. Law 9-98, § 6, 39 DCR 678.)

Prior Codifications. — 1981 Ed., § 3-445.

Temporary Addition of Section. — See note to § 27-101.

Emergency legislation. — For temporary addition of chapter, see §§ 2-7 of the Merchant's Civil Recovery for Criminal Conduct Emergency Act of 1991 (D.C. Act 9-110, November 25, 1991, 38 DCR 7304).

For temporary addition of chapter, see §§ 2-7 of the Merchant's Civil Recovery for Criminal

Conduct Congressional Recess Emergency Act of 1992 (D.C. Act 9-155, February 21, 1992, 39 DCR 1354).

Legislative history of Law 9-97. — For legislative history of D.C. Law 9-97, see Historical and Statutory Notes following § 27-101.

Legislative history of Law 9-98. — For legislative history of D.C. Law 9-98, see Historical and Statutory Notes following § 27-101.

§ 27-106. Attorney's fees.

Attorneys' fees and costs shall be awarded under this chapter without regard to ability to pay.

(May 16, 1992, D.C. Law 9-98, § 7, 39 DCR 678.)

Prior Codifications. — 1981 Ed., § 3-446.

Temporary Addition of Section. — See note to § 27-101.

Emergency legislation. — For temporary addition of chapter, see §§ 2-7 of the Merchant's Civil Recovery for Criminal Conduct Emergency Act of 1991 (D.C. Act 9-110, November 25, 1991, 38 DCR 7304).

For temporary addition of chapter, see §§ 2-7 of the Merchant's Civil Recovery for Criminal

Conduct Congressional Recess Emergency Act of 1992 (D.C. Act 9-155, February 21, 1992, 39 DCR 1354).

Legislative history of Law 9-97. — For legislative history of D.C. Law 9-97, see Historical and Statutory Notes following § 27-101.

Legislative history of Law 9-98. — For legislative history of D.C. Law 9-98, see Historical and Statutory Notes following § 27-101.

CASE NOTES

Construction and application.

To extent professional corporation could recover for losses from former bookkeeper under D.C. Merchant's Civil Recovery For Criminal

Conduct Act, corporation was entitled to attorneys' fees. Harpole Architects, P.C. v. Barlow, 668 F.Supp.2d 68, 2009 U.S. Dist. LEXIS 104043 (2009).

TITLE 28. COMMERCIAL INSTRUMENTS AND TRANSACTIONS.

SUBTITLE I. UNIFORM COMMERCIAL CODE

Article.

- 1. General Provisions.**
- 2. Sales.**
- 2A. Leases.**
- 3. Negotiable Instruments.**

SUBTITLE I. UNIFORM COMMERCIAL CODE.

ARTICLE 1. GENERAL PROVISIONS.

Part 1. Short Title, Construction, Application and Subject Matter

Sec.

28:1-101. Short title.

28:1-102. Purposes; rules of construction; variation by agreement.

28:1-103. Supplementary general principles of law applicable.

28:1-104. Construction against implicit repeal.

28:1-105. Territorial application of this subtitle; parties' power to choose applicable law.

28:1-106. Remedies to be liberally administered.

28:1-107. Waiver or renunciation of claim or right after breach.

28:1-108. Severability.

Sec.

28:1-109. Section captions.

Part 2. General Definitions and Principles of Interpretation

28:1-201. General definitions.

28:1-202. Prima facie evidence by third party documents.

28:1-203. Obligation of good faith.

28:1-204. Time; reasonable time; "seasonably".

28:1-205. Course of dealing and usage of trade.

28:1-206. Statute of frauds for kinds of personal property not otherwise covered.

28:1-207. Performance or acceptance under reservation of rights.

28:1-208. Option to accelerate at will.

Part 1. Short Title, Construction, Application and Subject Matter.

§ 28:1-101. Short title.

This subtitle shall be known and may be cited as Uniform Commercial Code.

(Dec. 30, 1963, 77 Stat. 631, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 2-1219.18.

Prior Codifications. — 1981 Ed., § 28:1-101.

1973 Ed., § 28:1-101.

Editor's notes. — Section 39(a) of D.C. Law 15-354 provided that Title 28 is designated Title 28 of the District of Columbia Official Code.

UNIFORM COMMERCIAL CODE COMMENT

Each Article of the Code (except this Article and Article 10) may also be cited by its own

short title. See Sections 2-101, 3-101, 4-101, 5-101, 6-101, 7-101, 8-101 and 9-101.

CASE NOTES

ANALYSIS

Attorney fees.

Deficiency judgment.

In general.

Insurance.

Security.

Attorney fees.

Secured creditor which only succeeded in part in its action to recover balance due on lease of computer equipment was not entitled to award of substantially all attorney fees it requested; limited success was to be considered

in determining what constituted a reasonable fee. *Fleming v. Carroll Pub. Co.*, 581 A.2d 1219, 1990 D.C. App. LEXIS 266 (1990), remanded by 621 A.2d 829, 1993 D.C. App. LEXIS 51, 20 U.C.C. Rep. Serv. 2d (CBC) 1141 (D.C. 1993).

Deficiency judgment.

"Absolute preclusion" rule, denying deficiency judgment to secured party who has failed to give notice of proposed sale of repossessed property to debtor, applied in business context. *Fleming v. Carroll Pub. Co.*, 581 A.2d 1219, 1990 D.C. App. LEXIS 266 (1990), re-

manded by 621 A.2d 829, 1993 D.C. App. LEXIS 51, 20 U.C.C. Rep. Serv. 2d (CBC) 1141 (D.C. 1993).

In general.

Despite secured creditor's improper failure to give debtor prior notice of sale of repossessed collateral, creditor's security interest in remaining unrepossessed collateral continued until debt was paid, absent express or implied relinquishment of security interest. *Fleming v. Carroll Pub. Co.*, 581 A.2d 1219, 1990 D.C. App. LEXIS 266 (1990), remanded by 621 A.2d 829, 1993 D.C. App. LEXIS 51, 20 U.C.C. Rep. Serv. 2d (CBC) 1141 (D.C. 1993).

Uniform Commercial Code provisions governing procedural matters apply to trials of actions commenced after its effective date even where transactions subject to litigation took place prior to its effective date. D.C. Code § 28:1-101 et seq. *Yasuna v. Miller*, 399 A.2d 68, 1979 D.C. App. LEXIS 309 (1979).

Insurance.

Balancing of equities is required when insur-

ance policy does not contain explicit subrogation provision and insurer brings suit as equitable subrogee against an innocent party. *National Union Fire Ins. Co. v. Riggs Nat'l Bank*, 5 F.3d 554, 1993 U.S. App. LEXIS 25280 (C.A.D.C. 1993).

Security.

Proprietary lease document for cooperative apartment was not "security" for purposes of Uniform Commercial Code sections providing that perfection by possession is possibility with respect to "instruments," and incorporating definition of security into definition of "instrument"; thus, creditor could not perfect security interest in borrower's right to apartment by creditor's possession of that document. D.C. Code 1981, §§ 28:8-102(1)(a), 28:9-105(1)(i), 28:9-305. *First Sav. Bank v. Barclays Bank, S.A.*, 618 A.2d 134, 1992 D.C. App. LEXIS 318 (1992).

§ 28:1-102. Purposes; rules of construction; variation by agreement.

(1) This subtitle shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this subtitle are:

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

(3) The effect of provisions of this subtitle may be varied by agreement, except as otherwise provided in this subtitle and except that the obligations of good faith, diligence, reasonableness and care prescribed by this subtitle may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this subtitle of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

(5) In this subtitle unless the context otherwise requires:

(a) words in the singular number include the plural, and in the plural include the singular;

(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

(Dec. 30, 1963, 77 Stat. 631, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2A-518, 28:2A-519, 28:2A-527, and 28:2A-528.

Prior Codifications. — 1981 Ed., § 28:1-102.

1973 Ed., § 28:1-102.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provisions: Section 74, Uniform Sales Act; Section 57, Uniform Warehouse Receipts Act; Section 52, Uniform Bills of Lading Act; Section 19, Uniform Stock Transfer Act; Section 18, Uniform Trust Receipts Act.

Changes: Rephrased and new material added.

Purposes of Changes:

1. Subsections (1) and (2) are intended to make it clear that:

This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices. However, the proper construction of the Act requires that its interpretation and application be limited to its reason.

Courts have been careful to keep broad acts from being hampered in their effects by later acts of limited scope. *Pacific Wool Growers v. Draper & Co.*, 158 Or. 1, 73 P.2d 1391 (1937), and compare Section 1-104. They have recognized the policies embodied in an act as applicable in reason to subject-matter which was not expressly included in the language of the act, *Commercial Nat. Bank of New Orleans v. Canal-Louisiana Bank & Trust Co.*, 239 U.S. 520, 36 S.Ct. 194, 60 L.Ed. 417 (1916) (bona fide purchase policy of Uniform Warehouse Receipts Act extended to case not covered but of equivalent nature). They have done the same where reason and policy so required, even where the subject-matter had been intentionally excluded from the act in general. *Agar v. Orda*, 264 N.Y. 248, 190 N.E. 479 (1934) (Uniform Sales Act change in seller's remedies applied to contract for sale of choses in action even though the general coverage of that Act was intentionally limited to goods "other than things in action.") They have implemented a statutory policy with liberal and useful remedies not provided in the statutory text. They have disregarded a statutory limitation of remedy where the reason of the limitation did not apply. *Fiterman v. J. N. Johnson & Co.*, 156 Minn. 201, 194 N.W. 399 (1923) (requirement of return of the goods as a condition to rescission for breach of warranty; also, partial rescission allowed). Nothing in this Act stands in the way of the continuance of such action by the courts.

The Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

2. Subsection (3) states affirmatively at the outset that freedom of contract is a principle of the Code: "the effect" of its provisions may be varied by "agreement." The meaning of the statute itself must be found in its text, including its definitions, and in appropriate extrinsic aids; it cannot be varied by agreement. But the Code seeks to avoid the type of interference with evolutionary growth found in *Manhattan Co. v. Morgan*, 242 N.Y. 38, 150 N.E. 594 (1926). Thus private parties cannot make an instrument negotiable within the meaning of Article 3 except as provided in Section 3-104; nor can they change the meaning of such terms as "bona fide purchaser," "holder in due course," or "due negotiation," as used in this Act. But an agreement can change the legal consequences which would otherwise flow from the provisions of the Act. "Agreement" here includes the effect given to course of dealing, usage of trade and course of performance by Sections 1-201, 1-205 and 2-208; the effect of an agreement on the rights of third parties is left to specific provisions of this Act and to supplementary principles applicable under the next section. The rights of third parties under Section 9-301 when a security interest is unperfected, for example, cannot be destroyed by a clause in the security agreement.

This principle of freedom of contract is subject to specific exceptions found elsewhere in the Act and to the general exception stated here. The specific exceptions vary in explicitness: the statute of frauds found in Section 2-201, for example, does not explicitly preclude oral waiver of the requirement of a writing, but a fair reading denies enforcement to such a waiver as part of the "contract" made unenforceable; Section 9-501(3), on the other hand, is quite explicit. Under the exception for "the obligations of good faith, diligence, reasonableness and care prescribed by this Act," provisions of the Act prescribing such obligations are not to be disclaimed. However, the section also recognizes the prevailing practice of having agreements set forth standards by which due diligence is measured and explicitly provides

that, in the absence of a showing that the standards manifestly are unreasonable, the agreement controls. In this connection, Section 1-205 incorporating into the agreement prior course of dealing and usages of trade is of particular importance.

3. Subsection (4) is intended to make it clear that, as a matter of drafting, words such as "unless otherwise agreed" have been used to avoid controversy as to whether the subject

matter of a particular section does or does not fall within the exceptions to subsection (3), but absence of such words contains no negative implication since under subsection (3) the general and residual rule is that the effect of all provisions of the Act may be varied by agreement.

4. Subsection (5) is modelled on 1 U.S.C. Section 1 and New York General Construction Law Sections 22 and 35.

CASE NOTES

ANALYSIS

Impracticability.
In general.

Impracticability.

The concept of impracticability assumes that performance was physically possible, a rule making nonperformance a condition precedent to recovery would unjustifiably encourage disappointment of expectations, and there is nothing necessarily inconsistent in claiming commercial impracticability for method of performance actually adopted and, accordingly, impossibility issue may be raised in suit to recover cost of alternative method of performance. D.C. Code §§ 28:1-102(3), 28:1-203, 28:2-302, 28:2-614 and (1), 28:2-615(a) (Supp. V 1966). *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 1966 U.S. App. LEXIS 6004 (C.A.D.C. 1966).

In general.

Issues in suit by buyer of automobile against

chattel mortgagee, which held mortgage created by seller and which repossessed automobile, were governed by provisions of Uniform Commercial Code, so that determination of issues in accordance with theory of estoppel constituted error; however, where judgment of trial judge was correct, such error did not require reversal. *Code Md.1957, art. 95B, § 1-101 et seq. Franklin Inv. Co. v. Homburg*, 252 A.2d 95, 1969 D.C. App. LEXIS 226 (App. 1969).

Under Uniform Commercial Code, classification of goods is mutually exclusive. *Code Md.1957, art. 95B, §§ 1-101 et seq., 9-109, 9-307, 9-307(2). Franklin Inv. Co. v. Homburg*, 252 A.2d 95, 1969 D.C. App. LEXIS 226 (App. 1969).

§ 28:1-103. Supplementary general principles of law applicable.

Unless displaced by the particular provisions of this subtitle, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions. The age of majority as it pertains to the capacity to contract is eighteen years of age.

(Dec. 30, 1963, 77 Stat. 631, Pub. L. 88-243, § 1; July 22, 1976, D.C. Law 1-75, § 6, 23 DCR 1183.)

Section references. — This section is referred to in § 28:1-201.

Prior Codifications. — 1981 Ed., § 28:1-103.

1973 Ed., § 28:1-103.

Legislative history of Law 1-75. — Law 1-75, the "District of Columbia Age of Majority Act," was introduced in Council and assigned

Bill No. 1-252, which was referred to the Committee on Public Services and Consumer Affairs. The Bill was adopted on first and second readings on April 6, 1976 and April 20, 1976, respectively. Signed by the Mayor on May 14, 1976, it was assigned Act No. 1-116 and transmitted to both Houses of Congress for its review.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 2 and 73, Uniform Sales Act; Section 196, Uniform Negotiable Instruments Act; Section 56, Uniform Warehouse Receipts Act; Section 51, Uniform Bills of Lading Act; Section 18, Uniform Stock Transfer Act; Section 17, Uniform Trust Receipts Act.

Changes: Rephrased, the reference to “estoppel” and “validating” being new.

Purposes of Changes:

1. While this section indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are explicitly displaced by this Act, the principle has been stated in more detail and the phrasing enlarged to make it clear that the “validating”, as well as the “invalidating” causes referred to in the prior uniform statutory provisions, are included here. “Validating” as used here in conjunction with “invalidating” is not intended as a narrow word confined to

original validation, but extends to cover any factor which at any time or in any manner renders or helps to render valid any right or transaction.

2. The general law of capacity is continued by express mention to make clear that section 2 of the old Uniform Sales Act (omitted in this Act as stating no matter not contained in the general law) is also consolidated in the present section. Hence, where a statute limits the capacity of a non-complying corporation to sue, this is equally applicable to contracts of sale to which such corporation is a party.

3. The listing given in this section is merely illustrative; no listing could be exhaustive. Nor is the fact that in some sections particular circumstances have led to express reference to other fields of law intended at any time to suggest the negation of the general application of the principles of this section.

CASE NOTES

ANALYSIS

Good faith.

In general.

Perfection of security interest.

Good faith.

Under District of Columbia law, breach of duty of good faith and fair dealing must necessarily arise out of contract's performance or enforcement, not out of contract negotiations. *C&E Servs. v. Ashland, Inc.*, 601 F.Supp.2d 262, 2009 U.S. Dist. LEXIS 19493 (2009), dismissed by 2009 U.S. App. LEXIS 29585 (D.C. Cir. May 1, 2009).

Under District of Columbia law, implied covenant of good faith and fair dealing is to be treated as though it were term of contract, and thus to breach covenant is to breach contract. *C&E Servs. v. Ashland, Inc.*, 601 F.Supp.2d 262, 2009 U.S. Dist. LEXIS 19493 (2009), dismissed by 2009 U.S. App. LEXIS 29585 (D.C. Cir. May 1, 2009).

Under District of Columbia law, restaurant chain did not breach duty of good faith in terminating agreement with meat supplier without investigation of supplier's financial health due to its justifiable concern about the supplier's ability to meet its financial obligations in light of supplier's payment problems. *D.C. Code 1981, §§ 28:2-103(1)(b), 28:2-609(1). Goldstein v. S & A Restaurant Corp.*, 622 F. Supp. 139, 1985 U.S. Dist. LEXIS 14328 (1985).

In general.

Under District of Columbia law, discovery rule was not applicable to delay running of

statute of limitations on customer's claim against depository bank for conversion and breach of contract by opening corporate account on request of customer's employee without any documentation and taking for deposit into the account checks on missing or forged endorsements, in that the injury was not latent and ordinary business could have detected siphoning of funds within the period of limitations following conversion. *D.C. Code 1981, § 12-301. Kuwait Airways Corp. v. American Sec. Bank, N.A.*, 890 F.2d 456, 1989 U.S. App. LEXIS 17944 (C.A.D.C. 1989).

Necessary step in formation of any contract is making of offer creating in offeree the power of acceptance. *Maurice Elec. Supply Co. v. Anderson Safeway Guard Rail Corp.*, 632 F. Supp. 1082, 1986 U.S. Dist. LEXIS 30992 (1986).

Uniform Commercial Code provisions governing assignment of accounts applied to assignment of taxpayer's right to receive contractual payments pursuant to factoring agreement. *D.C. Code 1981, §§ 28:1-103, 28:9-102, 28:9-102(1), 28:9-106. District of Columbia v. Thomas Funding Corp.*, 593 A.2d 1030, 1991 D.C. App. LEXIS 182 (1991).

Perfection of security interest.

Transaction by which bank in possession of debtor's fund-raising proceeds pursuant to security interest simultaneously credited and debited funds to debtor's account, for purposes of record keeping and compliance with federal election laws, was not lapse in possession and thus did not destroy bank's perfected security interest; funds only momentarily passed

through debtor's account, never left bank and were never made available for debtor's use and thus could not have misled third parties to believe that debtor had control of funds. Federal Election Campaign Act of 1971,

§ 302(h)(1), 2 U.S.C. § 432(h)(1); D.C. Code 1981, §§ 28:1-101 to 28:10-104, 28:9-203(1)(a), 28:9-304(1). *Tri-State Envelope of Maryland, Inc. v. Americans with Hart, Inc.*, 688 F. Supp. 769, 1988 U.S. Dist. LEXIS 9457 (1988).

§ 28:1-104. Construction against implicit repeal.

This subtitle being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

(Dec. 30, 1963, 77 Stat. 631, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:1-104. 1973 Ed., § 28:1-104.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

To express the policy that no Act which bears evidence of carefully considered permanent regulative intention should lightly be regarded as impliedly repealed by subsequent legisla-

tion. This Act, carefully integrated and intended as a uniform codification of permanent character covering an entire "field" of law, is to be regarded as particularly resistant to implied repeal. See *Pacific Wool Growers v. Draper & Co.*, 158 Or. 1, 73 P.2d 1391 (1937).

CASE NOTES

Choice of law.

District of Columbia law, as embodied in provisions of Uniform Commercial Code as adopted by District of Columbia, not Maryland law, governed diesel fuel seller's obligation under contract with transit authority to obtain

performance bond, where contract itself was governed by District of Columbia law. *Gatoil (U.S.A.) v. Washington Metro. Area Transit Auth.*, 801 F.2d 451, 1986 U.S. App. LEXIS 30683 (C.A.D.C. 1986).

§ 28:1-105. Territorial application of this subtitle; parties' power to choose applicable law.

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to the District and also to a state or nation, the parties may agree that the law either of the District or of the other state or nation shall govern their rights and duties. Failing such agreement, this subtitle applies to transactions bearing an appropriate relation to this state.

(2) Where one of the following provisions of this subtitle specifies the applicable law, that provision governs, and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods.	§ 28:2-402.
Applicability of the article on leases.	§§ 28:2A-104 and 28:2A-106.
Applicability of the article on bank deposits and collections.	§ 28:4-102.
Governing law in the article on funds transfers.	§ 28:4A-507.
Letters of credit.	§ 28:5-116.

- Bulk sales subject to the article on bulk sales. § 28:6-103.
 Applicability of the article on investment securities. § 28:8-110.
 Law governing perfection, the effect of perfection
 or nonperfection, and the priority
 of security interests. §§ 28:9-301 through 28:9-307.
 Governing law in the article on funds transfers. § 28:4A-507.

(Dec. 30, 1963, 77 Stat. 631, Pub. L. 88-243, § 1; Mar. 16, 1982, D.C. Law 4-85, § 2, 29 DCR 309; Apr. 30, 1992, D.C. Law 9-95, § 2(b), 39 DCR 1595; July 22, 1992, D.C. Law 9-128, § 2(c)(1), 39 DCR 3830; Apr. 9, 1997, D.C. Law 11-238, § 3(b), 44 DCR 923; Apr. 9, 1997, D.C. Law 11-239, § 3(b), 44 DCR 963; Apr. 9, 1997, D.C. Law 11-240, § 3(b), 44 DCR 1087; Apr. 9, 1997, D.C. Law 11-255, § 27(ii), 44 DCR 1271; Oct. 26, 2000, D.C. Law 13-201, § 201(b)(1), 47 DCR 7576.)

Prior Codifications. — 1981 Ed., § 28:1-105.

1973 Ed., § 28:1-105.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 4-85. — Law 4-85, the “Uniform Commercial Code Amendments Act of 1981,” was introduced in Council and assigned Bill No. 4-89, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 24, 1981, and December 8, 1981, respectively. Signed by the Mayor on January 18, 1982, it was assigned Act No. 4-139 and transmitted to both Houses of Congress for its review.

Legislative history of Law 9-95. — Law 9-95, the “District of Columbia Uniform Commercial Code—Funds Transfers Act of 1992,” was introduced in Council and assigned Bill No. 9-32, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on January 7, 1992, and February 4, 1992, respectively. Signed by the Mayor on March 2, 1992, it was assigned Act No. 9-165 and transmitted to both Houses of Congress for its review. D.C. Law 9-95 became effective on April 30, 1992.

Legislative history of Law 9-128. — Law 9-128, the “Uniform Commercial Code, Leases, Act of 1992,” was introduced in Council and assigned Bill No. 9-19, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on April 7, 1992, and May 6, 1992, respectively. Signed by the Mayor on May 28, 1992, it was assigned Act No. 9-212 and

transmitted to both Houses of Congress for its review. D.C. Law 9-128 became effective on July 22, 1992.

Legislative history of Law 11-238. — Law 11-238, the “Uniform Commercial Code—Letters of Credit Act of 1996,” was introduced in Council and assigned Bill No. 11-574, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-498 and transmitted to both Houses of Congress for its review. D.C. Law 11-238 became effective April 9, 1997.

Legislative history of Law 11-239. — Law 11-239, the “Uniform Commercial Code—Bulk Sales Act of 1996,” was introduced in Council and assigned Bill No. 11-575, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 11, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-499 and transmitted to both Houses of Congress for its review. D.C. Law 11-239 became effective on April 9, 1997.

Legislative history of Law 11-240. — Law 11-240, the “Uniform Commercial Code Investment Securities Revision Act of 1996,” was introduced in Council and assigned Bill No. 11-576, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-500 and transmitted to both Houses of Congress for its review. D.C. Law 11-240 became effective on April 9,

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. Subsection (1) states affirmatively the right of the parties to a multi-state transaction or a transaction involving foreign trade to choose their own law. That right is subject to the firm rules stated in the six sections listed in subsection (2), and is limited to jurisdictions to which the transaction bears a "reasonable relation." In general, the test of "reasonable relation" is similar to that laid down by the Supreme Court in *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 47 S.Ct. 626, 71 L.Ed. 1123 (1927). Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen.

2. Where there is no agreement as to the governing law, the Act is applicable to any transaction having an "appropriate" relation to any state which enacts it. Of course the Act applies to any transaction which takes place in its entirety in a state which has enacted the Act. But the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.

3. Where a transaction has significant contacts with a state which has enacted the Act and also with other jurisdictions, the question what relation is "appropriate" is left to judicial decision. In deciding that question, the court is not strictly bound by precedents established in other contexts. Thus a conflict-of-laws decision refusing to apply a purely local statute or rule of law to a particular multi-state transaction may not be valid precedent for refusal to apply the Code in an analogous situation. Application of the Code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries. Compare *Global Commerce Corp. v. Clark-Babbitt Industries,*

Inc., 239 F.2d 716, 719 (2d Cir. 1956). In particular, where a transaction is governed in large part by the Code, application of another law to some detail of performance because of an accident of geography may violate the commercial understanding of the parties.

4. The Act does not attempt to prescribe choice-of-law rules for states which do not enact it, but this section does not prevent application of the Act in a court of such a state. Common-law choice of law often rests on policies of giving effect to agreements and of uniformity of result regardless of where suit is brought. To the extent that such policies prevail, the relevant considerations are similar in such a court to those outlined above.

5. Subsection (2) spells out essential limitations on the parties' right to choose the applicable law. Especially in Article 9 parties taking a security interest or asked to extend credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings.

6. Sections 9-301 through 9-307 should be consulted as to the rules for perfection of security interests and the effects of perfection and nonperfection, and priority.

Reason for 1972 Change [D.C. Law 4-85]

The reference to Section 9-102 has been deleted and a change made in Section 9-102 deleting any reference therein to conflict of law problems, because there is no reason why the general principles of the present section should not be applicable to the choice of law problems within its scope. Section 9-103 continues to govern choice of law questions as to perfection of security interests and the effect of perfection and non-perfection thereof. The usual rule is that perfection is governed by the law of the jurisdiction in which the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected. Section 9-103 contains special rules for the cases of intangibles which have no situs, certain types of movable goods, goods which the parties intended at the inception of the transaction to be kept in another jurisdiction, goods subject to certificate of title laws, and certain other cases. Section 9-103 also contains local law rules as to reperfecting of security interests when collateral is moved from one jurisdiction to another.

Reason for 1987 Change [D.C. Law 9-128]

Uniform Statutory Source: Section 1-105, 1978 Official Text of the Act.

Changes: Subsection (2) is amended to reference two sections of the Article on Leases (Article 2A), which is being promulgated at the same time as this amendment.

CASE NOTES

ANALYSIS

Amendments.
Bankruptcy actions.
Federal actions, generally.
In general.

Amendments.

Amendment of section governing when article of District of Columbia code governing secured transactions applies, which amendments were made in early 1982, represented merely clarification, not change, in the law. D.C. Code 1981, § 28:9-104(f); Bankr.Code, 11 U.S.C. § 547. *Goldstein v. Madison Nat'l Bank*, 807 F.2d 1070, 1986 U.S. App. LEXIS 36387 (C.A.D.C. 1986).

If there is a choice of jurisdictions, preferable course is to select law of jurisdiction which would sustain transaction. In *re Parkwood, Inc.*, 461 F.2d 158, 1971 U.S. App. LEXIS 7189 (C.A.D.C. 1971).

Bankruptcy actions.

District court properly considered choice of law question in bankruptcy case; assignee of bankrupt never amended its answer to assert that Maryland law applied, pleadings were based on District of Columbia law, and trustee advised bankruptcy judge that case presented choice of law question. *Goldstein v. Madison Nat'l Bank*, 807 F.2d 1070, 1986 U.S. App. LEXIS 36387 (C.A.D.C. 1986).

Federal actions, generally.

Whether contractual provision that franchise agreements were to be interpreted conformably to law of New York was operative in federal action founded on diversity depended upon conflict of laws principles of District of Columbia in

which court was sitting. *Lee v. Flintkote Co.*, 593 F.2d 1275, 1979 U.S. App. LEXIS 17697 (C.A.D.C. 1979).

In general.

Assignment to creditor of right to receive amount owed debtor by another as payment of past-due obligation did not create "security interest" so as to trigger applicability of article of District of Columbia code governing secured transactions; thus, section of that article directing court to apply law of jurisdiction where debtor was located, Maryland, did not apply and under District of Columbia's general choice of law provision, District of Columbia law was applicable, in that assignment was prepared and executed in District of Columbia, debt was incurred and paid in District, and two of three parties to transactions were based on District. D.C. Code 1981, § 28:9-103. *Goldstein v. Madison Nat'l Bank*, 807 F.2d 1070, 1986 U.S. App. LEXIS 36387 (C.A.D.C. 1986).

Where Canadian corporation with no offices in the United States appointed plaintiff as sales representative for corporation's office furniture, plaintiff arranged sales to District of Columbia buyer, the furniture was delivered, and the corporation assigned the accounts receivable to Canadian factor with notice to buyer to pay to the factor, factor filed in Canada the assignment which identified the corporation as debtor and the factor as secured party, factor perfected his security interest in the buyer's outstanding obligation to the corporation within the meaning of District of Columbia Code, and such interest was superior to plaintiff's lien by attachment for unpaid commissions. D.C. Code § 28:9-103(5). *Heller v. Buchbinder*, 399 A.2d 850, 1979 D.C. App. LEXIS 317 (1979).

§ 28:1-106. Remedies to be liberally administered.

(1) The remedies provided by this subtitle shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this subtitle or by other rule of law.

(2) Any right or obligation declared by this subtitle is enforceable by action unless the provision declaring it specifies a different and limited effect.

(Dec. 30, 1963, 77 Stat. 632, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2A-501.

Prior Codifications. — 1981 Ed., § 28:1-106.

1973 Ed., § 28:1-106.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Subsection (1)—none; Subsection (2)—Section 72, Uniform Sales Act.

Changes: Reworded.

Purposes of Changes and New Matter: Subsection (1) is intended to effect three things:

1. First, to negate the unduly narrow or technical interpretation of some remedial provisions of prior legislation by providing that the remedies in this Act are to be liberally administered to the end stated in the section. Second, to make it clear that compensatory damages are limited to compensation. They do not include consequential or special damages, or penal damages; and the Act elsewhere makes it clear that damages must be minimized. Cf. Sections 1-203, 2-706(1), and 2-712(2). The third purpose of subsection (1) is to reject any doctrine that damages must be calculable with mathematical accuracy. Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accu-

racy the facts permit, but no more. Cf. Section 2-204(3).

2. Under subsection (2) any right or obligation described in this Act is enforceable by court action, even though no remedy may be expressly provided, unless a particular provision specifies a different and limited effect. Whether specific performance or other equitable relief is available is determined not by this section but by specific provisions and by supplementary principles. Cf. Sections 1-103, 2-716.

3. "Consequential" or "special" damages and "penal" damages are not defined in terms in the Code, but are used in the sense given them by the leading cases on the subject.

Cross References: Sections 1-103, 1-203, 2-204(3), 2-701, 2-706(1), 2-712(2) and 2-716.

Definitional Cross References:

"Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Rights". Section 1-201.

CASE NOTES

In general.

Where plaintiff originally sued 3 alleged tortfeasors but later entered into a consent judgment with one, the remaining defendants

are entitled to have that settlement credited against their joint liability as a "Snowden credit." *Johnson v. Conrail-Amtrak Fed. Credit Union*, 111 WLR 2297 (Super. Ct. 1983).

§ 28:1-107. Waiver or renunciation of claim or right after breach.

Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

(Dec. 30, 1963, 77 Stat. 632, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:1-107.

1973 Ed., § 28:1-107.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Compare Section 1, Uniform Written Obligations Act; Sections 119(3), 120(2) and 122, Uniform Negotiable Instruments Law.

Purposes:

This section makes consideration unnecessary to the effective renunciation or waiver of rights or claims arising out of an alleged breach of a commercial contract where such renunciation is in writing and signed and delivered by the aggrieved party. Its provisions, however, must be read in conjunction with the section

imposing an obligation of good faith. (Section 1-203). There may, of course, also be an oral renunciation or waiver sustained by consideration but subject to Statute of Frauds provisions and to the section of Article 2 on Sales dealing with the modification of signed writings (Section 2-209). As is made express in the latter section this Act fully recognizes the effectiveness of waiver and estoppel.

Cross References:

Sections 1-203, 2-201 and 2-209. And see Section 2-719.

Definitional Cross References:

"Aggrieved party". Section 1-201.

"Rights". Section 1-201.

"Signed". Section 1-201.

"Written". Section 1-201.

CASE NOTES

In general.

In action in which creditor, which repossessed collateral, a used automobile, and resold it without giving notice to debtor prescribed by Uniform Commercial Code, sought deficiency judgment against defaulting debtor, if creditor and trial court limited their concern to narrower legal argument about a "voluntary" repossession, than creditor's failure to raise "waiver" and "estoppel" at trial precluded their consideration on appeal unless injustice was manifest. D.C. Code § 28:9-504(3). *Gavin v. Washington Post Employees Federal Credit Union*, 397 A.2d 968, 1979 D.C. App. LEXIS 274 (1979).

In action in which creditor, which repossessed collateral, a used automobile, and resold

it without giving notice to debtor prescribed by Uniform Commercial Code, sought deficiency judgment against defaulting debtor, neither principles of waiver nor estoppel precluded debtor from asserting lack of notice, since, if trial court considered and rejected waiver and estoppel issues, its conclusions were supported by evidence, and since, if, to contrary, such issues were not raised and considered at trial, there was no perceived injustice in refusing, on appeal, to honor creditor's arguments concerning such issues. D.C. Code §§ 17-305(a), 28:9-501(3), 28:9-504(3), 40-901 et seq., 40-902(f); D.C. Code SCR, Civil Rule 52. *Gavin v. Washington Post Employees Federal Credit Union*, 397 A.2d 968, 1979 D.C. App. LEXIS 274 (1979).

§ 28:1-108. Severability.

If any provision or clause of this subtitle or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this subtitle which can be given effect without the invalid provision or application, and to this end the provisions of this subtitle are declared to be severable.

(Dec. 30, 1963, 77 Stat. 632, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:1-108.

1973 Ed., § 28:1-108.

UNIFORM COMMERCIAL CODE COMMENT

This is the model severability section recommended by the National Conference of Commissioners on Uniform State Laws for inclusion in all acts of extensive scope.

Definitional Cross Reference:

"Person". Section 1-201.

§ 28:1-109. Section captions.

Section captions are parts of this subtitle.

(Dec. 30, 1963, 77 Stat. 632, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:1-109.

1973 Ed., § 28:1-109.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: section captions are a part of the text of this Act and not mere surplusage.
None.

Purposes:

To make explicit in all jurisdictions that

*Part 2. General Definitions and Principles of Interpretation.***§ 28:1-201. General definitions.**

Subject to additional definitions contained in the subsequent articles of this subtitle which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in this subtitle:

(1) “Action” in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

(2) “Aggrieved party” means a party entitled to resort to a remedy.

(3) “Agreement” means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this subtitle (sections 28:1-205 and 28:2-208). Whether an agreement has legal consequences is determined by the provisions of this subtitle, if applicable; otherwise by the law of contracts (section 28:1-103). (Compare “Contract”).

(4) “Bank” means any person engaged in the business of banking.

(5) “Bearer” means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank.

(6) “Bill of lading” means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. “Airbill” means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

(7) “Branch” includes a separately incorporated foreign branch of a bank.

(8) “Burden of establishing” a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.

(9) “Buyer in ordinary course of business” means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 may be a buyer in ordinary course of business.

A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business.

(10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) IS CONSPICUOUS. LANGUAGE IN THE BODY OF A FORM IS "CONSPICUOUS" IF IT IS IN LARGER OR OTHER CONTRASTING TYPE OR COLOR. BUT IN A TELEGRAM ANY STATED TERM IS "CONSPICUOUS". WHETHER A TERM OR CLAUSE IS "CONSPICUOUS" OR NOT IS FOR DECISION BY THE COURT.

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this subtitle and any other applicable rules of law. (Compare "Agreement".)

(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

(13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

(14) "Delivery" with respect to instruments, documents of title, chattel paper, or certificated securities means voluntary transfer of possession.

(14a) "District" means the District of Columbia; and "state" includes the District.

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(16) "Fault" means wrongful act, omission or breach.

(17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this subtitle to the extent that under a particular agreement or document unlike units are treated as equivalents.

(18) "Genuine" means free of forgery or counterfeiting.

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

(20) "Holder", with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. The term "holder", with respect to a document of title, means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

(21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

(22) “Insolvency proceedings” includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

(23) A person is “insolvent” who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

(24) “Money” means a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by agreement between 2 or more nations.

(25) A person has “notice” of a fact when:

(a) he has actual knowledge of it; or

(b) he has received a notice or notification of it; or

(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person “knows” or has “knowledge” of a fact when he has actual knowledge of it. “Discover” or “learn” or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this subtitle.

(26) A person “notifies” or “gives” a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person “receives” a notice or notification when:

(a) it comes to his attention; or

(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless the communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

(28) “Organization” includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(29) “Party”, as distinct from “third party”, means a person who has engaged in a transaction or made an agreement within this subtitle.

(30) “Person” includes an individual or an organization (see section 28:1-102).

(31) “Presumption” or “presumed” means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

(32) “Purchase” includes taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or re-issue, gift or any other voluntary transaction creating an interest in property.

(33) “Purchaser” means a person who takes by purchase.

(34) “Remedy” means any remedial right to which an aggrieved party is entitled with or without resort to tribunal.

(35) “Representative” includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

(36) “Rights” includes remedies.

(37) “Security interest” means an interest in personal property or fixtures which secures payment or performance of an obligation. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9. The special property interest of a buyer of goods on identification of those goods to a contract for sale under § 28:2-401 is not a “security interest”, but a buyer may also acquire a “security interest” by complying with Article 9. Except as otherwise provided in § 28:2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a “security interest”, but a seller or lessor may also acquire a security interest by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (§ 28:2-401) is limited in effect to a reservation of a “security interest”.

(38) “Send” in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

(39) “Signed” includes any symbol executed or adopted by a party with present intention to authenticate a writing.

(40) “Surety” includes guarantor.

(41) “Telegram” includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

(42) “Term” means that portion of an agreement which relates to a particular matter.

(43) “Unauthorized signature” means one made without actual, implied, or apparent authority and includes a forgery.

(44) “Value”. Except as otherwise provided with respect to negotiable instruments and bank collections (sections 28:3-303, 28:4-210 and 28:4-211) a person gives “value” for rights if he acquires them:

(a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and

whether or not a charge-back is provided for in the event of difficulties in collection; or

(b) as security for or in total or partial satisfaction of a pre-existing claim; or

(c) by accepting delivery pursuant to a pre-existing contract for purchase; or

(d) generally, in return for any consideration sufficient to support a simple contract.

(45) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.

(46) "Written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form.

(Dec. 30, 1963, 77 Stat. 632, Pub. L. 88-243, § 1; Aug. 30, 1964, 78 Stat. 679, Pub. L. 88-509, § 4; Mar. 16, 1982, D.C. Law 4-85, § 3, 29 DCR 309; July 22, 1992, D.C. Law 9-128, § 2(c)(2), 39 DCR 3830; Mar. 16, 1993, D.C. Law 9-196, § 2, 39 DCR 9165; Mar. 23, 1995, D.C. Law 10-249, § 2(b)(1), 42 DCR 467; Apr. 9, 1997, D.C. Law 11-255, § 27(jj), 44 DCR 1271; Oct. 26, 2000, D.C. Law 13-201, § 201(b)(2), 47 DCR 7576.)

Section references. — This section is referred to in §§ 28:3-103, 28:4A-105, 28:4A-106, 28:7-102, 28:9-105, 28:9-307, 28:9-408, 28:10-104, 40-102, 50-601, and 50-1201.

Prior Codifications. — 1981 Ed., § 28:1-201.

1973 Ed., § 28:1-201.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 4-85. — For legislative history of D.C. Law 4-85, see Historical and Statutory Notes following § 28:1-105.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:1-105.

Legislative history of Law 9-196. — Law 9-196, the "Uniform Commercial Code Investment Securities Amendment Act of 1992," was introduced in Council and assigned Bill No. 9-20, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on October 6, 1992, and November 4, 1992, respectively. Signed by the Mayor on November 25, 1992, it was assigned Act No. 9-321 and trans-

mitted to both Houses of Congress for its review. D.C. Law 9-196 became effective on March 16, 1993.

Legislative history of Law 10-249. — Law 10-249, the "Uniform Commercial Code—Negotiable Instruments Act of 1994," was introduced in Council and assigned Bill No. 10-240, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on January 18, 1995, it was assigned Act No. 10-396 and transmitted to both Houses of Congress for its review. D.C. Law 10-249 became effective on March 23, 1995.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:1-105.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision, Changes and New Matter:

1. "Action". See similar definitions in Section 191, Uniform Negotiable Instruments Law;

Section 76, Uniform Sales Act; Section 58, Uniform Warehouse Receipts Act; Section 53, Uniform Bills of Lading Act. The definition has been rephrased and enlarged.

2. "Aggrieved party". New.

3. "Agreement". New. As used in this Act the word is intended to include full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts thereof, and of any agreement permitted under the provisions of this Act to displace a stated rule of law.

4. "Bank". See Section 191, Uniform Negotiable Instruments Law.

5. "Bearer". From Section 191, Uniform Negotiable Instruments Law. The prior definition has been broadened.

6. "Bill of Lading". See similar definitions in Section 1, Uniform Bills of Lading Act. The definition has been enlarged to include freight forwarders' bills and bills issued by contract carriers as well as those issued by common carriers. The definition of airbill is new.

7. "Branch". New.

8. "Burden of establishing a fact". New.

9. "Buyer in ordinary course of business". From Section 1, Uniform Trusts Receipts Act. The definition has been expanded to make clear the type of person protected. Its major significance lies in Section 2-403 and in the Article on Secured Transactions (Article 9).

The first sentence of paragraph (9) makes clear that a buyer from a pawnbroker cannot be a buyer in ordinary course of business. The second sentence tracks Section 6-102(1)(m). It explains what it means to buy "in the ordinary course." The penultimate sentence prevents a buyer that does not have the right to possession as against the seller from being a buyer in ordinary course of business. Concerning when a buyer obtains possessory rights, see Sections 2-502 and 2-716. However, the penultimate sentence is not intended to affect a buyer's status as a buyer in ordinary course of business in cases (such as a "drop shipment") involving delivery by the seller to a person buying from the buyer or a donee from the buyer. The requirement relates to whether as against the seller the buyer or one taking through the buyer has possessory rights.

10. "Conspicuous". New. This is intended to indicate some of the methods of making a term attention-calling. But the test is whether attention can reasonably be expected to be called to it.

11. "Contract". New. But see Sections 3 and 71, Uniform Sales Act.

12. "Creditor". New.

13. "Defendant". From Section 76, Uniform Sales Act. Rephrased.

14. "Delivery". Section 76, Uniform Sales Act, Section 191, Uniform Negotiable Instruments Law, Section 58, Uniform Warehouse Receipts Act and Section 53, Uniform Bills of Lading Act.

15. "Document of title". From Section 76, Uniform Sales Act, but rephrased to eliminate certain ambiguities. Thus, by making it explicit

that the obligation or designation of a third party as "bailee" is essential to a document of title, this definition clearly rejects any such result as obtained in *Hixson v. Ward*, 254 Ill.App. 505 (1929), which treated a conditional sales contract as a document of title. Also the definition is left open so that new types of documents may be included. It is unforeseeable what documents may one day serve the essential purpose now filled by warehouse receipts and bills of lading. Truck transport has already opened up problems which do not fit the patterns of practice resting upon the assumption that a draft can move through banking channels faster than the goods themselves can reach their destination. There lie ahead air transport and such probabilities as teletype transmission of what may some day be regarded commercially as "Documents of Title". The definition is stated in terms of the function of the documents with the intention that any document which gains commercial recognition as accomplishing the desired result shall be included within its scope. Fungible goods are adequately identified within the language of the definition by identification of the mass of which they are a part.

Dock warrants were within the Sales Act definition of document of title apparently for the purpose of recognizing a valid tender by means of such paper. In current commercial practice a dock warrant or receipt is a kind of interim certificate issued by steamship companies upon delivery of the goods at the dock, entitling a designated person to have issued to him at the company's office a bill of lading. The receipt itself is invariably nonnegotiable in form although it may indicate that a negotiable bill is to be forthcoming. Such a document is not within the general compass of the definition, although trade usage may in some cases entitle such paper to be treated as a document of title. If the dock receipt actually represents a storage obligation undertaken by the shipping company, then it is a warehouse receipt within this Section regardless of the name given to the instrument.

The goods must be "described", but the description may be by marks or labels and may be qualified in such a way as to disclaim personal knowledge of the issuer regarding contents or condition. However, baggage and parcel checks and similar "tokens" of storage which identify stored goods only as those received in exchange for the token are not covered by this Article.

The definition is broad enough to include an airway bill.

16. "Fault". From Section 76, Uniform Sales Act.

17. "Fungible". See Sections 5, 6 and 76, Uniform Sales Act; Section 58, Uniform Warehouse Receipts Act. Fungibility of goods "by agreement" has been added for clarity and accuracy. Amendment approved by the Perma-

nent Editorial Board for Uniform Commercial Code November 4, 1995.

18. "Genuine". New.

19. "Good faith". See Section 76(2), Uniform Sales Act; Section 58(2), Uniform Warehouse Receipts Act; Section 53(2), Uniform Bills of Lading Act; Section 22(2), Uniform Stock Transfer Act. "Good faith", whenever it is used in the Code, means at least what is here stated. In certain Articles, by specific provision, additional requirements are made applicable. See, e.g., Secs. 2-103(1)(b), 7-404. To illustrate, in the Article on Sales, Section 2-103, good faith is expressly defined as including in the case of a merchant observance of reasonable commercial standards of fair dealing in the trade, so that throughout that Article wherever a merchant appears in the case an inquiry into his observance of such standards is necessary to determine his good faith.

20. "Holder". See similar definitions in Section 191, Uniform Negotiable Instruments Law; Section 58, Uniform Warehouse Receipts Act; Section 53, Uniform Bills of Lading Act.

21. "Honor". New.

22. "Insolvency proceedings". New.

23. "Insolvent". Section 76(3), Uniform Sales Act. The three tests of insolvency—"ceased to pay his debts in the ordinary course of business," "cannot pay his debts as they become due," and "insolvent within the meaning of the federal bankruptcy law"—are expressly set up as alternative tests and must be approached from a commercial standpoint.

24. "Money". Section 6(5), Uniform Negotiable Instruments Law. The test adopted is that of sanction of government, whether by authorization before issue or adoption afterward, which recognizes the circulating medium as a part of the official currency of that government. The narrow view that money is limited to legal tender is rejected.

25. "Notice". New. Compare N.I.L. Sec. 56. Under the definition a person has notice when he has received a notification of the fact in question. But by the last sentence the act leaves open the time and circumstances under which notice or notification may cease to be effective. Therefore such cases as *Graham v. White-Phillips Co.*, 296 U.S. 27, 56 S.Ct. 21, 80 L.Ed. 20 (1935), are not overruled.

26. "Notifies". New. This is the word used when the essential fact is the proper dispatch of the notice, not its receipt. Compare "Send". When the essential fact is the other party's receipt of the notice, that is stated. The second sentence states when a notification is received.

27. New. This makes clear that reason to know, knowledge, or a notification, although "received" for instance by a clerk in Department A of an organization, is effective for a transaction conducted in Department B only from the time when it was or should have been commu-

nicated to the individual conducting that transaction.

28. "Organization". This is the definition of every type of entity or association, excluding an individual, acting as such. Definitions of "person" were included in Section 191, Uniform Negotiable Instruments Law; Section 76, Uniform Sales Act; Section 58, Uniform Warehouse Receipts Act; Section 53, Uniform Bills of Lading Act; Section 22, Uniform Stock Transfer Act; Section 1, Uniform Trust Receipts Act. The definition of "organization" given here includes a number of entities or associations not specifically mentioned in prior definition of "person", namely, government, governmental subdivision or agency, business trust, trust and estate.

29. "Party". New. Mention of a party includes, of course, a person acting through an agent. However, where an agent comes into opposition or contrast to his principal, particular account is taken of that situation.

30. "Person". See Comment to definition of "Organization". The reference to Section 1-102 is to subsection (5) of that section.

31. "Presumption". New.

32. "Purchase". Section 58, Uniform Warehouse Receipts Act; Section 76, Uniform Sales Act; Section 53, Uniform Bills of Lading Act; Section 22, Uniform Stock Transfer Act; Section 1, Uniform Trust Receipts Act. Rephrased. With the addition of taking "by ... security interest," the revised definition makes explicit what formerly was implicit.

33. "Purchaser". Section 58, Uniform Warehouse Receipts Act; Section 76, Uniform Sales Act; Section 53, Uniform Bills of Lading Act; Section 22, Uniform Stock Transfer Act; Section 1, Uniform Trust Receipts Act. Rephrased.

34. "Remedy". New. The purpose is to make it clear that both remedy and rights (as defined) include those remedial rights of "self help" which are among the most important bodies of rights under this Act, remedial rights being those to which an aggrieved party can resort on his own motion.

35. "Representative". New.

36. "Rights". New. See Comment to "Remedy".

37. "Security Interest". See Section 1, Uniform Trust Receipts Act. The definition of "security interest" was revised in connection with the promulgation of Article 2A and also to take account of the expanded scope of Article 9 as revised in the 1998 Official Text. It includes the interest of a consignor and the interest of a buyer of accounts, chattel paper, payment intangibles, or promissory notes. See Section 9-109. It also makes clear that, with certain exceptions, in rem rights of sellers and lessors under Articles 2 and 2A are not "security interests." Among the rights that are not security interests are the right to withhold delivery under Section 2-702(1), 2-703(a), or 2A-525, the

right to stop delivery under Section 2-705 or 2A-526, and the right to reclaim under Section 2-507(2) or 2-702(2).

One of the reasons it was decided to codify the law with respect to leases was to resolve an issue that has created considerable confusion in the courts: what is a lease? The confusion exists, in part, due to the last two sentences of the definition of security interest in the 1978 Official Text of the Act. Section 1-201(37). The confusion is compounded by the rather considerable change in the federal, state and local tax laws and accounting rules as they relate to leases of goods. The answer is important because the definition of lease determines not only the rights and remedies of the parties to the lease but also those of third parties. If a transaction creates a lease and not a security interest, the lessee's interest in the goods is limited to its leasehold estate; the residual interest in the goods belongs to the lessor. This has significant implications to the lessee's creditors. "On common law theory, the lessor, since he has not parted with title, is entitled to full protection against the lessee's creditors and trustee in bankruptcy" 1 G. Gilmore, *Security Interests in Personal Property* s 3.6, at 76 (1965).

Under pre-Act chattel security law there was generally no requirement that the lessor file the lease, a financing statement, or the like, to enforce the lease agreement against the lessee or any third party; the Article on Secured Transactions (Article 9) did not change the common law in that respect. Coogan, *Leasing and the Uniform Commercial Code, in Equipment Leasing—Leveraged Leasing* 681, 700 n.25, 729 n.80 (2d ed.1980). The Article on Leases (Article 2A) has not changed the law in that respect, except for leases of fixtures. Section 2A-309. An examination of the common law will not provide an adequate answer to the question of what is a lease. The definition of security interest in Section 1-201(37) of the 1978 Official Text of the Act provides that the Article on Secured Transactions (Article 9) governs security interests disguised as leases, i.e., leases intended as security; however, the definition is vague and outmoded.

Lease is defined in Article 2A as a transfer of the right to possession and use of goods for a term, in return for consideration. Section 2A-103(1)(j). The definition continues by stating that the retention or creation of a security interest is not a lease. Thus, the task of sharpening the line between true leases and security interests disguised as leases continues to be a function of this section.

The first paragraph of this definition is a revised version of the first five sentences of the 1978 Official Text of Section 1-201(37). The changes are modest in that they make a style change in the fourth sentence and delete the

reference to lease in the fifth sentence. The balance of this definition is new, although it preserves elements of the last two sentences of the prior definition. The focus of the changes was to draw a sharper line between leases and security interests disguised as leases to create greater certainty in commercial transactions.

Prior to this amendment, Section 1-201(37) provided that whether a lease was intended as security (i.e., a security interest disguised as a lease) was to be determined from the facts of each case; however, (a) the inclusion of an option to purchase did not itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee would become, or had the option to become, the owner of the property for no additional consideration, or for a nominal consideration, did make the lease one intended for security.

Reference to the intent of the parties to create a lease or security interest has led to unfortunate results. In discovering intent, the courts have relied upon factors that were thought to be more consistent with sales or loans than leases. Most of these criteria, however, are as applicable to true leases as to security interests. Examples include the typical net lease provisions, a purported lessor's lack of storage facilities or its character as a financing party rather than a dealer in goods. Accordingly, amended Section 1-201(37) deletes all reference to the parties' intent.

The second paragraph of the new definition is taken from Section 1(2) of the Uniform Conditional Sales Act (act withdrawn 1943), modified to reflect current leasing practice. Thus, reference to the case law prior to this Act will provide a useful source of precedent. Gilmore, *Security Law, Formalism and Article 9*, 47 Neb.L.Rev. 659, 671 (1968). Whether a transaction creates a lease or a security interest continues to be determined by the facts of each case. The second paragraph further provides that a transaction creates a security interest if the lessee has an obligation to continue paying consideration for the term of the lease, if the obligation is not terminable by the lessee (thus correcting early statutory gloss, e.g., *In re Royer's Bakery, Inc.*, 1 U.C.C. Rep.Serv. (Callaghan) 342 (Bankr.E.D.Pa.1963)) and if one of four additional tests is met. The first of these four tests, subparagraph (a), is that the original lease term is equal to or greater than the remaining economic life of the goods. The second of these tests, subparagraph (b), is that the lessee is either bound to renew the lease for the remaining economic life of the goods or to become the owner of the goods. *In re Gehrke Enters.*, 1 Bankr. 647, 651-52 (Bankr.W.D.Wis.1979). The third of these tests, subparagraph (c), is whether the lessee has an option to renew the lease for the remaining

economic life of the goods for no additional consideration or for nominal additional consideration, which is defined later in this section. In *re Celeryvale Transp.*, 44 Bankr. 1007, 1014-15 (Bankr.E.D.Tenn.1984). The fourth of these tests, subparagraph (d), is whether the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration. All of these tests focus on economics, not the intent of the parties. In *re Berge*, 32 Bankr. 370, 371-73 (Bankr.W.D.Wis.1983).

The focus on economics is reinforced by the next paragraph, which is new. It states that a transaction does not create a security interest merely because the transaction has certain characteristics listed therein. Subparagraph (a) has no statutory derivative; it states that a full payout lease does not per se create a security interest. *Rushton v. Shea*, 419 F.Supp. 1349, 1365 (D.Del.1976). Subparagraph (b) provides the same regarding the provisions of the typical net lease. Compare *All-States Leasing Co. v. Ochs*, 42 Or.App. 319, 600 P.2d 899 (Ct.App.1979) with *In re Tillery*, 571 F.2d 1361 (5th Cir.1978). Subparagraph (c) restates and expands the provisions of former Section 1-201(37) to make clear that the option can be to buy or renew. Subparagraphs (d) and (e) treat fixed price options and provide that fair market value must be determined at the time the transaction is entered into. Compare *Arnold Mach. Co. v. Balls*, 624 P.2d 678 (Utah 1981) with *Aoki v. Shepherd Mach. Co.*, 665 F.2d 941 (9th Cir.1982).

The relationship of the second paragraph of this subsection to the third paragraph of this subsection deserves to be explored. The fixed price purchase option provides a useful example. A fixed price purchase option in a lease does not of itself create a security interest. This is particularly true if the fixed price is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed. A security interest is created only if the option price is nominal and the conditions stated in the introduction to the second paragraph of this subsection are met. There is a set of purchase options whose fixed price is less than fair market value but greater than nominal that must be determined on the facts of each case to ascertain whether the transaction in which the option is included creates a lease or a security interest.

It was possible to provide for various other permutations and combinations with respect to options to purchase and renew. For example, this section could have stated a rule to govern the facts of *In re Marhoefer Packing Co.*, 674 F.2d 1139 (7th Cir.1982). This was not done because it would unnecessarily complicate the definition. Further development of this rule is left to the courts.

The fourth paragraph provides definitions and rules of construction.

38. "Send". New. Compare "notifies".

39. "Signed". New. The inclusion of authentication in the definition of "signed" is to make clear that as the term is used in this Act a complete signature is not necessary. Authentication may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible authentications can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing.

40. "Surety". New.

41. "Telegram". New.

42. "Term". New.

43. Under the former version of s 1-201(43), it was not clear whether a reference to an "unauthorized signature" in Articles 3 and 4 applied to indorsements. The words "or indorsement" are deleted so that references to "unauthorized signature" in s 3-406 and elsewhere will unambiguously refer to any signature.

44. "Value". See Sections 25, 26, 27, 191, Uniform Negotiable Instruments Law; Section 76, Uniform Sales Act; Section 53, Uniform Bills of Lading Act; Section 58, Uniform Warehouse Receipts Act; Section 22(1), Uniform Stock Transfer Act; Section 1, Uniform Trust Receipts Act. All the Uniform Acts in the commercial law field (except the Uniform Conditional Sales Act) have carried definitions of "value". All those definitions provided that value was any consideration sufficient to support a simple contract, including the taking of property in satisfaction of or as security for a pre-existing claim. Subsections (a), (b) and (d) in substance continue the definitions of "value" in the earlier acts. Subsection (c) makes explicit that "value" is also given in a third situation: where a buyer by taking delivery under a pre-existing contract converts a contingent into a fixed obligation.

This definition is not applicable to Articles 3 and 4, but the express inclusion of immediately available credit as value follows the separate definitions in those Articles. See Sections 4-208, 4-209, 3-303. A bank or other financing agency which in good faith makes advances against property held as collateral becomes a bona fide purchaser of that property even though provision may be made for charge-back in case of trouble. Checking credit is "immediately available" within the meaning of this section if the bank would be subject to an action for slander of credit in case checks drawn against the credit were dishonored, and when a charge-back is not discretionary with the bank, but may only

be made when difficulties in collection arise in connection with the specific transaction involved.

45. "Warehouse receipt". See Section 76(1), Uniform Sales Act; Section 1, Uniform Warehouse Receipts Act. Receipts issued by a field

warehouse are included, provided the warehouseman and the depositor of the goods are different persons.

46. "Written" or "writing". This is a broadening of the definition contained in Section 191 of the Uniform Negotiable Instruments Law.

CASE NOTES

ANALYSIS

Commercially reasonable manner.

Holder in due course.

Indorsement.

Own.

Perfection of security interest.

Property of another.

Warehouse receipts.

Warehouseman.

Without recourse.

Commercially reasonable manner.

Depository bank that has not acted in a commercially reasonable manner in taking checks over forged endorsements is not absolutely liable but may have available to it defenses of ratification and apparent authority. D.C. Code 1981, § 28:3-419. *Kuwait Airways Corp. v. American Sec. Bank, N.A.*, 890 F.2d 456, 1989 U.S. App. LEXIS 17944 (C.A.D.C. 1989).

Holder in due course.

Courts deny holder in due course status to noteholder who was involved in or intimately connected with sale or transaction which generated note; having taken part in original transaction with borrower, noteholder cannot thereafter stand aloof as holder in due course and in good faith. D.C. Code §§ 28:1-201(19, 25), 28:3-302, 28:3-307(3). *Slaughter v. Jefferson Federal Sav. & Loan Asso.*, 538 F.2d 397, 1976 U.S. App. LEXIS 8449 (C.A.D.C. 1976).

Mortgagors sufficiently alleged that mortgagee's assignee was a holder in due course, as required under District of Columbia law for mortgagors to assert claims against assignee in connection with their refinance loan, where they alleged that assignee knew or should have known that they could not afford the loan and that there was no reasonable probability that they could pay it. *Carroll v. Fremont Inv. & Loan*, 636 F.Supp.2d 41, 2009 U.S. Dist. LEXIS 61645 (2009).

Where finance company bought second trust notes, which arose from corporation's fraudulent home improvement scheme, from broker, who was not an agent of company, paid value for notes, acted in good faith without notice of any defenses to notes and bought such notes only for a short period and stopped when it learned of corporation's undesirable practices, company was a "holder in due course" and thus

was free of claims of fraud in the inducement, unconscionability and usury. D.C. Code §§ 28:1-101 et seq., 28:1-201(19, 25), 28:3-302, 28:3-302(2), 28:3-306, 28:3-307(3). *Slaughter v. Jefferson Federal Sav. & Loan Asso.*, 361 F. Supp. 590, 1973 U.S. Dist. LEXIS 12565 (1973), reversed by 538 F.2d 397, 176 U.S. App. D.C. 49, 1976 U.S. App. LEXIS 8449, 1976 U.S. App. LEXIS 11596, 19 U.C.C. Rep. Serv. (CBC) 171, 19 U.C.C. Rep. Serv. (CBC) 534 (1976).

Where associations, which refinanced mortgages so as to finance unconscionable home improvement contracts, knew that many of homeowners were of limited intelligence and were being refinanced out of notes with lower interest rates of monthly payments and where such associations were concerned solely with sufficiency of their security and did not inquire into bona fides and contract requirements and settlements adjustments, associations had not acted in good faith and thus were not "holders in due course" of homeowners' first trust notes and were not immune from defenses of fraud in the inducement, unconscionable dealing and usury. D.C. Code §§ 28:1-201(19, 25), 28:3-302, 28:3-302(2), 28:3-306, 28:3-307(3). *Slaughter v. Jefferson Federal Sav. & Loan Asso.*, 361 F. Supp. 590, 1973 U.S. Dist. LEXIS 12565 (1973), reversed by 538 F.2d 397, 176 U.S. App. D.C. 49, 1976 U.S. App. LEXIS 8449, 1976 U.S. App. LEXIS 11596, 19 U.C.C. Rep. Serv. (CBC) 171, 19 U.C.C. Rep. Serv. (CBC) 534 (1976).

Physical holder of unendorsed note drawn to order is not a "holder in due course." D.C. Code 1981, § 28:3-302. *Big Builders v. Israel*, 709 A.2d 74, 1998 D.C. App. LEXIS 54 (1998).

Holder establishes good faith, as required for holder in due course status, by testifying that he took instrument in complete innocence and by disclosing circumstances of transfer. D.C. Code 1981, § 28:3-302(a)(2)(ii). *Big Builders v. Israel*, 709 A.2d 74, 1998 D.C. App. LEXIS 54 (1998).

Indorsement.

Signature on separate unattached paper is not an "indorsement" of the commercial paper. D.C. Code 1981, § 28:3-204(a). *Big Builders v. Israel*, 709 A.2d 74, 1998 D.C. App. LEXIS 54 (1998).

Own.

Trial court's finding that defendant did not "own" merchandise, so as to be guilty of shop-

lifting, was supported by testimony of security officer that other party had informed him that defendant had shoplifted gloves, that security officer had observed defendant set off security alarm as he exited from department store, and that merchandise recovered from defendant's shoulder bag still bore store's price tags. D.C. Code 1981, §§ 22-3801(4), 22-3813(a). *Alston v. United States*, 509 A.2d 1129, 1986 D.C. App. LEXIS 335 (1986).

Perfection of security interest.

Proprietary lease document for cooperative apartment was not "security" for purposes of Uniform Commercial Code sections providing that perfection by possession is possibility with respect to "instruments," and incorporating definition of security into definition of "instrument"; thus, creditor could not perfect security interest in borrower's right to apartment by creditor's possession of that document. D.C. Code 1981, §§ 28:8-102(1)(a), 28:9-105(1)(i), 28:9-305. *First Sav. Bank v. Barclays Bank, S.A.*, 618 A.2d 134, 1992 D.C. App. LEXIS 318 (1992).

Where Canadian corporation with no offices in the United States appointed plaintiff as sales representative for corporation's office furniture, plaintiff arranged sales to District of Columbia buyer, the furniture was delivered, and the corporation assigned the accounts receivable to Canadian factor with notice to buyer to pay to the factor, factor filed in Canada the assignment which identified the corporation as debtor and the factor as secured party, factor perfected his security interest in the buyer's outstanding obligation to the corporation within the meaning of District of Columbia Code, and such interest was superior to plaintiff's lien by attachment for unpaid commissions. D.C. Code § 28:9-103(5). *Heller v. Buchbinder*, 399 A.2d 850, 1979 D.C. App. LEXIS 317 (1979).

Property of another.

Government did not have to affirmatively prove, in accordance with District of Columbia statute defining "property of another," that

gloves which defendant took were merchandise in which department store had more than security interest in order to make out prima facie case of shoplifting. D.C. Code 1981, §§ 22-3801(4), 22-3813(a). *Alston v. United States*, 509 A.2d 1129, 1986 D.C. App. LEXIS 335 (1986).

Warehouse receipts.

Household goods descriptive inventory which listed and described items stored by warehouseman, which stated no value for items, and which was signed by apparent officer of warehouseman, but not property owner, was "receipt issued by person engaged in business of storing goods for hire," and, therefore, "warehouse receipt" and "document of title." D.C. Code 1981, §§ 28:1-201(15, 45), 28:7-102(1)(e, g), 28:7-202, 28:7-401; Civil Rule 41(b). *Alston v. United States*, 509 A.2d 1129, 1986 D.C. App. LEXIS 335 (1986).

Warehouseman.

Warehouseman which was engaged in business of storing goods for hire was "warehouseman" required to exercise care of reasonably careful person without regard to whether document issued by warehouseman, household goods descriptive inventory, was "warehouse receipt." D.C. Code 1981, §§ 28:1-201(15, 45), 28:7-102(1)(e, g, h), 28:7-202, 28:7-202(2), 28:7-204(1, 2), 28:7-401; Civil Rule 41(b). *Alston v. United States*, 509 A.2d 1129, 1986 D.C. App. LEXIS 335 (1986).

Without recourse.

Although, with respect to unenforceability of note endorsed "without recourse" because of illegality of underlying loan, transferee had full knowledge of same facts as its transferor and made the same "mistake" of law, transferee did not subjectively know when it accepted the note that a good defense existed against it, and thus was entitled to coverage of warranty. D.C. Code §§ 28:1-103, 28:1-201(19), 28:3-417(2). *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

§ 28:1-202. Prima facie evidence by third party documents.

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

(Dec. 30, 1963, 77 Stat. 636, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:1-202. 1973 Ed., § 28:1-202.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. This section is designed to supply judicial recognition for documents which have traditionally been relied upon as trustworthy by commercial men.

2. This section is concerned only with documents which have been given a preferred status by the parties themselves who have required their procurement in the agreement and for this reason the applicability of the section is limited to actions arising out of the contract which authorized or required the document.

The documents listed are intended to be illustrative and not all inclusive.

3. The provisions of this section go no further than establishing the documents in question as prima facie evidence and leave to the court the ultimate determination of the facts where the accuracy or authenticity of the documents is questioned. In this connection the section calls for a commercially reasonable interpretation.

Definitional Cross References:

"Bill of lading". Section 1-201.

"Contract". Section 1-201.

"Genuine". Section 1-201.

§ 28:1-203. Obligation of good faith.

Every contract or duty within this subtitle imposes an obligation of good faith in its performance or enforcement.

(Dec. 30, 1963, 77 Stat. 636, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:1-203. 1973 Ed., § 28:1-203.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

This section sets forth a basic principle running throughout this Act. The principle involved is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties. Particular applications of this general principle appear in specific provisions of the Act such as the option to accelerate at will (Section 1-208), the right to cure a defective delivery of goods (Section 2-508), the duty of a merchant buyer who has rejected goods to effect salvage operations (Section 2-603), substituted performance (Section 2-614), and failure of presupposed conditions (Section 2-615). The concept, however, is broader than any of these illustrations and applies generally, as stated in this section, to the performance or enforcement of every contract or duty within this Act. It is further implemented by Section 1-205 on course of dealing and usage of trade. This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to

perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached. See PEB Commentary No. 10, dated February 10, 1994 [Uniform Laws Annotated, UCC, APP II, Comment 10].

It is to be noted that under the Sales Article definition of good faith (Section 2-103), contracts made by a merchant have incorporated in them the explicit standard not only of honesty in fact (Section 1-201), but also of observance by the merchant of reasonable commercial standards of fair dealing in the trade.

Cross References:

Sections 1-201; 1-205; 1-208; 2-103; 2-508; 2-603; 2-614; 2-615.

Definitional Cross References:

"Contract". Section 1-201.

"Good faith". Sections 1-201; 2-103.

CASE NOTES

ANALYSIS

Anticipatory breach.
Fact question.
In general.

Anticipatory breach.

Diesel fuel seller's communications with transit authority detailing seller's difficulties in obtaining supplier of fuel was not "anticipatory breach" of diesel fuel supply contract, where communication only established that, on day before contract became nullity due to failure of condition precedent, seller was having trouble obtaining fuel, that seller would be unable to begin deliveries on date previously agreed upon, and that seller was seeking alternative sources of supply and hoped to secure one within few days. *Gatoil (U.S.A.) v. Washington Metro. Area Transit Auth.*, 801 F.2d 451, 1986 U.S. App. LEXIS 30683 (C.A.D.C. 1986).

Fact question.

In breach of contract action brought by transit authority against diesel fuel seller to recover difference between contract price and price paid by authority to obtain replacement fuel, substantial issues of material fact existed as to whether seller acted in honesty in fact or observed standards of fair dealing in trade in attempting to obtain performance bond, which was condition precedent to contract. *Gatoil (U.S.A.) v. Washington Metro. Area Transit Auth.*, 801 F.2d 451, 1986 U.S. App. LEXIS 30683 (C.A.D.C. 1986).

Fact issue was presented as to whether seller of roofing materials had broken its obligation of good faith and would be unable to claim benefit of clause in contract limiting its liability for damages which was not unconscionable, precluding summary judgment in action by buyer, where buyer contended that seller acted in bad faith in its proposals to repair roof coatings pursuant to exclusive remedy in contract by seeking to repair by applying another layer of coating in violation of its own product specifications and by never testing whether second application of coating would properly adhere to existing layer of same coating. D.C. Code 1981, §§ 28:1-203, 28:2-719(3). *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

In general.

Provision of Uniform Commercial Code concerning requirements contracts does not preclude good-faith reductions that are highly disproportionate to normal prior requirements or stated estimates. D.C. Code § 28:2-306(1). *R.A. Weaver & Associates, Inc. v. Asphalt Constr., Inc.*, 587 F.2d 1315, 1978 U.S. App. LEXIS 8260 (C.A.D.C. 1978).

Seller who acted in bad faith may not claim benefit of limitation of remedy contained in contract for sale of goods that by itself would be valid. D.C. Code 1981, §§ 28:1-203, 28:2-719(3). *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Under District of Columbia law, obligation of good faith in enforcement or performance of every contract is imposed. D.C. Code 1981, § 28:1-203. *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Common-law D'Oench Duhme doctrine did not bar borrower's claim against Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank, alleging breach of duty of good faith and fair dealing which was implied into every contract as a matter of law by District of Columbia statute; FDIC had duty to know law and any obligations imposed by such laws and could not escape imposition of such obligation by reliance on D'Oench Duhme doctrine. D.C. Code 1981, § 28:1-203. *Beitzell & Co. v. FDIC (In re Beitzell & Co.)*, 163 B.R. 637, 1993 Bankr. LEXIS 2054 (1993).

Because obligation of good faith could be said to be part of loan documents under District of Columbia statute that imposed duty of good faith as matter of law into every contract, requirements of codified version of D'Oench Duhme doctrine were satisfied because loan agreement itself fulfilled those requirements. D.C. Code 1981, § 28:1-203; Federal Deposit Insurance Act, § 2[13](e), 12 U.S.C. § 1823(e). *Beitzell & Co. v. FDIC (In re Beitzell & Co.)*, 163 B.R. 637, 1993 Bankr. LEXIS 2054 (1993).

In context of claim for breach of the covenant of good faith and fair dealing, "bad faith" involves evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance; "bad faith" means more than mere negligence. *Allworth v. Howard Univ.*, 890 A.2d 194, 2006 D.C. App. LEXIS 4 (2006).

Subterfuges and evasions are not included in examples of "good faith" for purposes of claim for breach of the covenant of good faith and fair dealing, and "bad faith" may be overt or may consist of inaction, and "fair dealing" may require more than honesty. *Allworth v. Howard Univ.*, 890 A.2d 194, 2006 D.C. App. LEXIS 4 (2006).

"Good faith" performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they

violate standards of decency, fairness or reasonableness. *Allworth v. Howard Univ.*, 890 A.2d 194, 2006 D.C. App. LEXIS 4 (2006).

If the party to a contract evades the spirit of the contract, willfully renders imperfect perfor-

mance, or interferes with performance by the other party, he or she may be liable for breach of the implied covenant of good faith and fair dealing. *Allworth v. Howard Univ.*, 890 A.2d 194, 2006 D.C. App. LEXIS 4 (2006).

§ 28:1-204. Time; reasonable time; “seasonably”.

(1) Whenever this subtitle requires any action to be taken within a reasonable time, any time which is not manifested unreasonable may be fixed by agreement.

(2) What is a reasonable time for asking any action depends on the nature, purpose and circumstances of such action.

(3) An action is taken, “seasonably” when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

(Dec. 30, 1963, 77 Stat. 636, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:4A-204.

Prior Codifications. — 1981 Ed., § 28:1-204.

1973 Ed., § 28:1-204.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Compare Section 193, Negotiable Instruments Law.

Purposes:

1. Subsection (1) recognizes that nothing is stronger evidence of a reasonable time than the fixing of such time by a fair agreement between the parties. However, provision is made for disregarding a clause which whether by inadvertence or overreaching fixes a time so unreasonable that it amounts to eliminating all remedy under the contract. The parties are not required to fix the most reasonable time but

may fix any time which is not obviously unfair as judged by the time of contracting.

2. Under the section, the agreement which fixes the time need not be part of the main agreement, but may occur separately. Notice also that under the definition of “agreement” (Section 1-201) the circumstances of the transaction, including course of dealing or usages of trade or course of performance may be material. On the question what is a reasonable time these matters will often be important.

Definitional Cross Reference: “Agreement”. Section 1-201.

§ 28:1-205. Course of dealing and usage of trade.

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

(Dec. 30, 1963, 77 Stat. 636, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:1-201, 28:2-202, and 28:2-208.

Prior Codifications. — 1981 Ed., § 28:1-205.

1973 Ed., § 28:1-205.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: No such general provision but see Sections 9(1), 15(5), 18(2), and 71, Uniform Sales Act.

Purposes: This section makes it clear that:

1. This Act rejects both the “lay-dictionary” and the “conveyancer’s” reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing.

2. Course of dealing under subsection (1) is restricted, literally, to a sequence of conduct between the parties previous to the agreement. However, the provisions of the Act on course of performance make it clear that a sequence of conduct after or under the agreement may have equivalent meaning. (Section 2-208.)

3. “Course of dealing” may enter the agreement either by explicit provisions of the agreement or by tacit recognition.

4. This Act deals with “usage of trade” as a factor in reaching the commercial meaning of the agreement which the parties have made. The language used is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade. By adopting in this context the term “usage of trade” this Act expresses its intent to reject those cases which see evidence of “custom” as representing an effort to displace or negate “established rules of law”. A distinction is to be drawn between

mandatory rules of law such as the Statute of Frauds provisions of Article 2 on Sales whose very office is to control and restrict the actions of the parties, and which cannot be abrogated by agreement, or by a usage of trade, and those rules of law (such as those in Part 3 of Article 2 on Sales) which fill in points which the parties have not considered and in fact agreed upon. The latter rules hold “unless otherwise agreed” but yield to the contrary agreement of the parties. Part of the agreement of the parties to which such rules yield is to be sought for in the usages of trade which furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding.

5. A usage of trade under subsection (2) must have the “regularity of observance” specified. The ancient English tests for “custom” are abandoned in this connection. Therefore, it is not required that a usage of trade be “ancient or immemorial”, “universal” or the like. Under the requirement of subsection (2) full recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree. There is room also for proper recognition of usage agreed upon by merchants in trade codes.

6. The policy of this Act controlling explicit unconscionable contracts and clauses (Sections 1-203, 2-302) applies to implicit clauses which rest on usage of trade and carries forward the policy underlying the ancient requirement that a custom or usage must be “reasonable”. However, the emphasis is shifted. The very fact of

commercial acceptance makes out a prima facie case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable. But the anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard.

7. Subsection (3), giving the prescribed effect to usages of which the parties "are or should be aware", reinforces the provision of subsection (2) requiring not universality but only the described "regularity of observance" of the practice or method. This subsection also reinforces the point of subsection (2) that such usages may be either general to trade or particular to a special branch of trade.

8. Although the terms in which this Act defines "agreement" include the elements of course of dealing and usage of trade, the fact that express reference is made in some sections to those elements is not to be construed as carrying a contrary intent or implication elsewhere. Compare Section 1-102(4).

9. In cases of a well established line of usage varying from the general rules of this Act where the precise amount of the variation has not

been worked out into a single standard, the party relying on the usage is entitled, in any event, to the minimum variation demonstrated. The whole is not to be disregarded because no particular line of detail has been established. In case a dominant pattern has been fairly evidenced, the party relying on the usage is entitled under this section to go to the trier of fact on the question of whether such dominant pattern has been incorporated into the agreement.

10. Subsection (6) is intended to insure that this Act's liberal recognition of the needs of commerce in regard to usage of trade shall not be made into an instrument of abuse.

Cross References:

Point 1: Sections 1-203, 2-104 and 2-202.

Point 2: Section 2-208.

Point 4: Section 2-201 and Part 3 of Article 2.

Point 6: Sections 1-203 and 2-302.

Point 8: Sections 1-102 and 1-201.

Point 9: Section 2-204(3).

Definitional Cross References:

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Party". Section 1-201.

"Term". Section 1-201.

CASE NOTES

ANALYSIS

Construction of contracts.

Course of performance.

Evidence.

In general.

Construction of contracts.

Under District of Columbia law, while parties' mutual assent to contract is most clearly evidenced by terms of a signed written agreement, such a signed writing is not essential to formation of contract. *Sturdza v. Gov't of the United Arab Emirates*, 281 F.3d 1287, 2002 U.S. App. LEXIS 3650 (C.A.D.C.2002), remanded by 2002 U.S. App. LEXIS 11470 (D.C. Cir. June 6, 2002).

If language used in contract is ambiguous or vague and does not in itself disclose parties' intent, then court must resort to usage or other surrounding circumstances existing at time contract was made to divine intent of parties. *Carey Canada, Inc. v. Columbia Casualty Co.*, 940 F.2d 1548, 1991 U.S. App. LEXIS 17891 (C.A.D.C. 1991).

Methane company's retention of investor's money would be unjust, for purposes of establishing unjust enrichment under District of Columbia law, where investor gave company \$180,000 to secure a stake in the company, company accepted and used money under guise of an investment, but company failed to provide investor with written stock purchase agree-

ment, a signed, executed stock certificate, or any other executed documents that might evidence investor's ownership in company, failed to treat investor as an owner of the company in any way, and was unwilling or unable to provide investor with confirmation of any of its business dealings. *Lozinsky v. Ga. Res. Mgmt., LLC*, 734 F.Supp.2d 150, 2010 U.S. Dist. LEXIS 92169 (2010).

Under District of Columbia law, first step in construction of contracts is to determine what reasonable person in position of parties would have thought disputed language meant. *Sigmund v. Progressive Northern Ins. Co.*, 374 F.Supp.2d 33, 2005 U.S. Dist. LEXIS 11549 (2005).

Under District of Columbia law, quasi-contractual obligation does not arise when it would not be unfair for recipient to keep benefit without having to pay for it; plaintiff must prove not only that he has conferred an advantage upon defendant, but that retention of benefit without compensating one who conferred it is unjustified. *Perles v. Kagy*, 362 F.Supp.2d 195, 2005 U.S. Dist. LEXIS 4202 (2005).

Under District of Columbia law, existence of contract implied-in-fact requires finding of traditional fundamental contract elements other than expression, e.g. agreement as to all material terms including consideration. *Perles v. Kagy*, 362 F.Supp.2d 195, 2005 U.S. Dist. LEXIS 4202 (2005).

To establish existence of contract implied-in-fact under District of Columbia law, party must initially demonstrate: (1) that valuable services were rendered; (2) to person from whom recovery is sought; (3) which services were accepted by that person; and (4) under such circumstances as reasonably notified person that plaintiff expected to be paid by that person. *Perles v. Kagy*, 362 F.Supp.2d 195, 2005 U.S. Dist. LEXIS 4202 (2005).

Under District of Columbia law, for enforceable agreement to exist, there must be both (1) agreement as to all material terms, and (2) intention of parties to be bound. *Cambridge Holdings Group, Inc. v. Fed. Ins. Co.*, 357 F.Supp.2d 89, 2004 U.S. Dist. LEXIS 27009 (2004), appeal dismissed by 489 F.3d 1356, 376 U.S. App. D.C. 520, 2007 U.S. App. LEXIS 14360, 67 Fed. R. Serv. 3d (Callaghan) 1397 (2007).

In the District of Columbia a contract is formed when the offer is accepted. *Samra v. Shaheen Bus. & Inv. Group, Inc.*, 355 F.Supp.2d 483, 2005 U.S. Dist. LEXIS 1272 (2005).

In examining whether a contract is unconscionable under District of Columbia law, the court must determine whether one party lacked a meaningful choice and the contract terms were unreasonably favorable to the other party. *Booker v. Robert Half Int'l, Inc.*, 315 F.Supp.2d 94, 2004 U.S. Dist. LEXIS 7242 (2004), affirmed by 413 F.3d 77, 367 U.S. App. D.C. 77, 2005 U.S. App. LEXIS 13124, 86 Empl. Prac. Dec. (CCH) P42000, 95 Fair Empl. Prac. Cas. (BNA) 1841, 151 Lab. Cas. (CCH) P60027 (2005).

Under District of Columbia law, a signature on a contract indicates mutuality of assent and a party is bound by the contract unless he or she can show special circumstances relieving him or her of such an obligation. *Booker v. Robert Half Int'l, Inc.*, 315 F.Supp.2d 94, 2004 U.S. Dist. LEXIS 7242 (2004), affirmed by 413 F.3d 77, 367 U.S. App. D.C. 77, 2005 U.S. App. LEXIS 13124, 86 Empl. Prac. Dec. (CCH) P42000, 95 Fair Empl. Prac. Cas. (BNA) 1841, 151 Lab. Cas. (CCH) P60027 (2005).

Under District of Columbia law, signature on contract indicates mutuality of assent and party is bound by contract unless he or she can show special circumstances relieving him or her of such an obligation. *Sapiro v. VeriSign*, 310 F.Supp.2d 208, 2004 U.S. Dist. LEXIS 4940 (2004).

Under District of Columbia law, contract should be read so as to honor intent of what reasonable person, in position of parties at time contract was executed, would have thought. *Sapiro v. VeriSign*, 310 F.Supp.2d 208, 2004 U.S. Dist. LEXIS 4940 (2004).

In analyzing claim that contract was unconscionable, determination of whether party had meaningful choice in execution of contract can

only be made by consideration of all circumstances surrounding transaction; factors court can consider in making this determination include (1) whether meaningfulness of choice is negated by gross inequality of bargaining power and (2) circumstances surrounding contract's formation, i.e., whether each party to contract, considering his or her obvious education or lack thereof, had reasonable opportunity to understand terms of contract, or whether important terms were hidden in maze of fine print and minimized by deceptive sales practices. *Brown v. Dorsey & Whitney, LLP*, 267 F.Supp.2d 61, 2003 U.S. Dist. LEXIS 10132 (2003).

Signature on contract indicates mutuality of assent and party is bound by contract unless he or she can show special circumstances relieving him or her of that obligation. *Brown v. Dorsey & Whitney, LLP*, 267 F.Supp.2d 61, 2003 U.S. Dist. LEXIS 10132 (2003).

Under District of Columbia law, the reasonableness determination involving an evaluation of the surrounding circumstances in determining what a reasonable person in the position of the parties would have thought of the disputed contract language is to be applied whether the contract's language appears ambiguous or not. *Greene v. Rumsfeld*, 266 F.Supp.2d 125, 2003 U.S. Dist. LEXIS 9531 (2003).

The objective reasonable person assessing the contract's language is presumed to know all the circumstances before and contemporaneous with the making of the agreement and extrinsic evidence is admissible under District of Columbia law to determine the nature of those circumstances. *Greene v. Rumsfeld*, 266 F.Supp.2d 125, 2003 U.S. Dist. LEXIS 9531 (2003).

Although extrinsic evidence of the parties' subjective intent in making a contract under District of Columbia law may be resorted to only if the document is ambiguous, extrinsic evidence may be considered to determine the circumstances surrounding the making of the contract so that it may be ascertained what a reasonable person in the position of the parties would have thought the words meant. *Greene v. Rumsfeld*, 266 F.Supp.2d 125, 2003 U.S. Dist. LEXIS 9531 (2003).

Under District of Columbia law, provision in asset purchase and sales agreement requiring buyer to assume liability and indemnify seller for expenses related to asbestos-related lawsuits "which have been filed with any state or federal court having jurisdiction prior to the Closing Date" was ambiguous as to buyer's liability arising from suit filed before closing date, but which did not name seller as defendant until after closing date, and thus court could consider extrinsic evidence to determine provision's scope in seller's suit seeking con-

tractual indemnification for sums it paid in connection with suit. *Potomac Elec. Power Co. v. Mirant Corp.*, 251 F.Supp.2d 144, 2003 U.S. Dist. LEXIS 3487 (2003).

In the District of Columbia, a complete enforceable contract exists when there is (1) an agreement as to all the material terms; and (2) an intention of the parties to be bound. *Hood v. District of Columbia*, 211 F.Supp.2d 176, 2002 U.S. Dist. LEXIS 13531 (2002).

Under District of Columbia law, there must thus be an honest and fair meeting of the minds as to all issues in a contract. *Hood v. District of Columbia*, 211 F.Supp.2d 176, 2002 U.S. Dist. LEXIS 13531 (2002).

Under District of Columbia law, mutual assent is most clearly evinced by the terms of a signed written agreement, but such a signed writing is not essential to the formation of a contract; the parties' acts at the time of the making of the contract are also indicative of a meeting of the minds. *Hood v. District of Columbia*, 211 F.Supp.2d 176, 2002 U.S. Dist. LEXIS 13531 (2002).

Under District of Columbia law, a valid and enforceable contract requires both (1) agreement as to all material terms, and (2) intention of the parties to be bound; thus, there must be an honest and fair meeting of the minds as to all issues in a contract. *Johnson v. Mercedes-Benz, USA, LLC*, 182 F.Supp.2d 58, 2002 U.S. Dist. LEXIS 862 (2002).

Under either Russian, Canadian or District of Columbia law, there was no basis upon which to infer an exclusivity contract between the parties whereby Canadian company would be the sole and exclusive purchaser of Russian SKS carbine rifles for distribution in the United States and Canada since several material terms were missing from the alleged agreement; parties' correspondence did not adequately specify the subject matter of the contract, the number of goods to be exclusively sold to Canadian company and the duration or geographical scope of the exclusivity. *Century Int'l Arms, LTD. v. Fed. State Unitary Enter. State Corp. Rosvoorouzhnie*, 172 F.Supp.2d 79, 2001 U.S. Dist. LEXIS 17251 (2001).

Under District of Columbia law, a contract must be sufficiently definite as to its material terms (which include, e.g., subject matter, price, payment terms, quantity, quality, and duration) that the promises and performance to be rendered by each party are reasonably certain; test is met when the contract provides a sufficient basis for determining whether a breach has occurred and for identifying an appropriate remedy. *Century Int'l Arms, LTD. v. Fed. State Unitary Enter. State Corp. Rosvoorouzhnie*, 172 F.Supp.2d 79, 2001 U.S. Dist. LEXIS 17251 (2001).

Evidence of trade custom is admissible in contracts action, not to contradict terms of any

agreement, but to explain or supplement agreement or undertaking and intentions of parties when consistent with terms of agreement. *Piland Corp. v. Rea Constr. Co.*, 672 F. Supp. 244, 1987 U.S. Dist. LEXIS 10000 (1987).

Lawful and existing business customs or usage concerning subject matter of contract may be received in evidence to explain ambiguities in contracts or to add stipulations about which contract is silence. *Piland Corp. v. Rea Constr. Co.*, 672 F. Supp. 244, 1987 U.S. Dist. LEXIS 10000 (1987).

Unjust enrichment occurs when: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust. *News World Communs., Inc. v. Thompson*, 878 A.2d 1218, 2005 D.C. App. LEXIS 380 (2005).

For the plaintiff to recover on a quasi-contractual claim, he must show that the defendant was unjustly enriched at his expense and that the circumstances were such that in good conscience the defendant should make restitution. *News World Communs., Inc. v. Thompson*, 878 A.2d 1218, 2005 D.C. App. LEXIS 380 (2005).

Where a contract may reasonably be viewed as having more than one possible meaning, the court may look not only to the language employed, but also to the subject-matter and the surrounding circumstances, and may avail itself of the same light which the parties possessed when the contract was made. *Independence Mgmt. Co. v. Anderson & Summers, LLC*, 874 A.2d 862, 2005 D.C. App. LEXIS 252 (2005).

A court must honor the intentions of the parties as reflected in the settled usage of the terms they accepted in the contract and will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. *Independence Mgmt. Co. v. Anderson & Summers, LLC*, 874 A.2d 862, 2005 D.C. App. LEXIS 252 (2005).

Where the contractual language in question is unambiguous, its interpretation is a question of law for the court. *Independence Mgmt. Co. v. Anderson & Summers, LLC*, 874 A.2d 862, 2005 D.C. App. LEXIS 252 (2005).

The writing evidencing a contract must be interpreted as a whole, giving a reasonable, lawful, and effective meaning to all its terms. *Independence Mgmt. Co. v. Anderson & Summers, LLC*, 874 A.2d 862, 2005 D.C. App. LEXIS 252 (2005).

In construing a contract, a court must determine what a reasonable person in the position of the parties would have thought the disputed language meant. *Independence Mgmt. Co. v. Anderson & Summers, LLC*, 874 A.2d 862, 2005 D.C. App. LEXIS 252 (2005).

An "implied-in-fact contract" is a true contract, containing all necessary elements of a binding agreement; it differs from other contracts only in that it has not been committed to writing or stated orally in express terms, but is inferred from the conduct of the parties in the milieu in which they dealt. *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 2005 D.C. App. LEXIS 42 (2005).

Bylaws and other contracts are to be construed as a whole in a manner consistent with the clear, simple and unambiguous meaning of their language. *Mesheh v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 2005 D.C. App. LEXIS 49 (2005).

Court must honor the intentions of the parties as reflected in the settled usage of the terms they accepted in contract, and will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. *Bragdon v. Twenty-Five Twelve Assocs. L.P.*, 856 A.2d 1165, 2004 D.C. App. LEXIS 438 (2004).

Courts follow what has been called the "objective" law of contracts, which generally means that the written language embodying the terms of an agreement will govern the rights and liabilities of the parties, regardless of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of a clear and definite undertaking, or unless there is fraud, duress, or mutual mistake. *Bragdon v. Twenty-Five Twelve Assocs. L.P.*, 856 A.2d 1165, 2004 D.C. App. LEXIS 438 (2004).

In every contract, there is an implied covenant of good faith and fair dealing that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Willens v. 2720 Wis. Ave. Coop. Ass'n*, 844 A.2d 1126, 2004 D.C. App. LEXIS 67 (2004).

A writing must be interpreted as a whole, giving a reasonable, lawful, and effective meaning to all its terms. *Saul Subsidiary II Ltd. P'ship v. Venator Group Specialty, Inc.*, 830 A.2d 854, 2003 D.C. App. LEXIS 534 (2003).

Where the contract language in question is unambiguous, its interpretation is a question of law for the court. *Saul Subsidiary II Ltd. P'ship v. Venator Group Specialty, Inc.*, 830 A.2d 854, 2003 D.C. App. LEXIS 534 (2003).

When a contract does not specify a time for performance, that ordinarily does not render the contract ambiguous; the law implies a reasonable time. *Saul Subsidiary II Ltd. P'ship v. Venator Group Specialty, Inc.*, 830 A.2d 854, 2003 D.C. App. LEXIS 534 (2003).

Where an ambiguity is present, the intent and understanding of the parties is of critical importance in order to determine whether the parties have formed a binding agreement. How-

ard Univ. v. Lacy, 828 A.2d 733, 2003 D.C. App. LEXIS 469 (2003).

In order to form a binding agreement, both parties must have the distinct intention to be bound; without such intent, there can be no assent and therefore no contract. *Howard Univ. v. Lacy*, 828 A.2d 733, 2003 D.C. App. LEXIS 469 (2003).

In determining whether the parties entered into a contract, the intent of each party must be closely examined. *Howard Univ. v. Lacy*, 828 A.2d 733, 2003 D.C. App. LEXIS 469 (2003).

A quasi-contract is not a contract at all, but a duty thrust under certain conditions upon one party to requite another in order to avoid the former's unjust enrichment. *Fischer v. Estate of Flax*, 816 A.2d 1, 2003 D.C. App. LEXIS 19 (2003), remanded by 935 A.2d 362, 2007 D.C. App. LEXIS 659 (D.C. 2007), remanded by 935 A.2d 1091, 2007 D.C. App. LEXIS 669 (D.C. 2007).

An "implied-in-fact contract" is a true contract, containing all necessary elements of a binding agreement; it differs from other contracts only in that it has not been committed to writing or stated orally in express terms, but rather is inferred from the conduct of the parties in the milieu in which they dealt. *Fischer v. Estate of Flax*, 816 A.2d 1, 2003 D.C. App. LEXIS 19 (2003), remanded by 935 A.2d 362, 2007 D.C. App. LEXIS 659 (D.C. 2007), remanded by 935 A.2d 1091, 2007 D.C. App. LEXIS 669 (D.C. 2007).

As a general rule, absent fraud or mistake, one who signs a contract is bound by a contract which he has an opportunity to read whether he does so or not. *Forrest v. Verizon Commun., Inc.*, 805 A.2d 1007, 2002 D.C. App. LEXIS 509 (2002).

A contract is no less a contract simply because it is entered into via a computer. *Forrest v. Verizon Commun., Inc.*, 805 A.2d 1007, 2002 D.C. App. LEXIS 509 (2002).

In the absence of fraud, duress, or mistake, one who signs a contract which he had an opportunity to read and understand is bound by its provisions unless enforcement of the agreement should be withheld because the terms of the contract are unconscionable. *Pers Travel, Inc. v. Canal Square Assocs.*, 804 A.2d 1108, 2002 D.C. App. LEXIS 486 (2002).

The fact that a party may elect not to read a contract before signing it does not invalidate the contract. *Pers Travel, Inc. v. Canal Square Assocs.*, 804 A.2d 1108, 2002 D.C. App. LEXIS 486 (2002).

Generally, whether contracting parties have executed a new agreement or instead modified their original agreement is a question of fact. *Hildreth Consulting Eng'Rs, P.C. v. Larry E. Knight, Inc.*, 801 A.2d 967, 2002 D.C. App. LEXIS 361 (2002).

Generally, courts interpret the terms of a contract in a manner consistent with ordinary speech. *Hildreth Consulting Eng'Rs, P.C. v. Larry E. Knight, Inc.*, 801 A.2d 967, 2002 D.C. App. LEXIS 361 (2002).

District of Columbia adheres to the "objective law" of contracts, which means that the written language will govern the rights and liabilities of the parties unless it is not susceptible of clear meaning, or unless there is evidence of fraud, duress, or mutual mistake. *Double H Hous. Corp. v. Big Wash, Inc.*, 799 A.2d 1195, 2002 D.C. App. LEXIS 298 (2002).

Laws in effect at the time of the making of a contract form a part of the contract as fully as if they had been expressly referred to or incorporated in its terms. *Double H Hous. Corp. v. Big Wash, Inc.*, 799 A.2d 1195, 2002 D.C. App. LEXIS 298 (2002).

An "implied-in-fact contract" is inferred from the conduct of the parties in the milieu in which they dealt. *Union Light & Power Co. v. D.C. Dep't of Empl. Servs.*, 796 A.2d 665, 2002 D.C. App. LEXIS 85 (2002).

The written language of a contract governs the parties' rights unless it is not susceptible of clear meaning. *Patterson v. District of Columbia*, 795 A.2d 681, 2002 D.C. App. LEXIS 79 (2002), amended by 819 A.2d 320, 2003 D.C. App. LEXIS 143 (D.C. 2003).

Fundamentally, when interpreting a contract, the court should look to the intent of the parties entering into the agreement. *Patterson v. District of Columbia*, 795 A.2d 681, 2002 D.C. App. LEXIS 79 (2002), amended by 819 A.2d 320, 2003 D.C. App. LEXIS 143 (D.C. 2003).

In deciding whether contract language is susceptible of clear meaning, the court looks to the contract language itself, and asks generally what a reasonable person in the position of the parties would have thought the disputed language meant. *Patterson v. District of Columbia*, 795 A.2d 681, 2002 D.C. App. LEXIS 79 (2002), amended by 819 A.2d 320, 2003 D.C. App. LEXIS 143 (D.C. 2003).

An evaluation of the surrounding circumstances, to determine what a reasonable person in the position of the parties would have thought the disputed language meant, is to be applied whether the contract's language appears ambiguous or not. *Patterson v. District of Columbia*, 795 A.2d 681, 2002 D.C. App. LEXIS 79 (2002), amended by 819 A.2d 320, 2003 D.C. App. LEXIS 143 (D.C. 2003).

A contract is "ambiguous" when it is reasonably susceptible of different constructions or interpretations, or of two or more different meanings. *Patterson v. District of Columbia*, 795 A.2d 681, 2002 D.C. App. LEXIS 79 (2002), amended by 819 A.2d 320, 2003 D.C. App. LEXIS 143 (D.C. 2003).

A promise to refrain from competition that imposes a restraint that is ancillary to an

otherwise valid transaction or relationship is unreasonably in restraint of trade if: (1) the restraint is greater than is needed to protect the promisee's legitimate interest, or (2) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public. *Patterson v. District of Columbia*, 795 A.2d 681, 2002 D.C. App. LEXIS 79 (2002), amended by 819 A.2d 320, 2003 D.C. App. LEXIS 143 (D.C. 2003).

A covenant not to compete limited by time and space may be valid. *Patterson v. District of Columbia*, 795 A.2d 681, 2002 D.C. App. LEXIS 79 (2002), amended by 819 A.2d 320, 2003 D.C. App. LEXIS 143 (D.C. 2003).

When a contract lapses but the parties to the contract continue to act as if they are performing under a contract, the material terms of the prior contract will survive intact unless either one of the parties clearly and manifestly indicates, through words or through conduct, that it no longer wishes to continue to be bound thereby, or both parties mutually intend that the terms not survive. *Hahn v. Univ. of the Dist. of Columbia*, 789 A.2d 1252, 2002 D.C. App. LEXIS 7 (2002).

In a contract case, summary judgment is appropriate where the contract is unambiguous since, absent such ambiguity, a written contract duly signed and executed speaks for itself and binds the parties without the necessity of extrinsic evidence. *Dist. No. 1-Pac. Coast Dist., Marine Engr's Ben. Ass'n v. Travelers Cas. & Sur. Co.*, 782 A.2d 269, 2001 D.C. App. LEXIS 207 (2001).

A contract is not made ambiguous merely by the fact that the parties dispute its meaning or that its terms are complex or could have been clearer. *Dist. No. 1-Pac. Coast Dist., Marine Engr's Ben. Ass'n v. Travelers Cas. & Sur. Co.*, 782 A.2d 269, 2001 D.C. App. LEXIS 207 (2001).

A contract is ambiguous, when it is reasonably or fairly susceptible of different constructions or interpretations. *Dist. No. 1-Pac. Coast Dist., Marine Engr's Ben. Ass'n v. Travelers Cas. & Sur. Co.*, 782 A.2d 269, 2001 D.C. App. LEXIS 207 (2001).

Because determination of what the contracting parties intended is an objective inquiry, the first step—and often the final one—is to decide what a reasonable person in the position of the parties would have thought the terms of the contract meant. *Dist. No. 1-Pac. Coast Dist., Marine Engr's Ben. Ass'n v. Travelers Cas. & Sur. Co.*, 782 A.2d 269, 2001 D.C. App. LEXIS 207 (2001).

Where a legal theory that a party does advance is grounded on a contract that is before the court, the court does have a duty to read the contract without blinkers on, so that it can discern the meaning and applicability of its provisions correctly. *Chase v. State Farm Fire*

& Cas. Co., 780 A.2d 1123, 2001 D.C. App. LEXIS 197 (2001).

Parol evidence rule did not apply to, and therefore did not bar extrinsic evidence regarding, the determination of which travel agency signed, as lessee, a lease of an automated computer airline reservation and ticketing system. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

The parol evidence rule applies only to the actual terms of the contract itself, not to the preliminary determination of who the contracting parties were. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

If a document is facially unambiguous, its language should be relied upon as providing the best objective manifestation of the parties' intent. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

In order to be enforceable, a contract must be sufficiently definite as to its "material terms," which include, e.g., subject matter, price, payment terms, quantity, and duration, so that the promises and performance to be rendered by each party are reasonably certain. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

If the terms of the contract are clear enough for the court to determine whether a breach has occurred and to identify an appropriate remedy, it is enforceable. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

Any ambiguity in a contract will be construed against the drafter. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

It is appropriate to consider the contract first under the reasonable person standard and then, if no result is reached regarding construction of the contract, to apply the rule construing the contract against the drafter as a rebuttable presumption. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

The first step in the construction of contracts is to determine what a reasonable person in the position of the parties would have thought the disputed language meant. *Travelers Indem. Co. v. United Food & Commer. Workers Int'l Union*, 770 A.2d 978, 2001 D.C. App. LEXIS 98 (2001).

Question of construing an ambiguous term in a contract is a question of fact, to be answered by resort to extrinsic evidence, which may include the circumstances before and contemporaneous with the making of the contract, all usages—habitual and customary practices—which either party knows or has reason to know, the circumstances surrounding the transaction, and the course of conduct of the

parties under the contract. *Simon v. Circle Assocs.*, 753 A.2d 1006, 2000 D.C. App. LEXIS 134 (2000).

Course of performance.

Airplane seller, who had made no performance under contract, did not establish any course of performance with buyer and, therefore, failed to establish waiver of 30-day period for delivery of airplanes by course of performance under District of Columbia Law. D.C. Code 1981, §§ 28:1-205, 28:2-208(2, 3). *Marlowe v. Argentine Naval Com.*, 808 F.2d 120, 1986 U.S. App. LEXIS 36438 (C.A.D.C. 1986).

Evidence.

Evidence was insufficient to establish that course of dealing between bank and bank's customer before time that bank paid on fraudulent checks drawn against customer's account reflected parties' agreement to shift from bank to customer the risk of loss caused by forgeries; none of facsimile signature resolutions executed by customer concerned account in which fraud occurred, and even considered in aggregate, resolutions were too few, and too closely clustered and far removed in time, to put customer on notice that bank had general policy concerning facsimile signatures that would govern account in which fraud occurred. D.C. Code 1981, §§ 28:1-205(1), 28:3-404(1). *National Union Fire Ins. Co. v. Riggs Nat'l Bank*, 93 F.3d 885, 1996 U.S. App. LEXIS 21971 (C.A.D.C. 1996).

Under District of Columbia law, developer, which alleged that it had an enforceable agreement with the District of Columbia to negotiate exclusively to purchase property acquired by the District and that transit authority agreed to offer the District the right of first refusal to purchase any property that transit authority intended to sell, alleged facts to support an inference that it was an intended third-party beneficiary of the agreement between the District of Columbia and transit authority, and therefore developer adequately stated a breach of contract claim against transit authority based on its sale of subject property to another bidder. *Monument Realty LLC v. Wash. Metro. Area Transit Auth.*, 535 F.Supp.2d 60, 2008 U.S. Dist. LEXIS 14073 (2008).

Under District of Columbia law, court construing ambiguous contract may consider circumstances before and contemporaneous with making of contract, all habitual and customary practices which either party knows or has reason to know, circumstances surrounding transaction, and course of conduct of parties to contract. *Potomac Elec. Power Co. v. Mirant Corp.*, 251 F.Supp.2d 144, 2003 U.S. Dist. LEXIS 3487 (2003).

Resort to extrinsic evidence is permissible for interpretation of an ambiguous contract. *Dist. No. 1-Pac. Coast Dist., Marine Engr's Ben. Ass'n v. Travelers Cas. & Sur. Co.*, 782 A.2d 269, 2001 D.C. App. LEXIS 207 (2001).

Evidence established existence of agreement between two men to share equally in proceeds of winning lottery ticket, particularly in view of long-standing course of conduct involving men jointly purchasing tickets and jointly "scratching" them to reveal any winnings. *Pearsall v. Alexander*, 572 A.2d 113, 1990 D.C. App. LEXIS 62 (1990).

In general.

Limestone sales contract providing that estimated quantities would "be used to canvass bids but payment will be made only for actual quantities of work completed" and that "amount to be paid for will be the actual number of square feet of crushed stone paving installed, measured in place, and accepted" was not contract for fixed amount of limestone, but was, rather, a requirements contract; where no limestone was required, contract was not

breached when none was ordered. *R. A. Weaver & Associates, Inc. v. Asphalt Constr., Inc.*, 587 F.2d 1315, 1978 U.S. App. LEXIS 8260 (C.A.D.C. 1978).

In deciding whether contract language is ambiguous under District of Columbia law, court looks beyond language itself and determines what reasonable person in position of parties would have thought disputed language meant. *Potomac Elec. Power Co. v. Mirant Corp.*, 251 F.Supp.2d 144, 2003 U.S. Dist. LEXIS 3487 (2003).

Even if, as general usage of trade, price quotes did constitute offers to contract, course of dealing between parties, by which manufacturer required written home office acceptance when dealing with customers through its representative, and purchaser had just received such written acceptance form when it placed another order with manufacturer through its representative, would supersede such usage. *D.C. Code 1981, § 28.1-205(4). Maurice Elec. Supply Co. v. Anderson Safeway Guard Rail Corp.*, 632 F. Supp. 1082, 1986 U.S. Dist. LEXIS 30992 (1986).

§ 28:1-206. Statute of frauds for kinds of personal property not otherwise covered.

(1) Except in the cases described in subsection (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.

(2) Subsection (1) of this section does not apply to contracts for the sale of goods (section 28:2-201) nor of securities (section 28:8-113) nor to security agreements (section 28:9-203).

(Dec. 30, 1963, 77 Stat. 636, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-240, § 3(c), 44 DCR 1087.)

Prior Codifications. — 1981 Ed., § 28:1-206.

1973 Ed., § 28:1-206.

Legislative history of Law 11-240. — Law 11-240, the "Uniform Commercial Code Investment Securities Revision Act of 1996," was introduced in Council and assigned Bill No. 11-576, which was referred to the Committee

on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-500 and transmitted to both Houses of Congress for its review. D.C. Law 11-240 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 4, Uniform Sales Act (which was

based on Section 17 of the Statute of 29 Charles II).

Changes:

Completely rewritten by this and other sections.

Purposes:

To fill the gap left by the Statute of Frauds provisions for goods (Section 2-201), and security interests (Section 9-203). As to securities, see Section 8-113. The Uniform Sales Act covered the sale of "choses in action"; the principal gap relates to sale of the "general intangibles" defined in Article 9 (Section 9-106) and to transactions excluded from Article 9 by Section 9-104. Typical are the sale of bilateral contracts, royalty rights or the like. The informality normal to such transactions is recognized by lifting the limit for oral transactions to \$5,000. In such transactions there is often no standard of practice by which to judge, and values can

rise or drop without warning; troubling abuses are avoided when the dollar limit is exceeded by requiring that the subject-matter be reasonably identified in a signed writing which indicates that a contract for sale has been made at a defined or stated price. Amendments approved by the Permanent Editorial Board for Uniform Commercial Code November 4, 1995.

Definitional Cross References:

"Action". Section 1-201.

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Sale". Section 2-106.

"Signed". Section 1-201.

"Writing". Section 1-201.

CASE NOTES**Construction and application.**

Catchall statute of frauds covering sale of personal property "beyond" \$5,000 did not apply to agreement between two men to share

proceeds of winning lottery ticket since no sale of winnings was involved. D.C. Code 1981, § 28:1-206. *Pearsall v. Alexander*, 572 A.2d 113, 1990 D.C. App. LEXIS 62 (1990).

§ 28:1-207. Performance or acceptance under reservation of rights.

(1) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest", or the like are sufficient.

(2) Paragraph (1) of this section does not apply to an accord and satisfaction.

(Dec. 30, 1963, 77 Stat. 637, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(b)(2), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:1-207.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:1-201.

UNIFORM COMMERCIAL CODE COMMENT

1. This section provides machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute, by adopting the mercantile device of going ahead with delivery, acceptance, or payment "without prejudice," "under protest," "under reserve," "with reservation of all our rights," and the like. All of these phrases completely reserve all rights within the meaning of this section. The section therefore contemplates that limited as well as general reservations and acceptance by a party may be made "subject to satisfaction of our purchaser," "subject to acceptance by our customers," or the like.

2. This section does not add any new require-

ment of language of reservation where not already required by law, but merely provides a specific measure on which a party can rely as that party makes or concurs in any interim adjustment in the course of performance. It does not affect or impair the provisions of this Act such as those under which the buyer's remedies for defect survive acceptance without being expressly claimed if notice of the defects is given within a reasonable time. Nor does it disturb the policy of those cases which restrict the effect of a waiver of a defect to reasonable limits under the circumstances, even though no such reservation is expressed.

The section is not addressed to the creation

or loss of remedies in the ordinary course of performance but rather to a method of procedure where one party is claiming as of right something which the other believes to be unwarranted.

3. Judicial authority was divided on the issue of whether former Section 1-207 (present subsection (1)) applied to an accord and satisfaction. Typically the cases involved attempts to reach an accord and satisfaction by use of a check tendered in full satisfaction of a claim. Subsection (2) of revised Section 1-207 resolves

this conflict by stating that Section 1-207 does not apply to an accord and satisfaction. Section 3-311 of revised Article 3 governs if an accord and satisfaction is attempted by tender of a negotiable instrument as stated in that section. If Section 3-311 does not apply, the issue of whether an accord and satisfaction has been effected is determined by the law of contract. Whether or not Section 3-311 applies, Section 1-207 has no application to an accord and satisfaction.

§ 28:1-208. Option to accelerate at will.

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

(Dec. 30, 1963, 77 Stat. 637, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:1-208. 1973 Ed., § 28:1-208.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

The increased use of acceleration clauses either in the case of sales on credit or in time paper or in security transactions has led to some confusion in the cases as to the effect to be given to a clause which seemingly grants the power of an acceleration at the whim and caprice of one party. This Section is intended to make clear that despite language which can be so construed and which further might be held to make the agreement void as against public policy or to make the contract illusory or too indefinite for enforcement, the clause means

that the option is to be exercised only in the good faith belief that the prospect of payment or performance is impaired.

Obviously this section has no application to demand instruments or obligations whose very nature permits call at any time with or without reason. This section applies only to an agreement or to paper which in the first instance is payable at a future date.

Definitional Cross References:

"Burden of establishing". Section 1-201.
 "Good faith". Section 1-201.
 "Party". Section 1-201.
 "Term". Section 1-201.

ARTICLE 2. SALES.

Part 1. Short Title, General Construction and Subject Matter

Sec.

- 28:2-101. Short title.
- 28:2-102. Scope; certain security and other transactions excluded from this article.
- 28:2-103. Definitions and index of definitions.
- 28:2-104. Definitions: "merchant"; "between merchants"; "financing agency".
- 28:2-105. Definitions: transferability; "goods"; "future" goods; "lot"; "commercial unit".
- 28:2-106. Definitions: "contract"; "agreement"; "contract for sale"; "sale"; "present sale"; "conforming" to contract; "termination"; "cancellation".
- 28:2-107. Goods to be severed from realty; recording.

Part 2. Form, Formation and Readjustment of Contract

- 28:2-201. Formal requirements; statute of frauds.
- 28:2-202. Final written expression: parol or extrinsic evidence.
- 28:2-203. Seals inoperative.
- 28:2-204. Formation in general.
- 28:2-205. Firm offers.
- 28:2-206. Offer and acceptance in formation of contract.
- 28:2-207. Additional terms in acceptance or confirmation.
- 28:2-208. Course of performance or practical construction.
- 28:2-209. Modification, rescission and waiver.
- 28:2-210. Delegation of performance; assignment of rights.

Part 3. General Obligation and Construction of Contract

- 28:2-301. General obligations of parties.
- 28:2-302. Unconscionable contract or clause.
- 28:2-303. Allocation or division of risks.
- 28:2-304. Price payable in money, goods, realty, or otherwise.
- 28:2-305. Open price term.
- 28:2-306. Output, requirements and exclusive dealings.
- 28:2-307. Delivery in single lot or several lots.
- 28:2-308. Absence of specified place for delivery.
- 28:2-309. Absence of specific time provisions; notice of termination.
- 28:2-310. Open time for payment or running of credit; authority to ship under reservation.
- 28:2-311. Options and cooperation respecting performance.

Sec.

- 28:2-312. Warranty of title and against infringement; buyer's obligation against infringement.
- 28:2-313. Express warranties by affirmation, promise, description, sample.
- 28:2-314. Implied warranty: merchantability; usage of trade.
- 28:2-315. Implied warranty: fitness for particular purpose.
- 28:2-316. Exclusion or modification of warranties.
- 28:2-316.01. Limitation of exclusion or modification of warranties consumers.
- 28:2-317. Cumulation and conflict of warranties express or implied.
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- 28:2-319. F.O.B. and F.A.S. terms.
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Part 1. Short Title, General Construction and Subject Matter.

§ 28:2-101. Short title.

This article shall be known and may be cited as Uniform Commercial Code — Sales.

(Dec. 30, 1963, 77 Stat. 639, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-101. 1973 Ed., § 28:2-101.

UNIFORM COMMERCIAL CODE COMMENT

This Article is a complete revision and modernization of the Uniform Sales Act which was promulgated by the National Conference of Commissioners on Uniform State Laws in 1906 and has been adopted in 34 states and Alaska, the District of Columbia and Hawaii.

The coverage of the present Article is much more extensive than that of the old Sales Act and extends to the various bodies of case law which have been developed both outside of and under the latter.

The arrangement of the present Article is in

terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

CASE NOTES

Instructions.

Since strict liability theory and implied warranty of merchantability theory represented but one tort, it was error to have given instructions on both theories in products liability action; instructions gave rise to inconsistent find-

ings that product was not unreasonably dangerous but that product was so unreasonably fit for its intended purpose as to cause injury. *Bowler v. Stewart-Warner Corp.*, 563 A.2d 344, 1989 D.C. App. LEXIS 158 (1989).

§ 28:2-102. Scope; certain security and other transactions excluded from this article.

Unless the context otherwise requires, this article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

(Dec. 30, 1963, 77 Stat. 639, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-102. 1973 Ed., § 28:2-102.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 75, Uniform Sales Act.

Changes: Section 75 has been rephrased.

Purposes of Changes and New Matter: To make it clear that:

The Article leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the general sales aspects of such transactions. "Security transaction" is

used in the same sense as in the Article on Secured Transactions (Article 9).

Cross Reference:
Article 9.

Definitional Cross References:

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Present sale". Section 2-106.

"Sale". Section 2-106.

CASE NOTES

ANALYSIS

Choice of law.

In general.

Summary judgment.

Choice of law.

Whether contractual provision that franchise agreements were to be interpreted conformably to law of New York was operative in federal action founded on diversity depended upon con-

dict of laws principles of District of Columbia in which court was sitting. *Lee v. Flintkote Co.*, 593 F.2d 1275, 1979 U.S. App. LEXIS 17697 (C.A.D.C. 1979).

Rule in *Erie* did not mandate application of District of Columbia law in federal diversity action dependent upon conflict of laws principles of District of Columbia in which court was sitting since, if Congress had wished the Rules of Decision Act to govern in such a situation, it could easily have revised the Act by denominating the District of Columbia a "state" for purposes of diversity jurisdiction. 18 U.S.C. § 1652. *Lee v. Flintkote Co.*, 593 F.2d 1275, 1979 U.S. App. LEXIS 17697 (C.A.D.C. 1979).

In determining choice of law, District of Columbia employs "governmental interest analysis" requiring court to evaluate governmental policies underlying the applicable conflicting laws and to determine which jurisdiction's policy would be most advanced by having its law applied to facts of case under review. *Williams v. Central Money Co.*, 974 F. Supp. 22, 1997 U.S. Dist. LEXIS 11088 (1997).

In making determination as to which jurisdiction's governmental interests take precedent, for purposes of choice of law analysis, courts may consider which jurisdiction has most significant relationship to each issue in dispute, considering such factors as place injury occurred or where contract was created, location of contract's subject matter, where parties are domiciled or incorporated, and where relationship between parties is centered. Restatement (Second) of Conflict of Laws §§ 145, 188. *Williams v. Central Money Co.*, 974 F. Supp. 22, 1997 U.S. Dist. LEXIS 11088 (1997).

In deciding which jurisdiction's substantive law applies to case, analysis of contacts is undertaken to help courts determine which jurisdiction's policy would be most advanced by application of its law; such contacts are relevant, but not dispositive, in determining choice of law. *Williams v. Central Money Co.*, 974 F. Supp. 22, 1997 U.S. Dist. LEXIS 11088 (1997).

In general.

Franchise agreements which licensed operation of stores retailing franchised products, erected a procedure by which locations of stores

were to be fixed, and imposed a ban on another licensed location within radius specified were not ambiguous and, though granting franchisees an exclusive right to operate an outlet within specified radius, did not give franchisees right to exclusively sell franchised products, either to contractors or to retail customers in general, within that radius. *Lee v. Flintkote Co.*, 593 F.2d 1275, 1979 U.S. App. LEXIS 17697 (C.A.D.C. 1979).

A contract is ambiguous under law of District of Columbia when it is reasonably susceptible of different constructions or interpretations. *Lee v. Flintkote Co.*, 593 F.2d 1275, 1979 U.S. App. LEXIS 17697 (C.A.D.C. 1979).

Claim of common law unconscionability applies only defensively, for example, as response to attempt to enforce contract. Restatement (Second) of Contracts § 208 comment. *Williams v. Central Money Co.*, 974 F. Supp. 22, 1997 U.S. Dist. LEXIS 11088 (1997).

The majority of courts look to the "dominant element" of a contract to determine whether it is a contract for goods or services; this test involves a determination of which element of the transaction is more significant—the sale of goods or the provision of services. *Crawford, Inc. v. Coale*, 114 WLR 577 (Super. Ct. 1986).

Summary judgment.

In breach of contract action brought by transit authority against diesel fuel seller to recover difference between contract price and price paid by authority to obtain replacement fuel, substantial issues of material fact existed as to whether seller acted in honesty in fact or observed standards of fair dealing in trade in attempting to obtain performance bond, which was condition precedent to contract. *Gatol (U.S.A.) v. Washington Metro. Area Transit Auth.*, 801 F.2d 451, 1986 U.S. App. LEXIS 30683 (C.A.D.C. 1986).

Factual disputes between parties as to exactly what was required under contract to provide digital switching system and what had transpired under contract precluded summary judgment on buyer's breach of contract claim. *Synergistic Technologies v. IDB Mobile Communications*, 871 F. Supp. 24, 1994 U.S. Dist. LEXIS 18176 (1994).

§ 28:2-103. Definitions and index of definitions.

(1) In this article unless the context otherwise requires:

- (a) "Buyer" means a person who buys or contracts to buy goods.
- (b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
- (c) "Receipt" of goods means taking physical possession of them.
- (d) "Seller" means a person who sells or contracts to sell goods.

(2) Other definitions applying to this article or to specified parts thereof, and the sections in which they appear are:

- “Acceptance”. Section 28:2-606.
 - “Banker’s credit”. Section 28:2-325.
 - “Between merchants”. Section 28:2-104.
 - “Cancellation”. Section 28:2-106(4).
 - “Commercial unit”. Section 28:2-105.
 - “Confirmed credit”. Section 28:2-325.
 - “Conforming to contract”. Section 28:2-106.
 - “Contract for sale”. Section 28:2-106.
 - “Cover”. Section 28:2-712.
 - “Entrusting”. Section 28:2-403.
 - “Financing agency”. Section 28:2-104.
 - “Future goods”. Section 28:2-105.
 - “Goods”. Section 28:2-105.
 - “Identification”. Section 28:2-501.
 - “Installment contract”. Section 28:2-612.
 - “Letter of Credit”. Section 28:2-325.
 - “Lot”. Section 28:2-105.
 - “Merchant”. Section 28:2-104.
 - “Overseas”. Section 28:2-323.
 - “Person in position of seller”. Section 28:2-707.
 - “Present sale”. Section 28:2-106.
 - “Sale”. Section 28:2-106.
 - “Sale on approval”. Section 28:2-326.
 - “Sale or return”. Section 28:2-326.
 - “Termination”. Section 28:2-106.
- (3) The following definitions in other articles apply to this article:
- “Check”. Section 28:3-104.
 - “Consignee”. Section 28:7-102.
 - “Consignor”. Section 28:7-102.
 - “Consumer goods”. Section 28:9-102.
 - “Dishonor”. Section 28:3-502.
 - “Draft”. Section 28:3-104.

(4) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

(Dec. 30, 1963, 77 Stat. 639, Pub. L. 88-243, § 1; Oct. 26, 2000, D.C. Law 13-201, § 201(c)(1), 47 DCR 7576.)

Section references. — This section is referred to in §§ 28:2A-103 and 28:7-102.

Prior Codifications. — 1981 Ed., § 28:2-103.

1973 Ed., § 28:2-103.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 13-201. — Law 13-201, the “Uniform Commercial Code Secured Transactions Revision Act of 2000,” was introduced in Council and assigned Bill No. 13-370, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on June 6, 2000, and July 11, 2000, respectively. Signed by the Mayor on August 11, 2000, it was assigned Act No. 13-434 and transmitted to both Houses of

Congress for its review. D.C. Law 13-201 became effective on October 26, 2000.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provisions: Subsection (1): Section 76, Uniform Sales Act.

Changes:

The definitions of "buyer" and "seller" have been slightly rephrased, the reference in Section 76 of the prior Act to "any legal successor in interest of such person" being omitted. The definition of "receipt" is new.

Purposes of Changes and New Matter:

1. The phrase "any legal successor in interest of such person" has been eliminated since Section 2-210 of this Article, which limits some types of delegation of performance on assignment of a sales contract, makes it clear that not every such successor can be safely included in the definition. In every ordinary case, however, such successors are as of course included.

2. "Receipt" must be distinguished from del-

ivery particularly in regard to the problems arising out of shipment of goods, whether or not the contract calls for making delivery by way of documents of title, since the seller may frequently fulfill his obligations to "deliver" even though the buyer may never "receive" the goods. Delivery with respect to documents of title is defined in Article 1 and requires transfer of physical delivery. Otherwise the many divergent incidents of delivery are handled incident by incident.

Cross References:

Point 1: See Section 2-210 and Comment thereon.

Point 2: Section 1-201.

Definitional Cross Reference:

"Person". Section 1-201.

CASE NOTES

ANALYSIS

Anticipatory breach.
Consumer goods.
Controlling precedents.
Economic loss doctrine.
Good faith.
Offer.

Anticipatory breach.

Diesel fuel seller's communications with transit authority detailing seller's difficulties in obtaining supplier of fuel was not "anticipatory breach" of diesel fuel supply contract, where communication only established that, on day before contract became nullity due to failure of condition precedent, seller was having trouble obtaining fuel, that seller would be unable to begin deliveries on date previously agreed upon, and that seller was seeking alternative sources of supply and hoped to secure one within few days. *Gatoil (U.S.A.) v. Washington Metro. Area Transit Auth.*, 801 F.2d 451, 1986 U.S. App. LEXIS 30683 (C.A.D.C. 1986).

Consumer goods.

Under District of Columbia law, "consumer goods" which come within exception to rule that implied warranty of merchantability can be deleted by parties to sale of goods through exclusion clause are products used or bought for use primarily for personal, family, or household purposes. D.C. Code 1981, §§ 28:2-316.1(1), 28:9-109. *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Controlling precedents.

Although Maryland statutes and case law do

not constitute law of District of Columbia, courts customarily look to Maryland law as especially persuasive authority in determining how District of Columbia courts would rule on question of law. *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Economic loss doctrine.

Under "economic loss doctrine," plaintiff in tort action may not recover damages for loss of value or use of product itself, cost to repair or replace product, or lost profits resulting from loss or use of product regardless of whether claim is based on negligence, strict liability, or both. *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Good faith.

Fact issue was presented as to whether seller of roofing materials had broken its obligation of good faith and would be unable to claim benefit of clause in contract limiting its liability for damages which was not unconscionable, precluding summary judgment in action by buyer, where buyer contended that seller acted in bad faith in its proposals to repair roof coatings pursuant to exclusive remedy in contract by seeking to repair by applying another layer of coating in violation of its own product specifications and by never testing whether second application of coating would properly adhere to existing layer of same coating. D.C. Code 1981, §§ 28:1-203, 28:2-719(3). *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Under District of Columbia law, restaurant chain did not breach duty of good faith in terminating agreement with meat supplier without investigation of supplier's financial health due to its justifiable concern about the supplier's ability to meet its financial obligations in light of supplier's payment problems. D.C. Code 1981, §§ 28:2-103(1)(b), 28:2-609(1). *Goldstein v. S & A Restaurant Corp.*, 622 F. Supp. 139, 1985 U.S. Dist. LEXIS 14328 (1985).

"Good faith" in case of merchant means honesty in fact and observance of reasonable commercial standards of fair dealing in trade. D.C. Code 1981, § 28:2-103(1)(b). *Reliance Ins. Co. v. Market Motors, Inc.*, 498 A.2d 571, 1985 D.C. App. LEXIS 506 (1985).

Offer.

Transit authority's announcement of exten-

sion of period for fulfillment of condition precedent that diesel fuel supplier obtain performance bond was neither expressly nor implicitly accepted by supplier's course of conduct, and thus, supplier's failure to secure performance bond rendered contract ineffective, where before any significant conduct by supplier occurred, "offer" had been twice revised and its final form, which no longer extended time limit but rather converted condition precedent into contractual obligation, was categorically rejected by supplier. *Gatoil (U.S.A.) v. Washington Metro. Area Transit Auth.*, 801 F.2d 451, 1986 U.S. App. LEXIS 30683 (C.A.D.C. 1986).

§ 28:2-104. Definitions: "merchant"; "between merchants"; "financing agency".

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (section 28:2-707).

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

(Dec. 30, 1963, 77 Stat. 640, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-103 and 28:2A-103.

Prior Codifications. — 1981 Ed., § 28:2-104.

1973 Ed., § 28:2-104.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None. But see Sections 15 (2), (5), 16(c), 45(2) and 71, Uniform Sales Act, and Sections 35 and 37, Uniform Bills of Lading Act for examples of the policy expressly provided for in this Article.

Purposes:

1. This Article assumes that transactions between professionals in a given filed require special and clear rules which may not apply to a casual or inexperienced seller or buyer. It

thus adopts a policy of expressly stating rules applicable "between merchants" and "as against a merchant", wherever they are needed instead of making them depend upon the circumstances of each case as in the statutes cited above. This section lays the foundation of this policy by defining those who are to be regarded as professionals or "merchants" and by stating when a transaction is deemed to be "between merchants".

2. The term "merchant" as defined here roots in the "law merchant" concept of a professional in business. The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provisions.

The special provisions as to merchants appear only in this Article and they are of three kinds. Sections 2-201(2), 2-205, 2-207 and 2-209 dealing with the statute of frauds, firm offers, confirmatory memoranda and modification rest on normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of these sections almost every person in business would, therefore, be deemed to be a "merchant" under the language "who ... by his occupation holds himself out as having knowledge or skill peculiar to the practices ... involved in the transaction ..." since the practices involved in the transaction are non-specialized business practices such as answering mail. In this type of provision, banks or even universities, for example, well may be "merchants." But even these sections only apply to a merchant in his mercantile capacity; a lawyer or bank president buying fishing tackle for his own use is not a merchant.

On the other hand, in Section 2-314 on the warranty of merchantability, such warranty is implied only "if the seller is a merchant with

respect to goods of that kind." Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods. The exception in Section 2-402(2) for retention of possession by a merchant-seller falls in the same class; as does Section 2-403(2) on entrusting of possession to a merchant "who deals in goods of that kind".

A third group of sections includes 2-103(1)(b), which provides that in the case of a merchant "good faith" includes observance of reasonable commercial standards of fair dealing in the trade; 2-327(1)(c), 2-603 and 2-605, dealing with responsibilities of merchant buyers to follow seller's instructions, etc.; 2-509 on risk of loss, and 2-609 on adequate assurance of performance. This group of sections applies to persons who are merchants under either the "practices" or the "goods" aspect of the definition of merchant.

3. The "or to whom such knowledge or skill may be attributed by his employment of an agent or broker ..." clause of the definition of merchant means that even persons such as universities, for example, can come within the definition of merchant if they have regular purchasing departments or business personnel who are familiar with business practices and who are equipped to take any action required.

Cross References:

Point 1: See Sections 1-102 and 1-203.

Point 2: See Sections 2-314, 2-315 and 2-320 to 2-325, of this Article, and Article 9.

Definitional Cross References:

"Bank". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Document of title". Section 1-201.

"Draft". Section 3-104.

"Goods". Section 2-105.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Seller". Section 2-103.

CASE NOTES

In general.

Limestone sales contract providing that estimated quantities would "be used to canvass bids but payment will be made only for actual quantities of work completed" and that "amount to be paid for will be the actual number of square feet of crushed stone paving installed, measured in place, and accepted" was not contract for fixed amount of limestone, but was, rather, a requirements contract; where no limestone was required, contract was not breached when none was ordered. *R. A. Weaver & Associates, Inc. v. Asphalt Constr., Inc.*, 587 F.2d 1315, 1978 U.S. App. LEXIS 8260 (C.A.D.C. 1978).

Allegations that provider of components used in electronic train control system provided such equipment, software and support services to Washington Metropolitan Area Transit Authority (WMATA) was sufficient to state that provider dealt "in goods of the kind," and thus, was a merchant, under District of Columbia's Uniform Commercial Code (UCC), for purposes of breaches of implied warranties of merchantability and fitness for a particular purpose claims brought by rail passengers and estates of deceased rail passengers arising from train collision. *Jenkins v. Wash. Metro. Area Transit Auth.* (In re Fort Totten Metrorail Cases), 793

F.Supp.2d 133, 2011 U.S. Dist. LEXIS 68913
(2009).

§ 28:2-105. Definitions: transferability; “goods”; “future” goods; “lot”; “commercial unit”.

(1) “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (section 28:2-107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are “future” goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller’s interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) “Lot” means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) “Commercial unit” means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

(Dec. 30, 1963, 77 Stat. 640, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-103. 1973 Ed., § 28:2-105.

Prior Codifications. — 1981 Ed., § 28:2-105.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Subsections (1), (2), (3) and (4)—Sections 5, 6 and 76, Uniform Sales Act; Subsections (5) and (6)—none.

Changes: Rewritten.

Purposes of Changes and New Matter:

1. Subsection (1) on “goods”: The phraseology of the prior uniform statutory provision has been changed so that:

The definition of goods is based on the concept of movability and the term “chattels personal” is not used. It is not intended to deal with

things which are not fairly identifiable as movables before the contract is performed.

Growing crops are included within the definition of goods since they are frequently intended for sale. The concept of “industrial” growing crops has been abandoned, for under modern practices fruit, perennial hay, nursery stock and the like must be brought within the scope of this Article. The young of animals are also included expressly in this definition since they, too, are frequently intended for sale and may be contracted for before birth. The period

of gestation of domestic animals is such that the provisions of the section on identification can apply as in the case of crops to be planted. The reason of this definition also leads to the inclusion of a wool crop or the like as "goods" subject to identification under this Article.

The exclusion of "money in which the price is to be paid" from the definition of goods does not mean that foreign currency which is included in the definition of money may not be the subject matter of a sales transaction. Goods is intended to cover the sale of money when money is being treated as a commodity but not to include it when money is the medium of payment.

As to contracts to sell timber, minerals, or structures to be removed from the land Section 2-107(1) (Goods to be severed from Realty: recording) controls.

The use of the word "fixtures" is avoided in view of the diversity of definitions of that term. This Article in including within its scope "things attached to realty" adds the further test that they must be capable of severance without material harm thereto. As between the parties any identified things which fall within that definition become "goods" upon the making of the contract for sale.

"Investment securities" are expressly excluded from the coverage of this Article. It is not intended by this exclusion, however, to prevent the application of a particular section of this Article by analogy to securities (as was done with the Original Sales Act in *Agar v. Orda*, 264 N.Y. 248, 190 N.E. 479, 99 A.L.R. 269 (1934) when the reason of that section makes such

application sensible and the situation involved is not covered by the Article of this Act dealing specifically with such securities (Article 8).

2. References to the fact that a contract for sale can extend to future or contingent goods and that ownership in common follows the sale of a part interest have been omitted here as obvious without need for expression; hence no inference to negate these principles should be drawn from their omission.

3. Subsection (4) does not touch the question of how far an appropriation of a bulk of fungible goods may or may not satisfy the contract for sale.

4. Subsections (5) and (6) on "lot" and "commercial unit" are introduced to aid in the phrasing of later sections.

5. The question of when an identification of goods takes place is determined by the provisions of Section 2-501 and all that this section says is what kinds of goods may be the subject of a sale.

Cross References:

Point 1: Sections 2-107, 2-201, 2-501 and Article 8.

Point 5: Section 2-501.

See also Section 1-201.

Definitional Cross References:

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Fungible". Section 1-201.

"Money". Section 1-201.

"Present sale". Section 2-106.

"Sale". Section 2-106.

"Seller". Section 2-103.

CASE NOTES

ANALYSIS

Anticipatory breach.
Offer.

Anticipatory breach.

Diesel fuel seller's communications with transit authority detailing seller's difficulties in obtaining supplier of fuel was not "anticipatory breach" of diesel fuel supply contract, where communication only established that, on day before contract became nullity due to failure of condition precedent, seller was having trouble obtaining fuel, that seller would be unable to begin deliveries on date previously agreed upon, and that seller was seeking alternative sources of supply and hoped to secure one within few days. *Gatoil (U.S.A.) v. Washington Metro. Area Transit Auth.*, 801 F.2d 451, 1986 U.S. App. LEXIS 30683 (C.A.D.C. 1986).

Offer.

Transit authority's announcement of extension of period for fulfillment of condition precedent that diesel fuel supplier obtain performance bond was neither expressly nor implicitly accepted by supplier's course of conduct, and thus, supplier's failure to secure performance bond rendered contract ineffective, where before any significant conduct by supplier occurred, "offer" had been twice revised and its final form, which no longer extended time limit but rather converted condition precedent into contractual obligation, was categorically rejected by supplier. *Gatoil (U.S.A.) v. Washington Metro. Area Transit Auth.*, 801 F.2d 451, 1986 U.S. App. LEXIS 30683 (C.A.D.C. 1986).

§ 28:2-106. Definitions: “contract”; “agreement”; “contract for sale”; “sale”; “present sale”; “conforming” to contract; “termination”; “cancellation”.

(1) In this article unless the context otherwise requires “contract” and “agreement” are limited to those relating to the present or future sale of goods. “Contract for sale” includes both a present sale of goods and a contract to sell goods at a future time. A “sale” consists in the passing of title from the seller to the buyer for a price (section 28:2-401). A “present sale” means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are “conforming” or conform to the contract when they are in accordance with the obligations under the contract.

(3) “Termination” occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On “termination” all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) “Cancellation” occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of “termination” except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

(Dec. 30, 1963, 77 Stat. 641, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-103, 28:2A-103, 28:5-103, 28:7-102, and 28:9-105.

Prior Codifications. — 1981 Ed., § 28:2-106.

1973 Ed., § 28:2-106.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Subsection (1)—Section 1(1) and (2), Uniform Sales Act; Subsection (2)—none, but subsection generally continues policy of Sections 11, 44 and 69, Uniform Sales Act; Subsections (3) and (4)—none.

Changes: Completely rewritten.

Purposes of Changes and New Matter:

1. Subsection (1): “Contract for sale” is used as a general concept throughout this Article, but the rights of the parties do not vary according to whether the transaction is a present sale or a contract to sell unless the Article expressly so provides.

2. Subsection (2): It is in general intended to continue the policy of requiring exact performance by the seller of his obligations as a condition to his right to require acceptance. However, the seller is in part safeguarded against surprise as a result of sudden technicality on the buyer’s part by the provisions of Section 2-508 on seller’s cure of improper ten-

der or delivery. Moreover usage of trade frequently permits commercial leeways in performance and the language of the agreement itself must be read in the light of such custom or usage and also, prior course of dealing, and in a long term contract, the course of performance.

3. Subsections (3) and (4): These subsections are intended to make clear the distinction carried forward throughout this Article between termination and cancellation.

Cross References:

Point 2: Sections 1-203, 1-205, 2-208 and 2-508.

Definitional Cross References:

“Agreement”. Section 1-201.

“Buyer”. Section 2-103.

“Contract”. Section 1-201.

“Goods”. Section 2-105.

“Party”. Section 1-201.

“Remedy”. Section 1-201.

“Rights”. Section 1-201.

“Seller”. Section 2-103.

CASE NOTES

In general.

Where buyer, although indicating rejection of goods, refused to return goods because of fear of violence at his warehouse in area of city affected by rioting, fact that seller was at first willing to take back goods and, in effect, cancel contract rather than file an action for the price

did not bar subsequent action for price following buyer's inaction. D.C. Code §§ 28:1-204(3), 28:2-106(4), 28:2-602(1), 28:2-703(f), 28:2-709(1)(A), 28:2-720. *Robinson v. Jonathan Logan Financial*, 277 A.2d 115, 1971 D.C. App. LEXIS 314 (1971).

§ 28:2-107. Goods to be severed from realty; recording.

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

(Dec. 30, 1963, 77 Stat. 641, Pub. L. 88-243, § 1; Mar. 16, 1982, D.C. Law 4-85, § 4, 29 DCR 309.)

Section references. — This section is referred to in § 28:2-105.

Prior Codifications. — 1981 Ed., § 28:2-107.

1973 Ed., § 28:2-107.

Legislative history of Law 4-85. — Law 4-85, the "Uniform Commercial Code Amendment Act of 1981," was introduced in Council

and assigned Bill No. 4-89, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 24, 1981, and December 8, 1981, respectively. Signed by the Mayor on January 18, 1982, it was assigned Act No. 4-139 and transmitted to both Houses of Congress for its review.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: See Section 76, Uniform Sales Act on prior policy; Section 7, Uniform Conditional Sales Act.

Purposes:

1. Subsection (1). Notice that this subsection applies only if the timber, minerals or structures "are to be severed by the seller". If the buyer is to sever, such transactions are considered contracts affecting land and all problems of the Statute of Frauds and of the recording of land rights apply to them. Therefore, the Stat-

ute of Frauds section of this Article does not apply to such contracts though they must conform to the Statute of Frauds affecting the transfer of interests in land.

2. Subsection (2). "Things attached" to the realty which can be severed without material harm are goods within this Article regardless of who is to effect the severance. The word "fixtures" has been avoided because of the diverse definitions of this term, the test of "severance without material harm" being substituted.

The provision in subsection (3) for recording such contracts in within the purview of this Article since it is a means of preserving the buyer's rights under the contract of sale.

3. The security phases of things attached to or to become attached to realty are dealt with in the Article on Secured Transactions (Article 9) and it is to be noted that the definition of goods in that Article differs from the definition of goods in this Article.

Cross References:

Point 1: Section 2-201.

Point 2: Section 2-105.

Point 3: Articles 9 and 9-105.

Definitional Cross References:

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Present sale". Section 2-106.

"Rights". Section 1-201.

"Seller". Section 2-103.

Reason for 1972 Change [Laws 1977, Ch. 452]

Several timber-growing states have changed the 1962 Code to make timber to be cut under a contract of severance goods, regardless of the question who is to sever them. The section is revised to adopt this change. Financing of the transaction is facilitated if the timber is treated as goods instead of real estate. A similar change is made in the definition of "goods" in Section 9-105. To protect persons dealing with timberlands, filing on timber to be cut is required in Part 4 of Article 9 to be made in real estate records in a manner comparable to fixture filing.

CASE NOTES

Constructive trusts.

Constructive trusts and equitable liens are equitable remedies designed to prevent fraud

or unjust enrichment. *Stern v. J. Nichols Produce Co.*, 486 A.2d 84, 1984 D.C. App. LEXIS 579 (1984).

Part 2. Form, Formation and Readjustment of Contract.

§ 28:2-201. Formal requirements; statute of frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in conformation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable:

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but

the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (section 28:2-606).

(Dec. 30, 1963, 77 Stat. 642, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:1-206, 28:2-209, and 28:2-326.

Prior Codifications. — 1981 Ed., § 28:2-201.

1973 Ed., § 28:2-201.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 4, Uniform Sales Act (which was based on Section 17 of the Statute of 29 Charles II).

Changes: Completely rephrased; restricted to sale of goods. See also Sections 1-206, 8-319 and 9-203.

Purposes of Changes: The changed phraseology of this section is intended to make it clear that:

1. The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.

Special emphasis must be placed on the permissibility of omitting the price term in view of the insistence of some courts on the express inclusion of this term even where the parties have contracted on the basis of a published price list. In many valid contracts for sale the parties do not mention the price in express terms, the buyer being bound to pay and the seller to accept a reasonable price which the trier of the fact may well be trusted to determine. Again, frequently the price is not mentioned since the parties have based their agreement on a price list or catalogue known to both of them and this list serves as an efficient safeguard against perjury. Finally, "market" prices and valuations that are current in the vicinity constitute a similar check. Thus if the price is not stated in the memorandum it can normally be supplied without danger of fraud. Of course if the "price" consists of goods rather than money the quantity of goods must be stated.

Only three definite and invariable requirements as to the memorandum are made by this

subsection. First, it must evidence a contract for the sale of goods; second, it must be "signed", a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity.

2. "Partial performance" as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted.

Receipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists. If the court can make a just apportionment, therefore, the agreed price of any goods actually delivered can be recovered without a writing or, if the price has been paid, the seller can be forced to deliver an apportionable part of the goods.

The overt actions of the parties make admissible evidence of the other terms of the contract necessary to a just apportionment. This is true even though the actions of the parties are not in themselves inconsistent with a different transaction such as a consignment for resale or a mere loan of money.

Part performance by the buyer requires the delivery of something by him that is accepted by the seller as such performance. Thus, part payment may be made by money or check, accepted by the seller. If the agreed price consists of goods or services, then they must also have been delivered and accepted.

3. Between merchants, failure to answer a written confirmation of a contract within ten days of receipt is tantamount to a writing under subsection (2) and is sufficient against both parties under subsection (1). The only effect, however, is to take away from the party who fails to answer the defense of the Statute of Frauds; the burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected. Compare the effect of a failure to reply under Section 2-207.

4. Failure to satisfy the requirements of this section does not render the contract void for all purposes, but merely prevents it from being

judicially enforced in favor of a party to the contract. For example, a buyer who takes possession of goods as provided in an oral contract which the seller has not meanwhile repudiated, is not a trespasser. Nor would the Statute of Frauds provisions of this section be a defense to a third person who wrongfully induces a party to refuse to perform an oral contract, even though the injured party cannot maintain an action for damages against the party so refusing to perform.

5. The requirement of "signing" is discussed in the comment to Section 1-201.

6. It is not necessary that the writing be delivered to anybody. It need not be signed or authenticated by both parties but it is, of course, not sufficient against one who has not signed it. Prior to a dispute no one can determine which party's signing of the memorandum may be necessary but from the time of contracting each party should be aware that to him it is signing by the other which is important.

7. If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before the court, no

additional writing is necessary for protection against fraud. Under this section it is no longer possible to admit the contract in court and still treat the Statute as a defense. However, the contract is not thus conclusively established. The admission so made by a party is itself evidential against him of the truth of the facts so admitted and of nothing more; as against the other party, it is not evidential at all.

Cross References:

See Sections 1-201, 2-202, 2-207, 2-209 and 2-304.

Definitional Cross References:

"Action". Section 1-201.

"Between merchants". Section 2-104.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Notice". Section 1-201.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Sale". Section 2-106.

"Seller". Section 2-103.

CASE NOTES

ANALYSIS

In general.

Requirements contracts.

Waiver.

In general.

Seller's acknowledgements that "agreement" or "joint work project" existed with buyer sufficiently admitted contract was formed between parties, so that statute of frauds did not bar enforcement of sales contract that was not signed by seller. D.C. Code 1981, § 28:2-201(3)(b). *Synergistic Technologies v. IDB Mobile Communications*, 871 F. Supp. 24, 1994 U.S. Dist. LEXIS 18176 (1994).

Translations of Chinese language documents lacked prerequisites of admissible evidence in action for breach of contract and were subject to being excluded for purpose of deciding motion for summary judgment. *Government of Republic of China v. Compass Communications Corp.*, 473 F. Supp. 1306, 1979 U.S. Dist. LEXIS 10557 (1979).

Defendant could not recover on its counterclaim for plaintiff's alleged inducement of breach of defendant's contract with supplier where, having admitted that it did not pay supplier advance payment required as a condition precedent to supply agreement, defendant could not establish existence of a contract between itself and supplier and, in addition, failed to produce competent evidence to controvert plaintiff's contention that its agreement with supplier was to cover defendant's breach

and not to induce supplier to breach an agreement with defendant. *Government of Republic of China v. Compass Communications Corp.*, 473 F. Supp. 1306, 1979 U.S. Dist. LEXIS 10557 (1979).

Wholesaler's agreement for sales of tobacco to retailer complied with the statute of frauds and was an enforceable contract in suit disputing price; invoices sufficiently memorialized the terms of the agreement, wholesaler conceded agreement for the sale of goods, and retailer received, accepted, and paid for the goods at issue. *Segal Wholesale, Inc. v. United Drug Serv.*, 933 A.2d 780, 2007 D.C. App. LEXIS 487 (2007).

Requirements contracts.

Limestone sales contract providing that estimated quantities would "be used to canvass bids but payment will be made only for actual quantities of work completed" and that "amount to be paid for will be the actual number of square feet of crushed stone paving installed, measured in place, and accepted" was not contract for fixed amount of limestone, but was, rather, a requirements contract; where no limestone was required, contract was not breached when none was ordered. *R. A. Weaver & Associates, Inc. v. Asphalt Constr., Inc.*, 587 F.2d 1315, 1978 U.S. App. LEXIS 8260 (C.A.D.C. 1978).

Provision of Uniform Commercial Code concerning requirements contracts does not preclude good-faith reductions that are highly disproportionate to normal prior requirements or

stated estimates. D.C. Code § 28:2-306(1). *R. A. Weaver & Associates, Inc. v. Asphalt Constr., Inc.*, 587 F.2d 1315, 1978 U.S. App. LEXIS 8260 (C.A.D.C. 1978).

Waiver.

Defendant waives right to assert statute of frauds as a defense if his counsel stipulates the facts showing that an agreement has, in fact, been reached. D.C. Code §§ 28-3502, 28:2-201; D.C. Code SCR, Civil Rule 8(c). *Hackney v. Morelite Constr.*, 418 A.2d 1062, 1980 D.C. App. LEXIS 352 (1980).

In action to enforce option contract, stipulated facts, together with letter of intent, suffi-

ciently established elements of valid option contract by establishing that defendant, by its agent, made promise to keep open and offer to sell disputed property for fixed or reasonable period of time and that promise was given for valuable consideration, by establishing identification and location of property and by establishing that price was to be set by appropriate governmental agencies, and, thus, stipulations constituted a waiver of statute of frauds defense and of any parol evidence objections to admission of stipulated facts. D.C. Code §§ 28-3502, 28:2-201; D.C. Code SCR, Civil Rule 8(c). *Hackney v. Morelite Constr.*, 418 A.2d 1062, 1980 D.C. App. LEXIS 352 (1980).

§ 28:2-202. Final written expression: parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) by course of dealing or usage of trade (section 28:1-205) or by course of performance (section 28:2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

(Dec. 30, 1963, 77 Stat. 642, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-316 and 28:2-326.

Prior Codifications. — 1981 Ed., § 28:2-202.

1973 Ed., § 28:2-202.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. This section definitely rejects:

(a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon;

(b) The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used; and

(c) The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous.

2. Paragraph (a) makes admissible evidence

of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.

3. Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and

exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

Cross References:

Point 3: Sections 1-205, 2-207, 2-302 and 2-316.

Definitional Cross References:

"Agreed" and "agreement". Section 1-201.

"Course of dealing". Section 1-205.

"Parties". Section 1-201.

"Term". Section 1-201.

"Usage of trade". Section 1-205.

"Written" and "writing". Section 1-201.

CASE NOTES

ANALYSIS

Ambiguous contracts.

Entire agreement reduced to writing.

Parol or extrinsic evidence contradicting or varying terms of written instrument.

Partially integrated agreement.

Ambiguous contracts.

A contract is ambiguous under law of District of Columbia when it is reasonably susceptible of different constructions or interpretations. *Lee v. Flintkote Co.*, 593 F.2d 1275, 1979 U.S. App. LEXIS 17697 (C.A.D.C. 1979).

Franchise agreements which licensed operation of stores retailing franchised products, erected a procedure by which locations of stores were to be fixed, and imposed a ban on another licensed location within radius specified were not ambiguous and, though granting franchisees an exclusive right to operate an outlet within specified radius, did not give franchisees right to exclusively sell franchised products, either to contractors or to retail customers in general, within that radius. *Lee v. Flintkote Co.*, 593 F.2d 1275, 1979 U.S. App. LEXIS 17697 (C.A.D.C. 1979).

Under District of Columbia law, contracts must be sufficiently definite as to their material terms. *Calveti v. Antcliff*, 346 F.Supp.2d 92, 2004 U.S. Dist. LEXIS 23062 (2004).

Entire agreement reduced to writing.

When the parties to a contract have reduced their entire agreement to writing, the court will disregard and treat as legally inoperative parol evidence of the prior negotiations and oral agreements. *Segal Wholesale, Inc. v. United Drug Serv.*, 933 A.2d 780, 2007 D.C. App. LEXIS 487 (2007).

Parol or extrinsic evidence contradicting or varying terms of written instrument.

Minutes of management meeting held by franchisor prior to execution of subject franchise agreements were correctly rejected in antitrust action as barred by parol evidence rule of District of Columbia insofar as they may have been offered to show an antecedent compact or understanding varying or supplement-

ing terms of those agreements. *Lee v. Flintkote Co.*, 593 F.2d 1275, 1979 U.S. App. LEXIS 17697 (C.A.D.C. 1979).

Strictly speaking, parol evidence rule does not bar extra-contractual evidence of meanings of assigned contract terms; but plain meaning rule does. *Lee v. Flintkote Co.*, 593 F.2d 1275, 1979 U.S. App. LEXIS 17697 (C.A.D.C. 1979).

Although express terms of agreement may not be contradicted by prior or contemporaneous agreements, they may be explained or supplemented by evidence of course of performance. D.C. Code 1981, § 28:2-202(a). *Radiation Sys. v. Amplicon, Inc.*, 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

Buyer's purchase order constituted valid and enforceable contract in writing for sale of goods which represented totality of agreement between buyer and seller, and its terms could not be contradicted by parol evidence. U.C.C. § 2-101 et seq.; D.C. Code 1981, § 28:2-202. *Graham, Van Leer & Elmore Co. v. Jones & Wood, Inc.*, 656 F. Supp. 667, 1987 U.S. Dist. LEXIS 2452 (1987).

Under the "parol evidence rule," extrinsic or parol evidence which tends to contradict, vary, add to, or subtract from the terms of a written contract must be excluded. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

Partially integrated agreement.

Invoices for wholesaler's sales to retailer were not completely integrated for purposes of parol evidence rule; the invoices were not a complete and exclusive statement of the terms of the agreement, but omitted other necessary terms such as the method or timing of delivery. *Segal Wholesale, Inc. v. United Drug Serv.*, 933 A.2d 780, 2007 D.C. App. LEXIS 487 (2007).

Invoices for wholesaler's sales to retailer was partially integrated agreement on price and, therefore, could not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement for a different price; the invoices unambiguously specified the prices, and retailer paid all but final invoice. *Segal Wholesale, Inc. v. United Drug Serv.*, 933 A.2d 780, 2007 D.C. App. LEXIS 487 (2007).

No extrinsic evidence may be introduced for a completely integrated agreement, but evidence

consistent with the terms of a partially integrated agreement is permissible. *Segal Whole-*

sale, Inc. v. United Drug Serv., 933 A.2d 780, 2007 D.C. App. LEXIS 487 (2007).

§ 28:2-203. Seals inoperative.

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

(Dec. 30, 1963, 77 Stat. 642, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-203. 1973 Ed., § 28:2-203.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 3, Uniform Sales Act.

Changes: Portion pertaining to “seals” rewritten.

Purposes of Changes:

1. This section makes it clear that every effect of the seal which relates to “sealed instruments” as such is wiped out insofar as contracts for sale are concerned. However, the substantial effects of a seal, except extension of the period of limitations, may be had by appropriate drafting as in the case of firm offers (see Section 2-205).

2. This section leaves untouched any aspects of a seal which relate merely to signatures or to authentication of execution and the like. Thus, a statute providing that a purported signature

gives prima facie evidence of its own authenticity or that a signature gives prima facie evidence of consideration is still applicable to sales transactions even though a seal may be held to be a signature within the meaning of such a statute. Similarly, the authorized affixing of a corporate seal bearing the corporate name to a contractual writing purporting to be made by the corporation may have effect as a signature without any reference to the law of sealed instruments.

Cross Reference:

Point 1: Section 2-205.

Definitional Cross References:

“Contract for sale”. Section 2-106.

“Goods”. Section 2-105.

“Writing”. Section 1-201.

§ 28:2-204. Formation in general.

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

(Dec. 30, 1963, 77 Stat. 643, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-311. 1973 Ed., § 28:2-204.

Prior Codifications. — 1981 Ed., § 28:2-204.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 1 and 3, Uniform Sales Act.

Changes: Completely rewritten by this and other sections of this Article.

Purposes of Changes:

Subsection (1) continues without change the basic policy of recognizing any manner of expression of agreement, oral, written or otherwise. The legal effect of such an agreement is, of course, qualified by other provisions of this Article.

Under subsection (1) appropriate conduct by the parties may be sufficient to establish an agreement. Subsection (2) is directed primarily to the situation where the interchanged correspondence does not disclose the exact point at which the deal was closed, but the actions of the parties indicate that a binding obligation has been undertaken.

Subsection (3) states the principle as to "open terms" underlying later sections of the Article. If the parties intend to enter into a binding agreement, this subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy. The test is not certainty as to what the parties were to do nor as to the

exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of "indefiniteness" are intended to be applied, this Act making provision elsewhere for missing terms needed for performance, open price, remedies and the like.

The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite the omissions.

Cross References:

Subsection (1): Sections 1-103, 2-201 and 2-302.

Subsection (2): Sections 2-205 through 2-209.

Subsection (3): See Part 3.

Definitional Cross References:

"Agreement", Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Term". Section 1-201.

§ 28:2-205. Firm offers.

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

(Dec. 30, 1963, 77 Stat. 643, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-205. 1973 Ed., § 28:2-205.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 1 and 3, Uniform Sales Act.

Changes: Completely rewritten by this and other sections of this Article.

Purposes of Changes:

1. This section is intended to modify the former rule which required that "firm offers" be sustained by consideration in order to bind, and to require instead that they must merely be characterized as such and expressed in signed writings.

2. The primary purpose of this section is to give effect to the deliberate intention of a mer-

chant to make a current firm offer binding. The deliberation is shown in the case of an individualized document by the merchant's signature to the offer, and in the case of an offer included on a form supplied by the other party to the transaction by the separate signing of the particular clause which contains the offer. "Signed" here also includes authentication but the reasonableness of the authentication herein allowed must be determined in the light of the purpose of the section. The circumstances surrounding the signing may justify something less than a formal signature or initialing but

typically the kind of authentication involved here would consist of a minimum of initialing of the clause involved. A handwritten memorandum on the writer's letterhead purporting in its terms to "confirm" a firm offer already made would be enough to satisfy this section, although not subscribed, since under the circumstances it could not be considered a memorandum of mere negotiation and it would adequately show its own authenticity. Similarly, an authorized telegram will suffice, and this is true even though the original draft contained only a typewritten signature. However, despite settled courses of dealing or usages of the trade whereby firm offers are made by oral communication and relied upon without more evidence, such offers remain revocable under this Article since authentication by a writing is the essence of this section.

3. This section is intended to apply to current "firm" offers and not to long term options, and an outside time limit of three months during which such offers remain irrevocable has been set. The three month period during which firm offers remain irrevocable under this section need not be stated by days or by date. If the offer states that it is "guaranteed" or "firm" until the happening of a contingency which will occur within the three month period, it will remain irrevocable until that event. A promise

made for a longer period will operate under this section to bind the offeror only for the first three months of the period but may of course be renewed. If supported by consideration it may continue for as long as the parties specify. This section deals only with the offer which is not supported by consideration.

4. Protection is afforded against the inadvertent signing of a firm offer when contained in a form prepared by the offeree by requiring that such a clause be separately authenticated. If the offer clause is called to the offeror's attention and he separately authenticates it, he will be bound; Section 2-302 may operate, however, to prevent an unconscionable result which otherwise would flow from other terms appearing in the form.

5. Safeguards are provided to offer relief in the case of material mistake by virtue of the requirement of good faith and the general law of mistake.

Cross References:

Point 1: Section 1-102.

Point 2: Section 1-102.

Point 3: Section 2-201.

Point 5: Section 2-302.

Definitional Cross References:

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Signed". Section 1-201.

"Writing". Section 1-201.

CASE NOTES

Reasonable commercial standards.

Jury question was presented as to whether drawee bank adhered to reasonable commercial standards and whether payee was negligent with respect to checks paid on missing or forged endorsements, so as to constitute a defense to conversion claim under District of Columbia law. D.C. Code 1981, §§ 28:3-406, 28:3-419(1)(c). *Kuwait Airways Corp. v. American Sec. Bank, N.A.*, 890 F.2d 456, 1989 U.S. App. LEXIS 17944 (C.A.D.C. 1989).

Depository bank that has not acted in a commercially reasonable manner in taking checks over forged endorsements is not absolutely liable but may have available to it defenses of ratification and apparent authority. *D.C. Code 1981, § 28:3-419. Kuwait Airways Corp. v. American Sec. Bank, N.A.*, 890 F.2d 456, 1989 U.S. App. LEXIS 17944 (C.A.D.C. 1989).

§ 28:2-206. Offer and acceptance in formation of contract.

(1) Unless otherwise unambiguously indicated by the language or circumstances:

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of

acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

(Dec. 30, 1963, 77 Stat. 643, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-206. 1973 Ed., § 28:2-206.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 1 and 3, Uniform Sales Act.

Changes: Completely rewritten in this and other sections of this Article.

Purposes of Changes: To make it clear that:

1. Any reasonable manner of acceptance is intended to be regarded as available unless the offeror has made quite clear that it will not be acceptable. Former technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptance, etc., are rejected and a criterion that the acceptance be "in any manner and by any medium reasonable under the circumstances," is substituted. This section is intended to remain flexible and its applicability to be enlarged as new media of communication develop or as the more time-saving present day media come into general use.

2. Either shipment or a prompt promise to ship is made a proper means of acceptance of an offer looking to current shipment. In accordance with ordinary commercial understanding the section interprets an order looking to current shipment as allowing acceptance either by actual shipment or by a prompt promise to ship and rejects the artificial theory that only a single mode of acceptance is normally envisaged by an offer. This is true even though the language of the offer happens to be "ship at once" or the like. "Shipment" is here used in the same sense as in Section 2-504; it does not include the beginning of delivery by the seller's own truck or by messenger. But loading on the

seller's own truck might be a beginning of performance under subsection (2).

3. The beginning of performance by an offeree can be effective as acceptance so as to bind the offeror only if followed within a reasonable time by notice to the offeror. Such a beginning of performance must unambiguously express the offeree's intention to engage himself. For the protection of both parties it is essential that notice follow in due course to constitute acceptance. Nothing in this section however bars the possibility that under the common law performance begun may have an intermediate effect of temporarily barring revocation of the offer, or at the offeror's option, final effect in constituting acceptance.

4. Subsection (1)(b) deals with the situation where a shipment made following an order is shown by a notification of shipment to be referable to that order but has a defect. Such a non-conforming shipment is normally to be understood as intended to close the bargain, even though it proves to have been at the same time a breach. However, the seller by stating that the shipment is non-conforming as is offered only as an accommodation to the buyer keeps the shipment or notification from operating as an acceptance.

Definitional Cross References:

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

CASE NOTES

Personal liability.

Restaurant corporation's agent would be personally liable for breach of contract with regard to each delivery of produce prior to effective disclosure of agency; however, agent would not

be personally liable with respect to deliveries made after disclosure. D.C. Code 1981, § 28:2-206(1)(b). *Rosenthal v. National Produce Co.*, 573 A.2d 365, 1990 D.C. App. LEXIS 87 (1990).

§ 28:2-207. Additional terms in acceptance or confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even

though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this subtitle.

(Dec. 30, 1963, 77 Stat. 643, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-207. 1973 Ed., § 28:2-207.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 1 and 3, Uniform Sales Act.

Changes: Completely rewritten by this and other sections of this Article.

Purposes of Changes:

1. This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed. The other situation is offer and acceptance, in which a wire or letter expressed and intended as an acceptance or the closing of an agreement adds further minor suggestions or proposals such as "ship by Tuesday," "rush," "ship draft against bill of lading inspection allowed," or the like. A frequent example of the second situation is the exchange of printed purchase order and acceptance (sometimes called "acknowledgment") forms. Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction.

2. Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained in the confirmation or in the acceptance falls within subsec-

tion (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional or different terms.

3. Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.

4. Examples of typical clauses which would normally "materially alter" the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.

5. Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given

are: a clause setting forth and perhaps enlarging slightly upon the seller's exemption due to supervening causes beyond his control, similar to those covered by the provision of this Article on merchant's excuse by failure of presupposed conditions or a clause fixing in advance any reasonable formula of proration under such circumstances; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for sub-sale, providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or fixing the seller's standard credit terms where they are within the range of trade practice and do not limit any credit bargained for; a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance "with adjustment" or otherwise limiting remedy in a reasonable manner (see Sections 2-718 and 2-719).

6. If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract. The contract then

consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Act, including subsection (2). The written confirmation is also subject to Section 2-201. Under that section a failure to respond permits enforcement of a prior oral agreement; under this section a failure to respond permits additional terms to become part of the agreement.

7. In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See Section 2-204. The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule.

Cross References:

See generally Section 2-302.

Point 5: Sections 2-513, 2-602, 2-607, 2-609, 2-612, 2-614, 2-615, 2-616, 2-718 and 2-719.

Point 6: Sections 1-102 and 2-104.

Definitional Cross References:

"Between merchants". Section 2-104.

"Contract". Section 1-201.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Seasonably". Section 1-204.

"Send". Section 1-201.

"Term". Section 1-201.

"Written". Section 1-201.

CASE NOTES

Requisites and validity of contract.

An exchange of letters and telegrams between a lumber company and the Emergency Fleet Corporation, whereby the lumber company agreed to furnish a stated quantity of timber each month, which offer was accepted by a telegram and letter, establishes a contract for the furnishing of the timber, notwithstanding a request in the letter of acceptance that more

timber be furnished each month than was stated in the offer. *Eichberg v. U.S. Shipping Bd. Emergency Fleet Corp.*, 273 F. 886, 1921 U.S. App. LEXIS 1557 (1921).

Necessary step in formation of any contract is making of offer creating in offeree the power of acceptance. *Maurice Elec. Supply Co. v. Anderson Safeway Guard Rail Corp.*, 632 F. Supp. 1082, 1986 U.S. Dist. LEXIS 30992 (1986).

§ 28:2-208. Course of performance or practical construction.

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other, but when such construction is unreasonable, express terms shall control course of performance and

course of performance shall control both course of dealing and usage of trade (section 28:1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

(Dec. 30, 1963, 77 Stat. 644, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:1-201 and 28:2-202.

Prior Codifications. — 1981 Ed., § 28:2-208.

1973 Ed., § 28:2-208.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: No such general provision but concept of this section recognized by terms such as “course of dealing”, “the circumstances of the case,” “the conduct of the parties,” etc., in Uniform Sales Act.

Purposes:

1. The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was. This section thus rounds out the set of factors which determines the meaning of the “agreement” and therefore also of the “unless otherwise agreed” qualification to various provisions of this Article.

2. Under this section a course of performance is always relevant to determine the meaning of the agreement. Express mention of course of performance elsewhere in this Article carries no contrary implication when there is a failure to refer to it in other sections.

3. Where it is difficult to determine whether a particular act merely sheds light on the meaning of the agreement or represents a waiver of a term of the agreement, the preference is in favor of “waiver” whenever such construction, plus the application of the provisions on the reinstatement of rights waived (see Section 2-209), is needed to preserve the flexible character of commercial contracts and to prevent surprise or other hardship.

4. A single occasion of conduct does not fall within the language of this section but other sections such as the ones on silence after acceptance and failure to specify particular defects can affect the parties’ rights on a single occasion (see Sections 2-605 and 2-607).

Cross References:

Point 1: Section 1-201.

Point 2: Section 2-202.

Point 3: Sections 2-209, 2-601 and 2-607.

Point 4: Sections 2-605 and 2-607.

CASE NOTES

Course of performance.

Airplane seller, who had made no performance under contract, did not establish any course of performance with buyer and, therefore, failed to establish waiver of 30-day period for delivery of airplanes by course of performance under District of Columbia Law. D.C. Code 1981, §§ 28:1-205, 28:2-208(2, 3). *Marlowe v. Argentine Naval Com.*, 808 F.2d

120, 1986 U.S. App. LEXIS 36438 (C.A.D.C. 1986).

Even if parol evidence rule bars consideration of prior oral agreements, parties’ actions can constitute course of performance that modifies express terms of agreement. D.C. Code 1981, § 28:2-208(1). *Radiation Sys. v. Amplicon, Inc.*, 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

§ 28:2-209. Modification, rescission and waiver.

(1) An agreement modifying a contract within this article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this article (section 28:2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3), it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required by any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

(Dec. 30, 1963, 77 Stat. 644, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-255, § 27(kk), 44 DCR 1271; Mar. 24, 1998, D.C. Law 12-81, § 16(a), 45 DCR 745.)

Prior Codifications. — 1981 Ed., § 28:2-209.

1973 Ed., § 28:2-209.

Legislative history of Law 11-255. — Law 11-255, the “Second Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

Legislative history of Law 12-81. — Law 12-81, the “Technical Amendments Act of 1998,” was introduced in Council and assigned Bill No. 12-408, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 4, 1997, and December 4, 1997, respectively. Signed by the Mayor on December 22, 1997, it was assigned Act No. 12-246 and transmitted to both Houses of Congress for its review. D.C. Law 12-81 became effective on March 24, 1998.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Subsection (1)—Compare Section 1, Uniform Written Obligations Act; Subsections (2) to (5)—none.

Purposes of Changes and New Matter:

1. This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments.

2. Subsection (1) provides that an agreement modifying a sales contract needs no consideration to be binding.

However, modifications made thereunder must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a “modification” without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.

The test of “good faith” between merchants or as against merchants includes “observance of reasonable commercial standards of fair dealing in the trade” (Section 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes

performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2-615 and 2-616.

3. Subsections (2) and (3) are intended to protect against false allegations of oral modifications. “Modification or rescission” includes abandonment or other change by mutual consent, contrary to the decision in *Green v. Doniger*, 300 N.Y. 238, 90 N.E.2d 56 (1949); it does not include unilateral “termination” or “cancellation” as defined in Section 2-106.

The Statute of Frauds provisions of this Article are expressly applied to modifications by subsection (3). Under those provisions the “delivery and acceptance” test is limited to the goods which have been accepted, that is, to the past. “Modification” for the future cannot therefore be conjured up by oral testimony if the price involved is \$500.00 or more since such modification must be shown at least by an authenticated memo. And since a memo is limited in its effect to the quantity of goods set forth in it there is safeguard against oral evidence.

Subsection (2) permits the parties in effect to make their own Statute of Frauds as regards any future modification of the contract by giv-

ing effect to a clause in a signed agreement which expressly requires any modification to be by signed writing. But note that if a consumer is to be held to such a clause on a form supplied by a merchant it must be separately signed.

4. Subsection (4) is intended, despite the provisions of subsections (2) and (3), to prevent contractual provisions excluding modification except by a signed writing from limiting in other respects the legal effect of the parties' actual later conduct. The effect of such conduct as a waiver is further regulated in subsection (5).

Cross References:

Point 1: Section 1-203.

Point 2: Sections 1-201, 1-203, 2-615 and 2-616.

Point 3: Sections 2-106, 2-201 and 2-202.

Point 4: Sections 2-202 and 2-208.

Definitional Cross References:

"Agreement". Section 1-201.

"Between merchants". Section 2-104.

"Contract". Section 1-201.

"Notification". Section 1-201.

"Signed". Section 1-201.

"Term". Section 1-201.

"Writing". Section 1-201.

CASE NOTES

ANALYSIS

Course of performance.

Modification of contract, generally.

Parol or extrinsic evidence.

Repudiation of contract.

Summary judgment.

Waiver.

Course of performance.

Although express terms of agreement may not be contradicted by prior or contemporaneous agreements, they may be explained or supplemented by evidence of course of performance. D.C. Code 1981, § 28:2-202(a). *Radiation Sys. v. Amplicon, Inc.*, 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

Even if parol evidence rule bars consideration of prior oral agreements, parties' actions can constitute course of performance that modifies express terms of agreement. D.C. Code 1981, § 28:2-208(1). *Radiation Sys. v. Amplicon, Inc.*, 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

Modification of contract, generally.

Contract for sale of airplanes, which permitted modification only by written agreement, could not be modified by oral agreement under District of Columbia law. D.C. Code 1981, § 28:2-209(2). *Marlowe v. Argentine Naval Com.*, 808 F.2d 120, 1986 U.S. App. LEXIS 36438 (C.A.D.C. 1986).

Buyer's correspondence with bank and internal memorandum, which referred only to extension of letters of credit and never said anything about modification of 30-day delivery period for airplanes, did not modify contract delivery period under District of Columbia law. D.C. Code 1981, § 28:2-209(2, 4). *Marlowe v. Argentine Naval Com.*, 808 F.2d 120, 1986 U.S. App. LEXIS 36438 (C.A.D.C. 1986).

Contract, which required modification to be made by instrument in writing, barred modification by written memorialization of alleged oral modification of delivery date for airplanes.

D.C. Code 1981, § 28:2-209(2, 4). *Marlowe v. Argentine Naval Com.*, 808 F.2d 120, 1986 U.S. App. LEXIS 36438 (C.A.D.C. 1986).

Parol or extrinsic evidence.

Generally, when parties have reduced their entire agreement to writing, parol evidence rule excludes evidence of prior or contemporaneous oral agreements inconsistent with express terms of writing. *Radiation Sys. v. Amplicon, Inc.*, 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

Parol evidence rule did not apply to, and therefore did not bar extrinsic evidence regarding, the determination of which travel agency signed, as lessee, a lease of an automated computer airline reservation and ticketing system. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

The parol evidence rule is a matter of substantive law, not a mere rule of evidence. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

The parol evidence rule applies only to the actual terms of the contract itself, not to the preliminary determination of who the contracting parties were. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

The parol evidence rule applies only to written contracts that have been duly signed and executed. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

Repudiation of contract.

The other party to a contract has the right under the law of the District of Columbia to recover for breach of contract when the repudiating party has communicated by word or conduct, unequivocally and positively, its intention not to perform. D.C. Code §§ 28:2-209, 28:2-610. *Government of Republic of China v. Com-*

pass Communications Corp., 473 F. Supp. 1306, 1979 U.S. Dist. LEXIS 10557 (1979).

Where a party to an executed contract discovers a material misrepresentation made in the execution of the contract, that party may elect one of two mutually exclusive remedies; he may either affirm the contract and sue for damages, or repudiate the contract and recover that with which he has parted. *Dean v. Garland*, 779 A.2d 911, 2001 D.C. App. LEXIS 189 (2001), writ of certiorari denied by 536 U.S. 924, 122 S. Ct. 2591, 153 L. Ed. 2d 780, 2002 U.S. LEXIS 4497, 70 U.S.L.W. 3774 (2002).

Summary judgment.

Genuine issue of material fact as to whether course of performance by lease financing agency in tripartite commercial leasing transaction modified requirement of purchase order that special delivery and acceptance certificate provided by agency be executed precluded summary judgment for agency on its claim that its obligation to pay was discharged; agency had paid supplier for partial shipments accepted by third party-lessee on certificates other than agency's. *Fed.R.Civ.Proc. Rule 56(c)*, 18 U.S.C. *Radiation Sys. v. Amplicon, Inc.*, 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

Genuine issue of material fact as to whether lease financing agency's conduct in paying for partial shipments of antennas that occurred outside 90-day period required by purchase order amounted to modification of express terms of purchase order precluded summary judgment on agency's claim that its obligation to pay in tripartite commercial leasing transac-

tion was discharged. *Fed.R.Civ.Proc. Rule 56(c)*, 18 U.S.C. *Radiation Sys. v. Amplicon, Inc.*, 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

Genuine issue of material fact as to whether express terms of purchase order in tripartite commercial leasing transaction were waived by conduct of parties precluded summary judgment for lease financing agency. *Fed.Rules Civ.Proc.Rule 56(c)*, 18 U.S.C. *Radiation Sys. v. Amplicon, Inc.*, 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

Genuine issue of material fact as to whether lease financing agency accepted non-conforming goods in tripartite commercial leasing transaction by not giving reasonable notice of its objection thereto precluded summary judgment for agency. *Fed.R.Civ.Proc. Rule 56(c)*, 18 U.S.C. *Radiation Sys. v. Amplicon, Inc.*, 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

Waiver.

In action in which creditor, which repossessed collateral, a used automobile, and resold it without giving notice to debtor prescribed by Uniform Commercial Code, sought deficiency judgment against defaulting debtor, if creditor and trial court limited their concern to narrower legal argument about a "voluntary" repossession, than creditor's failure to raise "waiver" and "estoppel" at trial precluded their consideration on appeal unless injustice was manifest. D.C. Code § 28:9-504(3). *Gavin v. Washington Post Employees Federal Credit Union*, 397 A.2d 968, 1979 D.C. App. LEXIS 274 (1979).

§ 28:2-210. Delegation of performance; assignment of rights.

(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Except as otherwise provided in section 28:9-406, unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

(2A) The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer's chance of obtaining

return performance within the purview of subsection (2) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but (a) the seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer; and (b) a court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement.

(3) Unless the circumstances indicate the contrary a prohibition of assignment of “the contract” is to be construed as barring only the delegation to the assignee of the assignor’s performance.

(4) An assignment of “the contract” or of “all my rights under the contract” or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (section 28:2-609).

(Dec. 30, 1963, 77 Stat. 644, Pub. L. 88-243, § 1; Oct. 26, 2000, D.C. Law 13-201, § 201(c)(2), 47 DCR 7576; Apr. 13, 2005, D.C. Law 15-354, § 39(b), 52 DCR 2638.)

Prior Codifications. — 1981 Ed., § 28:2-210.

1973 Ed., § 28:2-210.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

D.C. Law 15-354, in par. (2), substituted “section 28:9-406” for “Section 9-406”.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:2-103.

Legislative history of Law 15-354. — Law 15-354, the “Technical Amendments Act of 2004”, was introduced in Council and assigned Bill No. 15-1130 which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 7, 2004, and December 21, 2004, respectively. Signed by the Mayor on February 9, 2005, it was assigned Act No. 15-770 and transmitted to both Houses of Congress for its review. D.C. Law 15-354 became effective on April 13, 2005.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. Generally, this section recognizes both delegation of performance and assignability as normal and permissible incidents of a contract for the sale of goods.

2. Delegation of performance, either in conjunction with an assignment or otherwise, is provided for by subsection (1) where no sub-

stantial reason can be shown as to why the delegated performance will not be as satisfactory as personal performance.

3. Under subsection (2) rights which are no longer executory such as a right to damages for breach may be assigned although the agreement prohibits assignment. In such cases no question of delegation of any performance is involved. Subsection (2) is subject to Section 9-406, which makes rights to payment for goods

sold ("accounts"), whether or not earned, freely alienable notwithstanding a contrary agreement or rule of law.

4. The nature of the contract or the circumstances of the case, however, may bar assignment of the contract even where delegation of performance is not involved. This Article and this section are intended to clarify this problem, particularly in cases dealing with output, requirement and exclusive dealing contracts. In the first place the section on requirements and exclusive dealing removes from the construction of the original contract most of the "personal discretion" element by substituting the reasonably objective standard of good faith operation of the plant or business to be supplied. Secondly, the section on insecurity and assurances, which is specifically referred to in subsection (5) of this section, frees the other party from the doubts and uncertainty which may afflict him under an assignment of the character in question by permitting him to demand adequate assurance of due performance without which he may suspend his own performance. Subsection (5) is not in any way intended to limit the effect of the section on insecurity and assurances and the word "performance" includes the giving of orders under a requirements contract.

Of course, in any case where a material personal discretion is sought to be transferred, effective assignment is barred by subsection (2).

5. Subsection (4) lays down a general rule of construction distinguishing between a normal commercial assignment, which substitutes the assignee for the assignor both as to rights and duties, and a financing assignment in which only the assignor's rights are transferred.

This Article takes no position on the possibility of extending some recognition or power to the original parties to work out normal commercial readjustments of the contract in the case of financing assignments even after the original obligor has been notified of the assignment. This question is dealt with in the Article on Secured Transactions (Article 9).

6. Subsection (5) recognizes that the non-assigning original party has a stake in the reliability of the person with whom he has closed the original contract, and is, therefore, entitled to due assurance that any delegated performance will be properly forthcoming.

7. This section is not intended as a complete statement of the law of delegation and assignment but is limited to clarifying a few points doubtful under the case law. Particularly, neither this section nor this Article touches directly on such questions as the need or effect of notice of the assignment, the rights of successive assignees, or any question of the form of an assignment, either as between the parties or as against any third parties. Some of these questions are dealt with in Article 9.

Cross References:

Point 3: Articles 5 and 9.

Point 4: Sections 2-306 and 2-609.

Point 5: Article 9, Sections 9-317 and 9-318.

Point 7: Article 9.

Definitional Cross References:

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Party". Section 1-201.

"Rights". Section 1-201.

"Seller". Section 2-103.

"Term". Section 1-201.

CASE NOTES

Actions of assignee.

Higher prices and direct debiting by franchisor were anticipated and permitted by original franchise contract, and thus assignment did not materially increase burdens or risks for franchisee with respect to those issues, and did not violate District of Columbia Retail Service Station Amendment Act (RSSA), where that contract stated that prices were "subject to change at any time and without notice," method of payment could include automated direct debit "or any other method as designate[d] from time to time," franchisor could assign any or all of its rights or interests, without restriction, to any person or entity, and assignment by franchisor could affect franchisee's rights and obligations under agreement to extent that as-

signee had policies or programs different from franchisor's. *Metroil, Inc. v. ExxonMobil Oil Corp.*, 672 F.3d 1108, 2012 U.S. App. LEXIS 5712 (C.A.D.C. 2012).

Under District of Columbia law, alleged actions by assignee of franchisor's gas station franchise agreement, in raising the price charged for fuel, demanding payment in advance instead of cash on delivery, and withdrawing excessive funds from franchisee's bank account, were permitted by the franchise agreement and were not invalid under the Uniform Commercial Code (UCC). *Metroil, Inc. v. ExxonMobil Oil Corp.*, 724 F.Supp.2d 70, 2010 U.S. Dist. LEXIS 72562 (2010), affirmed by 672 F.3d 1108, 400 U.S. App. D.C. 43, 2012 U.S. App. LEXIS 5712 (2012).

Part 3. General Obligation and Construction of Contract.

§ 28:2-301. General obligations of parties.

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

(Dec. 30, 1963, 77 Stat. 645, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-301. 1973 Ed., § 28:2-301.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 11 and 41, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes:

This section uses the term "obligation" in contrast to the term "duty" in order to provide for the "condition" aspects of delivery and payment insofar as they are not modified by other sections of this Article such as those on cure of tender. It thus replaces not only the general provisions of the Uniform Sales Act on the parties' duties, but also the general provisions of that Act on the effect of conditions. In order to determine what is "in accordance with the

contract" under this Article usage of trade, course of dealing and performance, and the general background of circumstances must be given due consideration in conjunction with the lay meaning of the words used to define the scope of the conditions and duties.

Cross References:

Section 1-106. See also Sections 1-205, 2-208, 2-209, 2-508, and 2-612.

Definitional Cross References:

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Party". Section 1-201.

"Seller". Section 2-103.

§ 28:2-302. Unconscionable contract or clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

(Dec. 30, 1963, 77 Stat. 645, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-302. 1973 Ed., § 28:2-302.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of lan-

guage, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is

whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (Cf. *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 3d Cir. 1948) and not of disturbance of allocation of risks because of superior bargaining power. The underlying basis of this section is illustrated by the results in cases such as the following:

Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 93 Utah 414, 73 P.2d 1272 (1937), where a clause limiting time for complaints was held inapplicable to latent defects in a shipment of catsup which could be discovered only by microscopic analysis; *Hardy v. General Motors Acceptance Corporation*, 38 Ga.App. 463, 144 S.E. 327 (1928), holding that a disclaimer of warranty clause applied only to express warranties, thus letting in a fair implied warranty; *Andrews Bros. v. Singer & Co.* (1934 CA) 1 K.B. 17, holding that where a car with substantial mileage was delivered instead of a "new" car, a disclaimer of warranties, including those "implied," left unaffected an "express obligation" on the description, even though the Sale of Goods Act called such an implied warranty; *New Prague Flouring Mill Co. v. G.A. Spears*, 194 Iowa 417, 189 N.W. 815 (1922), holding that a clause permitting the seller, upon the buyer's failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely postponed 30 days at a time by the inaction, does not indefinitely postpone the date of measuring damages for the buyer's breach, to the seller's advantage; and *Kansas Flour Mills Co. v. Dirks*, 100 Kan. 376, 164 P. 273 (1917), where under a similar clause in a rising market the court permitted

the buyer to measure his damages for non-delivery at the end of only one 30 day postponement; *Green v. Arcos, Ltd.* (1931 CA) 47 T.L.R. 336, where a blanket clause prohibiting rejection of shipments by the buyer was restricted to apply to shipments where discrepancies represented merely mercantile variations; *Meyer v. Packard Cleveland Motor Co.*, 106 Ohio St. 328, 140 N.E. 118 (1922), in which the court held that a "waiver" of all agreements not specified did not preclude implied warranty of fitness of a rebuilt dump truck for ordinary use as a dump truck; *Austin Co. v. J. H. Tillman Co.*, 104 Or. 541, 209 P. 131 (1922), where a clause limiting the buyer's remedy to return was held to be applicable only if the seller had delivered a machine needed for a construction job which reasonably met the contract description; *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790, 59 A.L.R. 1164 (1927), refusing to allow warranty of fitness for purpose imposed by law to be negated by clause excluding all warranties "made" by the seller; *Robert A. Munroe & Co. v. Meyer* (1930) 2 K.B. 312, holding that the warranty of description overrides a clause reading "with all faults and defects" where adulterated meat not up to the contract description was delivered.

2. Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.

3. The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in subsection (2) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts.

Definitional Cross Reference:

"Contract". Section 1-201.

CASE NOTES

ANALYSIS

Evidence.
Fraud.
In general.
Meaningful choice.
Question of law.
Review.
Unreasonable price.

Evidence.

Evidence that buyer had been free to indulge in comparative shopping at time she purchased

household effects sustained finding that conditional sale contract under which buyer was obligated to pay \$832 including \$219.30 credit charge over two-year period for purchase of goods which cost seller only \$234.35 was not unconscionable. D.C. Code § 28:2-302. *Morris v. Capitol Furniture & Appliance Co.*, 280 A.2d 775, 1971 D.C. App. LEXIS 189 (1971).

Interrogatories may be used to develop evidence of commercial setting, purpose and effect of a contract at time it was made for purpose of determining whether contract is unconscionable. D.C. Code § 28:2-302. *Patterson v. Walker-*

Thomas Furniture Co., 277 A.2d 111, 1971 D.C. App. LEXIS 313 (1971).

Fraud.

Fraud can be presumed from grossly unfair nature of terms of contract. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 1965 U.S. App. LEXIS 4673 (C.A.D.C. 1965).

In general.

Where element of unconscionability is present at time contract is made, contract should not be enforced. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 1965 U.S. App. LEXIS 4673 (C.A.D.C. 1965).

That Congress enacted Uniform Commercial Code specifically providing that court may refuse to enforce contract which it finds to be unconscionable at time it was made does not mean that common law of District of Columbia was otherwise at time of enactment nor preclude court from adopting similar rule in exercise of its powers to develop common law for District of Columbia. D.C. Code 1961, § 28-2-302. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 1965 U.S. App. LEXIS 4673 (C.A.D.C. 1965).

Claim of common law unconscionability applies only defensively, for example, as response to attempt to enforce contract. Restatement (Second) of Contracts § 208 comment. *Williams v. Central Money Co.*, 974 F. Supp. 22, 1997 U.S. Dist. LEXIS 11088 (1997).

Under District of Columbia law, agreements between restaurant chain and meat supplier were not unconscionable where the agreements were the product of a meeting of the minds and they did not diminish any rights that party complaining of unconscionability possessed prior to them. D.C. Code 1981, §§ 28:2-302, 28:2-302 comment, 28:2-309. *Goldstein v. S & A Restaurant Corp.*, 622 F. Supp. 139, 1985 U.S. Dist. LEXIS 14328 (1985).

Despite depositor's contention that provision in joint tenancy certificate of deposit agreement allowing bank to set off any debt owed by either joint tenant did not accurately express parties' intent, provision was unambiguous and enforceable, absent claim of fraud, duress or mutual mistake. *Isaac v. First Nat'l Bank*, 647 A.2d 1159, 1994 D.C. App. LEXIS 167 (1994).

Meaningful choice.

"Unconscionability" includes absence of meaningful choice on part of one of parties together with contract terms which are unreasonably favorable to the other party. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 1965 U.S. App. LEXIS 4673 (C.A.D.C. 1965).

Whether meaningful choice is present in particular case as to one of parties to contract claimed to be unconscionable can only be determined by consideration of all circumstances surrounding transaction and may be negated

by gross inequality of bargaining power. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 1965 U.S. App. LEXIS 4673 (C.A.D.C. 1965).

Manner in which contract was entered into is relevant to determining whether meaningful choice was present on part of one of parties for purposes of deciding whether contract was unconscionable. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 1965 U.S. App. LEXIS 4673 (C.A.D.C. 1965).

One-sided bargain is itself evidence of inequality of bargaining parties in determining whether contract was unconscionable. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 1965 U.S. App. LEXIS 4673 (C.A.D.C. 1965).

Test to be applied in those cases where no meaningful choice was exercised upon entering into contract are whether terms are so extreme as to appear unconscionable according to mores and business practices of time and place. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 1965 U.S. App. LEXIS 4673 (C.A.D.C. 1965).

Question of law.

Under District of Columbia law, determination of contract's unconscionability is question of law for court. D.C. Code 1981, §§ 28:2-302(1), 28:2-719(3). *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Review.

Inasmuch as trial court and appellate court did not recognize that contracts whereby balance due on purchases from retail furniture store was kept on every item purchased until balance due on all items, whenever purchased, was liquidated could be unenforceable on basis of being unconscionable and record was not sufficient for Court of Appeals to decide issue as matter of law, cases must be remanded to trial court for further proceedings. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 1965 U.S. App. LEXIS 4673 (C.A.D.C. 1965).

Unreasonable price.

Where contract price paid to corporation under home improvement contracts was usually at least double the cost and reasonable profit to contractor, such contracts were unconscionable for purposes of raising defense against holders of notes arising out of financing of such contracts. D.C. Code §§ 28:1-101 et seq., 28:2-302. *Slaughter v. Jefferson Federal Sav. & Loan Asso.*, 361 F. Supp. 590, 1973 U.S. Dist. LEXIS 12565 (1973), reversed by 538 F.2d 397, 176 U.S. App. D.C. 49, 1976 U.S. App. LEXIS 8449, 1976 U.S. App. LEXIS 11596, 19 U.C.C. Rep. Serv. (CBC) 171, 19 U.C.C. Rep. Serv. (CBC) 534 (1976).

The two elements of which unconscionability is comprised; namely, an absence of meaningful

choice and contract terms unreasonably favorable to the other party, must be particularized in some detail before a merchant is required to divulge his pricing policies through interrogatories and through the production of records in court and an answer asserting affirmative defense of unconscionability only on basis of a stated conclusion that price is excessive is insufficient. D.C. Code § 28:2-302. *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111, 1971 D.C. App. LEXIS 313 (1971).

In a proper case, gross overpricing may be raised in defense to action on sales contract as an element of unconscionability; however, price as an unreasonable contract term is only one of the elements which underpin proof of unconscionability. D.C. Code § 28:2-302. *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111, 1971 D.C. App. LEXIS 313 (1971).

§ 28:2-303. Allocation or division of risks.

Where this article allocates a risk or a burden as between the parties "unless otherwise agreed", the agreement may not only shift the allocation but may also divide the risk or burden.

(Dec. 30, 1963, 77 Stat. 645, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-303. 1973 Ed., § 28:2-303.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. This section is intended to make it clear that the parties may modify or allocate "unless otherwise agreed" risks or burdens imposed by this Article as they desire, always subject, of course, to the provisions on unconscionability.

Compare Section 1-102(4).

2. The risk or burden may be divided by the express terms of the agreement or by the attending circumstances, since under the defini-

tion of "agreement" in this Act the circumstances surrounding the transaction as well as the express language used by the parties enter into the meaning and substance of the agreement.

Cross References:

Point 1: Sections 1-102, 2-302.

Point 2: Section 1-201.

Definitional Cross References:

"Party". Section 1-201.

"Agreement". Section 1-201.

§ 28:2-304. Price payable in money, goods, realty, or otherwise.

(1) The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

(2) Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller's obligations with reference to them are subject to this article, but not the transfer of the interest in realty or the transferor's obligations in connection therewith.

(Dec. 30, 1963, 77 Stat. 645, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-304. 1973 Ed., § 28:2-304.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Subsections (2) and (3) of Section 9, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes:

1. This section corrects the phrasing of the Uniform Sales Act so as to avoid misconstruction and produce greater accuracy in commercial result. While it continues the essential intent and purpose of the Uniform Sales Act it rejects any purely verbalistic construction in disregard of the underlying reason of the provisions.

2. Under subsection (1) the provisions of this Article are applicable to transactions where the "price" of goods is payable in something other than money. This does not mean, however, that this whole Article applies automatically and in its entirety simply because an agreed transfer of title to goods is not a gift. The basic purposes and reasons of the Article must always be considered in determining the applicability of any of its provisions.

3. Subsection (2) lays down the general principle that when goods are to be exchanged for realty, the provisions of this Article apply only

to those aspects of the transaction which concern the transfer of title to goods but do not affect the transfer of the realty since the detailed regulation of various particular contracts which fall outside the scope of this Article is left to the courts and other legislation. However, the complexities of these situations may be such that each must be analyzed in the light of the underlying reasons in order to determine the applicable principles. Local statutes dealing with realty are not to be lightly disregarded or altered by language of this Article. In contrast, this Article declares definite policies in regard to certain matters legitimately within its scope though concerned with real property situations, and in those instances the provisions of this Article control.

Cross References:

Point 1: Section 1-102.

Point 3: Sections 1-102, 1-103, 1-104 and 2-107.

Definitional Cross References:

"Goods". Section 2-105.

"Money". Section 1-201.

"Party". Section 1-201.

"Seller". Section 2-103.

§ 28:2-305. Open price term.

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if:

(a) nothing is said as to price; or

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

(Dec. 30, 1963, 77 Stat. 645, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-305. 1973 Ed., § 28:2-305.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 9 and 10, Uniform Sales Act.

Changes: Completely rewritten.

Purposes of Changes:

1. This section applies when the price term is left open on the making of an agreement which is nevertheless intended by the parties to be a binding agreement. This Article rejects in these instances the formula that "an agreement to agree is unenforceable" if the case falls within subsection (1) of this section, and rejects also defeating such agreements on the ground of "indefiniteness". Instead this Article recognizes the dominant intention of the parties to have the deal continue to be binding upon both. As to future performance, since this Article recognizes remedies such as cover (Section 2-712), resale (Section 2-706) and specific performance (Section 2-716) which go beyond any mere arithmetic as between contract price and market price, there is usually a "reasonably certain basis for granting an appropriate remedy for breach" so that the contract need not fail for indefiniteness.

2. Under some circumstances the postponement of agreement on price will mean that no deal has really been concluded, and this is made express in the preamble of subsection (1) ("The parties if they so intend") and in subsection (4). Whether or not this is so is, in most cases, a question to be determined by the trier of fact.

3. Subsection (2) dealing with the situation where the price is to be fixed by one party rejects the uncommercial idea that an agreement that the seller may fix the price means that he may fix any price he may wish by the express qualification that the price so fixed must be fixed in good faith. Good faith includes observance of reasonable commercial standards of fair dealing in the trade if the party is a merchant. (Section 2-103). But in the normal case a "posted price" or a future seller's or buyer's "given price," "price in effect," "market price," or the like satisfies the good faith requirement.

4. The section recognizes that there may be cases in which a particular person's judgment

is not chosen merely as a barometer or index of a fair price but is an essential condition to the parties' intent to make any contract at all. For example, the case where a known and trusted expert is to "value" a particular painting for which there is no market standard differs sharply from the situation where a named expert is to determine the grade of cotton, and the difference would support a finding that in the one the parties did not intend to make a binding agreement if that expert were unavailable whereas in the other they did so intend. Other circumstances would of course affect the validity of such a finding.

5. Under subsection (3), wrongful interference by one party with any agreed machinery for price fixing in the contract may be treated by the other party as a repudiation justifying cancellation, or merely as a failure to take cooperative action thus shifting to the aggrieved party the reasonable leeway in fixing the price.

6. Throughout the entire section, the purpose is to give effect to the agreement which has been made. That effect, however, is always conditioned by the requirement of good faith action which is made an inherent part of all contracts within this Act. (Section 1-203).

Cross References:

Point 1: Sections 2-204(3), 2-706, 2-712 and 2-716.

Point 3: Section 2-103.

Point 5: Sections 2-311 and 2-610.

Point 6: Section 1-203.

Definitional Cross References:

"Agreement". Section 1-201.

"Burden of establishing". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Fault". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Receipt of goods". Section 2-103.

"Seller". Section 2-103.

"Term". Section 1-201.

CASE NOTES

ANALYSIS

Escalation clause.

In general.

Escalation clause.

Where aviation fuel purchase and supply contract containing escalation clause using posted prices for particular crude oil as a benchmark was executed by parties prior to imposi-

tion of government price controls when there was only one grade of oil, contract's pricing mechanism was so indefinite in context of two-tier pricing system for new and old oil under price controls it could no longer be applied, and since agreed standard failed, a reasonable price must be substituted while enforcing contract according to its remaining terms. D.C. Code § 28:2-305(1); C.R.S. '73, 4-2-305(1). North

Cent. Airlines, Inc. v. Continental Oil Co., 574 F.2d 582, 1978 U.S. App. LEXIS 12482 (C.A.D.C. 1978).

Finding of district court, in airline's suit against oil company for breach of contract for purchase and supply of aviation fuel which contained an escalation clause using posted price for particular grade and weight of crude oil as benchmark price to be paid for jet fuel, that price bulletins for exempt oil under subsequent two-tier pricing system following imposition of government control after execution of contract did not constitute "posted prices" within meaning of contract was clearly erroneous. North Cent. Airlines, Inc. v. Continental Oil Co., 574 F.2d 582, 1978 U.S. App. LEXIS 12482 (C.A.D.C. 1978).

In general.

Since the pricing mechanism provided by

aviation fuel supply and purchase contract tied to the posted prices as existed under system before imposition of government price controls could no longer be applied in the context of the two-tier pricing system, on remand district court was required to determine what was a reasonable price for aviation fuel where parties intended to pass through some costs of raw materials by increasing price of refined product in relation to increase in price of crude oil. North Cent. Airlines, Inc. v. Continental Oil Co., 574 F.2d 582, 1978 U.S. App. LEXIS 12482 (C.A.D.C. 1978).

§ 28:2-306. Output, requirements and exclusive dealings.

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

(Dec. 30, 1963, 77 Stat. 646, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-306. 1973 Ed., § 28:2-306.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. Subsection (1) of this section, in regard to output and requirements, applies to this specific problem the general approach of this Act which requires the reading of commercial background and intent into the language of any agreement and demands good faith in the performance of that agreement. It applies to such contracts of nonproducing establishments such as dealers or distributors as well as to manufacturing concerns.

2. Under this Article, a contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation

since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure. Reasonable elasticity in the requirements is expressly envisaged by this section and good faith variations from prior requirements are permitted even when the variation may be such as to result in discontinuance. A shutdown by a requirements buyer for lack of orders might be permissible when a shut-down merely to curtail losses would not. The essential test is whether the party is acting in good faith. Similarly, a sudden expansion of the plant by which requirements are to be measured would not be included within the

scope of the contract as made but normal expansion undertaken in good faith would be within the scope of this section. One of the factors in an expansion situation would be whether the market price had risen greatly in a case in which the requirements contract contained a fixed price. Reasonable variation of an extreme sort is exemplified in *Southwest Natural Gas Co. v. Oklahoma Portland Cement Co.*, 102 F.2d 630 (C.C.A. 10, 1939). This Article takes no position as to whether a requirements contract is a provable claim in bankruptcy.

3. If an estimate of output or requirements is included in the agreement, no quantity unreasonably disproportionate to it may be tendered or demanded. Any minimum or maximum set by the agreement shows a clear limit on the intended elasticity. In similar fashion, the agreed estimate is to be regarded as a center around which the parties intend the variation to occur.

4. When an enterprise is sold, the question may arise whether the buyer is bound by an existing output or requirements contract. That question is outside the scope of this Article, and is to be determined on other principles of law. Assuming that the contract continues, the output or requirements in the hands of the new owner continue to be measured by the actual good faith output or requirements under the normal operation of the enterprise prior to sale. The sale itself is not grounds for sudden expansion or decrease.

5. Subsection (2), on exclusive dealing, makes explicit the commercial rule embodied in this Act under which the parties to such contracts are held to have impliedly, even when not expressly, bound themselves to use reasonable diligence as well as good faith in their performance of the contract. Under such contracts the exclusive agent is required, although no express commitment has been made, to use reasonable effort and due diligence in the expansion of the market or the promotion of the product, as the case may be. The principal is expected under such a contract to refrain from supplying any other dealer or agent within the exclusive territory. An exclusive dealing agreement brings into play all of the good faith aspects of the output and requirement problems of subsection (1). It also raises questions of insecurity and right to adequate assurance under this Article.

Cross References:

Point 4: Section 2-210.

Point 5: Sections 1-203 and 2-609.

Definitional Cross References:

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Good faith". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Term". Section 1-201.

"Seller". Section 2-103.

CASE NOTES

ANALYSIS

Liability.

Requirements contracts.

Liability.

Seller who violates his duty to exercise good faith in attempting to secure fulfillment of condition precedent to requirements contract, thereby preventing underlying contract from coming into effect, can be held liable under District of Columbia law for difference between cost to buyer of substitute goods and contract price. D.C. Code 1981, §§ 28:2-306(1), 28:2-610, 28:2-711, 28:2-712. *Gatolil (U.S.A.) v. Washington Metro. Area Transit Auth.*, 801 F.2d 451, 1986 U.S. App. LEXIS 30683 (C.A.D.C. 1986).

Requirements contracts.

Provision of Uniform Commercial Code concerning requirements contracts does not pre-

clude good-faith reductions that are highly disproportionate to normal prior requirements or stated estimates. D.C. Code § 28:2-306(1). *R. A. Weaver & Associates, Inc. v. Asphalt Constr., Inc.*, 587 F.2d 1315, 1978 U.S. App. LEXIS 8260 (C.A.D.C. 1978).

Limestone sales contract providing that estimated quantities would "be used to canvass bids but payment will be made only for actual quantities of work completed" and that "amount to be paid for will be the actual number of square feet of crushed stone paving installed, measured in place, and accepted" was not contract for fixed amount of limestone, but was, rather, a requirements contract; where no limestone was required, contract was not breached when none was ordered. *R. A. Weaver & Associates, Inc. v. Asphalt Constr., Inc.*, 587 F.2d 1315, 1978 U.S. App. LEXIS 8260 (C.A.D.C. 1978).

§ 28:2-307. Delivery in single lot or several lots.

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where

the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

(Dec. 30, 1963, 77 Stat. 646, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-307. 1973 Ed., § 28:2-307.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 45(1), Uniform Sales Act.

Changes: Rewritten and expanded.

Purposes of Changes:

1. This section applies where the parties have not specifically agreed whether delivery and payment are to be by lots and generally continues the essential intent of original Act, Section 45(1) by assuming that the parties intended delivery to be in a single lot.

2. Where the actual agreement or the circumstances do not indicate otherwise, delivery in lots is not permitted under this section and the buyer is properly entitled to reject for a deficiency in the tender, subject to any privilege in the seller to cure the tender.

3. The “but” clause of this section goes to the case in which it is not commercially feasible to deliver or to receive the goods in a single lot as for example, where a contract calls for the shipment of ten carloads of coal and only three cars are available at a given time. Similarly, in a contract involving brick necessary to build a building the buyer’s storage space may be limited so that it would be impossible to receive the entire amount of brick at once, or it may be necessary to assemble the goods as in the case of cattle on the range, or to mine them.

In such cases, a partial delivery is not subject to rejection for the defect in quantity alone, if the circumstances do not indicate a repudiation or default by the seller as to the expected balance or do not give the buyer ground for suspending his performance because of insecurity under the provisions of Section 2-609. However, in such cases the undelivered balance of goods under the contract must be forthcoming

within a reasonable time and in a reasonable manner according to the policy of Section 2-503 on manner of tender of delivery. This is reinforced by the express provisions of Section 2-608 that if a lot has been accepted on the reasonable assumption that its nonconformity will be cured, the acceptance may be revoked if the cure does not seasonably occur. The section rejects the rule of *Kelly Construction Co. v. Hackensack Brick Co.*, 91 N.J.L. 585, 103 A. 471, 2 A.L.R. 685 (1918) and approves the result in *Lynn M. Ranger, Inc. v. Gildersleeve*, 106 Conn. 372, 138 A. 142 (1927) in which a contract was made for six carloads of coal then rolling from the mines and consigned to the seller but the seller agreed to divert the carloads to the buyer as soon as the car numbers became known to him. He arranged a diversion of two cars and then notified the buyer who then repudiated the contract. The seller was held to be entitled to his full remedy for the two cars diverted because simultaneous delivery of all of the cars was not contemplated by either party.

4. Where the circumstances indicate that a party has a right to delivery in lots, the price may be demanded for each lot if it is apportionable.

Cross References:

Point 1: Section 1-201.

Point 2: Sections 2-508 and 2-601.

Point 3: Sections 2-503, 2-608 and 2-609.

Definitional Cross References:

“Contract for sale”. Section 2-106.

“Goods”. Section 2-105.

“Lot”. Section 2-105.

“Party”. Section 1-201.

“Rights”. Section 1-201.

§ 28:2-308. Absence of specified place for delivery.

Unless otherwise agreed:

(a) the place for delivery of goods is the seller’s place of business or if he has none his residence; but

(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

(c) documents of title may be delivered through customary banking channels.

(Dec. 30, 1963, 77 Stat. 646, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-308. 1973 Ed., § 28:2-308.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Paragraphs (a) and (b)—Section 43(1), Uniform Sales Act; Paragraph (c)—none.

Changes: Slight modification in language.

Purposes of Changes and New Matter:

1. Paragraphs (a) and (b) provide for those noncommercial sales and for those occasional commercial sales where no place or means of delivery has been agreed upon by the parties. Where delivery by carrier is “required or authorized by the agreement”, the seller’s duties as to delivery of the goods are governed not by this section but by Section 2-504.

2. Under paragraph (b) when the identified goods contracted for are known to both parties to be in some location other than the seller’s place of business or residence, the parties are presumed to have intended that place to be the place of delivery. This paragraph also applies (unless, as would be normal, the circumstances show that delivery by way of documents is intended) to a bulk of goods in the possession of a bailee. In such a case, however, the seller has the additional obligation to procure the acknowledgment by the bailee of the buyer’s right to possession.

3. Where “customary banking channels” call only for due notification by the banker that the documents are on hand, leaving the buyer himself to see to the physical receipt of the goods,

tender at the buyer’s address is not required under paragraph (c). But that paragraph merely eliminates the possibility of a default by the seller if “customary banking channels” have been properly used in giving notice to the buyer. Where the bank has purchased a draft accompanied by documents or has undertaken its collection on behalf of the seller, Part 5 of Article 4 spells out its duties and relations to its customer. Where the documents move forward under a letter of credit the Article on Letters of Credit spells out the duties and relations between the bank, the seller and the buyer.

4. The rules of this section apply only “unless otherwise agreed.” The surrounding circumstances, usage of trade, course of dealing and course of performance, as well as the express language of the parties, may constitute an “otherwise agreement”.

Cross References:

Point 1: Sections 2-504 and 2-505.

Point 2: Section 2-503.

Point 3: Section 2-512, Articles 4, Part 5, and 5.

Definitional Cross References:

“Contract for sale”. Section 2-106.

“Delivery”. Section 1-201.

“Document of title”. Section 1-201.

“Goods”. Section 2-105.

“Party”. Section 1-201.

“Seller”. Section 2-103.

CASE NOTES

Authority to enter into contract.

Even if manufacturer’s representative, as manufacturer’s agent, took action that could be deemed acceptance on behalf of its principal, representative lacked either actual or apparent

authority to enter into contracts on behalf of manufacturer. *Maurice Elec. Supply Co. v. Anderson Safeway Guard Rail Corp.*, 632 F. Supp. 1082, 1986 U.S. Dist. LEXIS 30992 (1986).

§ 28:2-309. Absence of specific time provisions; notice of termination.

(1) The time for shipment or delivery or any other action under a contract if not provided in this article or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(3) Termination of a contract by one party except on the happening of an

agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

(Dec. 30, 1963, 77 Stat. 646, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-309. 1973 Ed., § 28:2-309.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Subsection (1)—see Sections 43(2), 45(2), 47(1) and 48, Uniform Sales Act, for policy continued under this Article; Subsection (2)—none; Subsection (3)—none.

Changes: Completely different in scope.

Purposes of Changes and New Matter:

1. Subsection (1) requires that all actions taken under a sales contract must be taken within a reasonable time where no time has been agreed upon. The reasonable time under this provision turns on the criteria as to “reasonable time” and on good faith and commercial standards set forth in Sections 1-203, 1-204 and 2-103. It thus depends upon what constitutes acceptable commercial conduct in view of the nature, purpose and circumstances of the action to be taken. Agreement as to a definite time, however, may be found in a term implied from the contractual circumstances, usage of trade or course of dealing or performance as well as in an express term. Such cases fall outside of this subsection since in them the time for action is “agreed” by usage.

2. The time for payment, where not agreed upon, is related to the time for delivery; the particular problems which arise in connection with determining the appropriate time of payment and the time for any inspection before payment which is both allowed by law and demanded by the buyer are covered in Section 2-513.

3. The facts in regard to shipment and delivery differ so widely as to make detailed provision for them in the text of this Article impracticable. The applicable principles, however, make it clear that surprise is to be avoided, good faith judgment is to be protected, and notice or negotiation to reduce the uncertainty to certainty is to be favored.

4. When the time for delivery is left open, unreasonably early offers of or demands for delivery are intended to be read under this Article as expressions of desire or intention, requesting the assent or acquiescence of the other party, not as final positions which may amount without more to breach or to create breach by the other side. See Sections 2-207 and 2-609.

5. The obligation of good faith under this Act requires reasonable notification before a contract may be treated as breached because a reasonable time for delivery or demand has expired. This operates both in the case of a contract originally indefinite as to time and of one subsequently made indefinite by waiver.

When both parties let an originally reasonable time go by in silence, the course of conduct under the contract may be viewed as enlarging the reasonable time for tender or demand of performance. The contract may be terminated by abandonment.

6. Parties to a contract are not required in giving reasonable notification to fix, at peril of breach, a time which is in fact reasonable in the unforeseeable judgment of a later trier of fact. Effective communication of a proposed time limit calls for a response, so that failure to reply will make out acquiescence. Where objection is made, however, or if the demand is merely for information as to when goods will be delivered or will be ordered out, demand for assurances on the ground of insecurity may be made under this Article pending further negotiations. Only when a party insists on undue delay or on rejection of the other party’s reasonable proposal is there a question of flat breach under the present section.

7. Subsection (2) applies a commercially reasonable view to resolve the conflict which has arisen in the cases as to contracts of indefinite duration. The “reasonable time” of duration appropriate to a given arrangement is limited by the circumstances. When the arrangement has been carried on by the parties over the years, the “reasonable time” can continue indefinitely and the contract will not terminate until notice.

8. Subsection (3) recognizes that the application of principles of good faith and sound commercial practice normally call for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement. An agreement dispensing with notification or limiting the time for the seeking of a substitute arrangement is, of course, valid under this subsection unless the results of putting it into

operation would be the creation of an unconscionable state of affairs.

9. Justifiable cancellation for breach is a remedy for breach and is not the kind of termination covered by the present subsection.

10. The requirement of notification is dispensed with where the contract provides for termination on the happening of an "agreed event." "Event" is a term chosen here to contrast with "option" or the like.

Cross References:

Point 1: Sections 1-203, 1-204 and 2-103.

Point 2: Sections 2-320, 2-321, 2-504, and 2-511 through 2-514.

Point 5: Section 1-203.

Point 6: Section 2-609.

Point 7: Section 2-204.

Point 9: Sections 2-106, 2-318, 2-610 and 2-703.

Definitional Cross References:

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Notification". Section 1-201.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Termination". Section 2-106.

CASE NOTES

ANALYSIS

Authority to enter into contract.

In general.

Offer.

Authority to enter into contract.

Even if manufacturer's representative, as manufacturer's agent, took action that could be deemed acceptance on behalf of its principal, representative lacked either actual or apparent authority to enter into contracts on behalf of manufacturer. *Maurice Elec. Supply Co. v. Anderson Safeway Guard Rail Corp.*, 632 F. Supp. 1082, 1986 U.S. Dist. LEXIS 30992 (1986).

In general.

Under District of Columbia law, contract to supply restaurant chain with meat was a contract at will where one party was in breach due to default. *Goldstein v. S & A Restaurant Corp.*,

622 F. Supp. 139, 1985 U.S. Dist. LEXIS 14328 (1985).

Offer.

November price quote on electric fixtures to be used in construction project was not exception to general rule that mere price quotation is not offer, but rather invitation to enter into negotiations, or mere suggestion to induce offers by others; record did not support conclusion that, as general rule, in electrical supply industry, offers are made with sufficient detail as to be "definite and certain," or that they are made with intent of seller that their acceptance shall bind seller to contract, and home office acceptance, which was required to be in writing to clarify specifications and terms of sales, had never occurred with respect to price quotation. *Maurice Elec. Supply Co. v. Anderson Safeway Guard Rail Corp.*, 632 F. Supp. 1082, 1986 U.S. Dist. LEXIS 30992 (1986).

§ 28:2-310. Open time for payment or running of credit; authority to ship under reservation.

Unless otherwise agreed:

(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (section 28:2-513); and

(c) if delivery is authorized and made by way of documents of title otherwise than by paragraph (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

(d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or

delaying its dispatch will correspondingly delay the starting of the credit period.

(Dec. 30, 1963, 77 Stat. 646, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-310. 1973 Ed., § 28:2-310.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 42 and 47(2), Uniform Sales Act.

Changes: Completely rewritten in this and other sections.

Purposes of Changes: This section is drawn to reflect modern business methods of dealing at a distance rather than face to face. Thus:

1. Paragraph (a) provides that payment is due at the time and place "the buyer is to receive the goods" rather than at the point of delivery except in documentary shipment cases (paragraph (c)). This grants an opportunity for the exercise by the buyer of his preliminary right to inspect before paying even though under the delivery term the risk of loss may have previously passed to him or the running of the credit period has already started.

2. Paragraph (b) while providing for inspection by the buyer before he pays, protects the seller. He is not required to give up possession of the goods until he has received payment, where no credit has been contemplated by the parties. The seller may collect through a bank by a sight draft against an order bill of lading "hold until arrival; inspection allowed." The obligations of the bank under such a provision are set forth in Part 5 of Article 4. In the absence of a credit term, the seller is permitted to ship under reservation and if he does payment is then due where and when the buyer is to receive the documents.

3. Unless otherwise agreed, the place for the receipt of the documents and payment is the buyer's city but the time for payment is only after arrival of the goods, since under paragraph (b), and Sections 2-512 and 2-513 the buyer is under no duty to pay prior to inspection.

4. Where the mode of shipment is such that goods must be unloaded immediately upon arrival, too rapidly to permit adequate inspection before receipt, the seller must be guided by the provisions of this Article on inspection which provide that if the seller wishes to demand payment before inspection, he must put an appropriate term into the contract. Even requiring payment against documents will not of itself have this desired result if the documents are to be held until the arrival of the goods. But under (b) and (c) if the terms are C.I.F., C.O.D., or cash against documents payment may be due before inspection.

5. Paragraph (d) states the common commercial understanding that an agreed credit period runs from the time of shipment or from that dating of the invoice which is commonly recognized as a representation of the time of shipment. The provision concerning any delay in sending forth the invoice is included because such conduct results in depriving the buyer of his full notice and warning as to when he must be prepared to pay.

Cross References:

Generally: Part 5.

Point 1: Section 2-509.

Point 2: Sections 2-505, 2-511, 2-512, 2-513 and Article 4.

Point 3: Sections 2-308(b), 2-512 and 2-513.

Point 4: Section 2-513(3)(b).

Definitional Cross References:

"Buyer". Section 2-103.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Receipt of goods". Section 2-103.

"Seller". Section 2-103.

"Send". Section 1-201.

"Term". Section 1-201.

CASE NOTES

Breach of contract.

Where turkey broker's remedy for turkey producer's breach of sales contract was not limited to rescission and sales contract did not provide for inspection upon delivery to broker, trial court's finding that place of inspection was point of delivery rather than ultimate destination was reversible error in broker's action

against producer for breach of contract. D.C. Code §§ 28:2-310, 28:2-513, 28:2-607. *Rubewa Products Co. v. Watson's Quality Turkey Products, Inc.*, 242 A.2d 609, 1968 D.C. App. LEXIS 159 (App. 1968).

Rescission is not the buyer's only remedy for a breach of warranty; the buyer may also affirm the contract and seek damages for its breach.

D.C. Code §§ 28:2-310, 28:2-513, 28:2-607. key Products, Inc., 242 A.2d 609, 1968 D.C. Rubewa Products Co. v. Watson's Quality Tur- App. LEXIS 159 (App. 1968).

§ 28:2-311. Options and cooperation respecting performance.

(1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of section 28:2-204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in subsections (1) (c) and (3) of section 28:2-319 specifications or arrangements relating to shipment are at the seller's option.

(3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies:

(a) is excused for any resulting delay in his own performance; and

(b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

(Dec. 30, 1963, 77 Stat. 647, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-319. 1973 Ed., § 28:2-311.

Prior Codifications. — 1981 Ed., § 28:2-311.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. Subsection (1) permits the parties to leave certain detailed particulars of performance to be filled in by either of them without running the risk of having the contract invalidated for indefiniteness. The party to whom the agreement gives power to specify the missing details is required to exercise good faith and to act in accordance with commercial standards so that there is no surprise and the range of permissible variation is limited by what is commercially reasonable. The "agreement" which permits one party so to specify may be found as well in a course of dealing, usage of trade, or implication from circumstances as in explicit language used by the parties.

2. Options as to assortment of goods or shipping arrangements are specifically reserved to the buyer and seller respectively under subsection (2) where no other arrangement has been

made. This section rejects the test which mechanically and without regard to usage or the purpose of the option gave the option to the party "first under a duty to move" and applies instead a standard commercial interpretation to these circumstances. The "unless otherwise agreed" provision of this subsection covers not only express terms but the background and circumstances which enter into the agreement.

3. Subsection (3) applies when the exercise of an option or cooperation by one party is necessary to or materially affects the other party's performance, but it is not seasonably forthcoming; the subsection relieves the other party from the necessity for performance or excuses his delay in performance as the case may be. The contract-keeping party may at his option under this subsection proceed to perform in any commercially reasonable manner rather than wait. In addition to the special remedies provided, this subsection also reserves "all other remedies". The remedy of particular impor-

tance in this connection is that provided for insecurity. Request may also be made pursuant to the obligation of good faith for a reasonable indication of the time and manner of performance for which a party is to hold himself ready.

4. The remedy provided in subsection (3) is one which does not operate in the situation which falls within the scope of Section 2-614 on substituted performance. Where the failure to cooperate results from circumstances set forth in that Section, the other party is under a duty to proffer or demand (as the case may be) substitute performance as a condition to claiming rights against the noncooperating party.

Cross References:

Point 1: Sections 1-201, 2-204 and 1-203.

Point 3: Sections 1-203 and 2-609.

Point 4: Section 2-614.

Definitional Cross References:

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

§ 28:2-312. Warranty of title and against infringement; buyer's obligation against infringement.

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that:

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

(Dec. 30, 1963, 77 Stat. 647, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-607 and 28-3904.

Prior Codifications. — 1981 Ed., § 28:2-312.

1973 Ed., § 28:2-312.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 13, Uniform Sales Act.

Changes: Completely rewritten, the provisions concerning infringement being new.

Purposes of Changes:

1. Subsection (1) makes provision for a buyer's basic needs in respect to a title which he in good faith expects to acquire by his purchase, namely, that he receive a good, clean title transferred to him also in a rightful manner so that he will not be exposed to a lawsuit in order to protect it.

The warranty extends to a buyer whether or not the seller was in possession of the goods at the time the sale or contract to sell was made.

The warranty of quiet possession is abolished. Disturbance of quiet possession, although not mentioned specifically, is one way, among many, in which the breach of the warranty of title may be established.

The "knowledge" referred to in subsection 1(b) is actual knowledge as distinct from notice.

2. The provisions of this Article requiring notification to the seller within a reasonable

time after the buyer's discovery of a breach apply to notice of a breach of the warranty of title, where the seller's breach was innocent. However, if the seller's breach was in bad faith he cannot be permitted to claim that he has been misled or prejudiced by the delay in giving notice. In such case the "reasonable" time for notice should receive a very liberal interpretation. Whether the breach by the seller is in good or bad faith Section 2-725 provides that the cause of action accrues when the breach occurs. Under the provisions of that section the breach of the warranty of good title occurs when tender of delivery is made since the warranty is not one which extends to "future performance of the goods."

3. When the goods are part of the seller's normal stock and are sold in his normal course of business, it is his duty to see that no claim of infringement of a patent or trademark by a third party will mar the buyer's title. A sale by a person other than a dealer, however, raises no implication in its circumstances of such a warranty. Nor is there such an implication when the buyer orders goods to be assembled, prepared or manufactured on his own specifications. If, in such a case, the resulting product infringes a patent or trademark, the liability will run from buyer to seller. There is, under such circumstances, a tacit representation on the part of the buyer that the seller will be safe in manufacturing according to the specifications, and the buyer is under an obligation in good faith to indemnify him for any loss suffered.

4. This section rejects the cases which recognize the principle that infringements violate the warranty of title but deny the buyer a remedy unless he has been expressly prevented from using the goods. Under this Article "eviction" is not a necessary condition to the buyer's remedy since the buyer's remedy arises immediately upon receipt of notice of infringement; it

is merely one way of establishing the fact of breach.

5. Subsection (2) recognizes that sales by sheriffs, executors, certain foreclosing lienors and persons similarly situated may so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer and therefore no personal obligation is imposed upon the seller who is purporting to sell only an unknown or limited right. This subsection does not touch upon and leaves open all questions of restitution arising in such cases, when a unique article so sold is reclaimed by a third party as the rightful owner.

Foreclosure sales under Article 9 are another matter. Section 9-610 provides that a disposition of collateral under that section includes warranties such as those imposed by this section on a voluntary disposition of property of the kind involved. Consequently, unless properly excluded under subsection (2) or under the special provisions for exclusion in Section 9-610, a disposition under Section 9-610 of collateral consisting of goods includes the warranties imposed by subsection (1) and, if applicable, subsection (3).

6. The warranty of subsection (1) is not designated as an "implied" warranty, and hence is not subject to Section 2-316(3). Disclaimer of the warranty of title is governed instead by subsection (2), which requires either specific language or the described circumstances.

Cross References:

Point 1: Section 2-403.

Point 2: Sections 2-607 and 2-725.

Point 3: Section 1-203.

Point 4: Sections 2-609 and 2-725.

Point 6: Section 2-316.

Definitional Cross References:

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Person". Section 1-201.

"Right". Section 1-201.

"Seller". Section 2-103.

CASE NOTES

In general.

Homeowner could not recover from contractor and its owner for breach of contract based on failure of contractor to complete installation of heating and air conditioning system in home

where there was no evidence presented of reasonable cost of completing contract which would have been appropriate measure of damages. *Adams v. A.B. & A., Inc.*, 613 A.2d 858, 1992 D.C. App. LEXIS 118 (1992).

§ 28:2-313. Express warranties by affirmation, promise, description, sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates

an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

(Dec. 30, 1963, 77 Stat. 647, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28-3904.

1973 Ed., § 28:2-313.

Prior Codifications. — 1981 Ed., § 28:2-313.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 12, 14 and 16, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To consolidate and systematize basic principles with the result that:

1. "Express" warranties rest on "dickered" aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms. "Implied" warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated.

This section reverts to the older case law insofar as the warranties of description and sample are designated "express" rather than "implied".

2. Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of Section 2-318 on third party beneficiaries expressly recognize

this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

3. The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact.

4. In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under Section 2-316.

This is not intended to mean that the parties,

if they consciously desire, cannot make their own bargain as they wish. But in determining what they have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.

5. Paragraph (1)(b) makes specific some of the principles set forth above when a description of the goods is given by the seller.

A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them. Past deliveries may set the description of quality, either expressly or impliedly by course of dealing. Of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts.

6. The basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction. This section includes both a "sample" actually drawn from the bulk of goods which is the subject matter of the sale, and a "model" which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods.

Although the underlying principles are unchanged, the facts are often ambiguous when something is shown as illustrative, rather than as a straight sample. In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain. But there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn from an existing bulk, good faith of course requires that the sample be fairly drawn. But in mercantile experience the mere exhibition of a "sample" does not of itself show whether it is merely intended to "suggest" or to "be" the character of the subject-matter of the contract. The question is whether the seller has so acted with reference to the sample as to make him responsible that the whole shall have at least the values shown by it. The circumstances aid in answering this question. If the sample has been drawn from an

existing bulk, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility. If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong, and particularly so if modification on the buyer's initiative impairs any feature of the model.

7. The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2-209).

8. Concerning affirmations of value or a seller's opinion or commendation under subsection (2), the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary. The provisions of subsection (2) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain. Even as to false statements of value, however, the possibility is left open that a remedy may be provided by the law relating to fraud or misrepresentation.

Cross References:

- Point 1: Section 2-316.
- Point 2: Sections 1-102(3) and 2-318.
- Point 3: Section 2-316(2)(b).
- Point 4: Section 2-316.
- Point 5: Sections 1-205(4) and 2-314.
- Point 6: Section 2-316.
- Point 7: Section 2-209.
- Point 8: Section 1-103.

Definitional Cross References:

- "Buyer". Section 2-103.
- "Conforming". Section 2-106.
- "Goods". Section 2-105.
- "Seller". Section 2-103.

CASE NOTES

ANALYSIS

Choice of law.
Construction and application.
Evidence.
Limitation of actions.
Practice and procedure.
Summary judgment.

Choice of law.

With respect to negligence and strict liability claims involving alleged defect in riding lawn tractor, no true conflict existed between law of District of Columbia and law of Maryland, even though Maryland imposed cap on noneconomic damages; policy underlying cap would not be advanced by application of Maryland law inas-

much as none of defendants was located in Maryland, did business in Maryland, or engaged in conduct in Maryland relating to plaintiffs' claims. *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 1995 U.S. Dist. LEXIS 2197 (1995).

No true conflict existed between District of Columbia law and Maryland law with respect to plaintiffs' breach of warranty claims, and federal court sitting in diversity in the District of Columbia would apply District of Columbia law to such claims; pertinent Uniform Commercial Code sections had been adopted and codified in both jurisdictions. *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 1995 U.S. Dist. LEXIS 2197 (1995).

Construction and application.

In view of fact that true strength of concrete would not be revealed until after 28-day curing period had elapsed, buyer's use of concrete originating at seller's plant even though tests performed at jobsite indicated that concrete contained air in excess of normal bounds did not constitute negligent or malicious act on part of buyer so as to absolve seller from breach of warranty. D.C. Code §§ 28:2-313 to 28:2-315, 28:2-714, 28:2-715. *Bevard v. Howat Concrete Co.*, 433 F.2d 1202, 1970 U.S. App. LEXIS 8259 (C.A.D.C. 1970).

District of Columbia's (D.C.) express warranty statute requires buyers who have accepted goods from sellers to notify those sellers within reasonable time when buyer contends that there has been breach by seller of terms and conditions of sale; constructive notice, if established, will satisfy this requirement. D.C. Code 1981, §§ 28:2-313, 28:2-607(3)(a). *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 1997 U.S. Dist. LEXIS 7077 (1997).

Where seller willfully fails to disclose defect in its product, seller cannot raise buyer's failure to inform seller of that defect as affirmative defense to buyer's action under District of Columbia's (D.C.) express warranty statute. D.C. Code 1981, §§ 28:2-313, 28:2-607(3)(a). *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 1997 U.S. Dist. LEXIS 7077 (1997).

Where distributor of carbon dioxide entered into negotiations for purchase of surplus carbon dioxide of brewer and demanded and was furnished a sample which distributor tested and found of satisfactory quality and odor free and past deliveries aggregating over 700,000 pounds of carbon dioxide had been picked up by buyer-distributor from brewer with no deviation from quality of sample or any objectionable odor which formed basis of suit by bottler against distributor, sample must be considered as describing values of goods contracted for from brewer in absence of a clear, convincing and unmistakable denial of such responsibility. D.C. Code § 28:2-313(1)(c). *Rock Creek Ginger*

Ale Co. v. Thermice Corp., 352 F. Supp. 522, 1971 U.S. Dist. LEXIS 12653 (1971).

Evidence.

In action by concrete subcontractor against concrete supplier for breaches of contract and warranty arising from delivery and use of defective concrete, evidence supported trial court's conclusion that supplier was liable under alternative theories of breach of contract and breach of implied and express warranties. D.C. Code §§ 28:2-313 to 28:2-315. *District Concrete Co. v. Bernstein Concrete Corp.*, 418 A.2d 1030, 1980 D.C. App. LEXIS 345 (1980).

Limitation of actions.

Discovery rule did not apply to District of Columbia statute of limitations governing breach of warranty products liability claims arising under Uniform Commercial Code. D.C. Code 1981, § 28:2-725(1, 2). *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 1995 U.S. Dist. LEXIS 2197 (1995).

Practice and procedure.

To succeed on breach of warranty claim under District of Columbia (D.C.) law, plaintiff must prove notice as well as that defendant breached express promise made about product sold. D.C. Code 1981, §§ 28:2-313, 28:2-607(3)(a). *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 1997 U.S. Dist. LEXIS 7077 (1997).

Smoker's widower's claim that defendant tobacco company's failure to disclose known addictiveness of nicotine implied a warranty that its cigarettes were not addictive did not state claim under District of Columbia (D.C.) law for breach of express warranty; plaintiff failed to plead any express promise made by defendant. D.C. Code 1981, § 28:2-313. *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 1997 U.S. Dist. LEXIS 7077 (1997).

Plaintiffs in products liability action involving allegedly defective riding lawn tractor were not entitled to jury charge on doctrine of *res ipsa loquitur*; plaintiffs could not show that injury sustained as result of rollover did not result from some factor other than defendants' negligence, that injuries did not normally happen absent negligence, or that there was no intervening cause. *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 1995 U.S. Dist. LEXIS 2197 (1995).

Summary judgment.

Genuine issue of material fact existed as to whether valves used in heating, ventilation, and air conditioning (HVAC) systems failed to conform to manufacturer's alleged express warranties regarding fitness for a particular purpose, precluding summary judgment for manufacturer on express warranty claims under District of Columbia's Uniform Commercial

Code (UCC) brought by company in the business of installing and repairing HVAC units. Quality Air Servs., LLC v. Milwaukee Valve

Co., 671 F.Supp.2d 36, 2009 U.S. Dist. LEXIS 110363 (2009).

§ 28:2-314. Implied warranty: merchantability; usage of trade.

(1) Unless excluded or modified (section 28:2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (section 28:2-316), or implied warranties may arise from course of dealing or usage of trade.

(Dec. 30, 1963, 77 Stat. 648, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28-3904.

1973 Ed., § 28:2-314.

Prior Codifications. — 1981 Ed., § 28:2-314.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 15(2), Uniform Sales Act.

Changes: Completely rewritten.

Purposes of Changes: This section, drawn in view of the steadily developing case law on the subject, is intended to make it clear that:

1. The seller's obligation applies to present sales as well as to contracts to sell subject to the effects of any examination of specific goods. (Subsection (2) of Section 2-316). Also, the warranty of merchantability applies to sales for use as well as to sales for resale.

2. The question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade. Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods

used in the agreement. The responsibility imposed rests on any merchant-seller, and the absence of the words "grower or manufacturer or not" which appeared in Section 15(2) of the Uniform Sales Act does not restrict the applicability of this section.

3. A specific designation of goods by the buyer does not exclude the seller's obligation that they be fit for the general purposes appropriate to such goods. A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description. A person making an isolated sale of goods is not a "merchant" within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply. His knowledge of any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and

the provisions on good faith, impose an obligation that known material but hidden defects be fully disclosed.

4. Although a seller may not be a “merchant” as to the goods in question, if he states generally that they are “guaranteed” the provisions of this section may furnish a guide to the content of the resulting express warranty. This has particular significance in the case of second-hand sales, and has further significance in limiting the effect of fine-print disclaimer clauses where their effect would be inconsistent with large-print assertions of “guarantee”.

5. The second sentence of subsection (1) covers the warranty with respect to food and drink. Serving food or drink for value is a sale, whether to be consumed on the premises or elsewhere. Cases to the contrary are rejected. The principal warranty is that stated in subsections (1) and (2)(c) of this section.

6. Subsection (2) does not purport to exhaust the meaning of “merchantable” not to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. The language used is “must be at least such as ...,” and the intention is to leave open other possible attributes of merchantability.

7. Paragraphs (a) and (b) of subsection (2) are to be read together. Both refer, as indicated above, to the standards of that line of the trade which fits the transaction and the seller’s business. “Fair average” is a term directly appropriate to agricultural bulk products and means goods centering around the middle belt of quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass “without objection.” Of course a fair percentage of the least is permissible but the goods are not “fair average” if they are all of the least or worst quality possible under the description. In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section.

8. Fitness for the ordinary purposes for which goods of the type are used is a fundamental concept of the present section and is covered in paragraph (c). As stated above, merchantability is also a part of the obligation owing to the purchaser for use. Correspondingly, protection, under this aspect of the warranty, of the person buying for resale to the ultimate consumer is equally necessary, and merchantable goods must therefore be “honestly” resalable in the normal course of business because they are what they purport to be.

9. Paragraph (d) on evenness of kind, quality and quantity follows case law. But precautionary language has been added as a reminder of the frequent usages of trade which permit substantial variations both with and without an

allowance or an obligation to replace the varying units.

10. Paragraph (e) applies only where the nature of the goods and of the transaction require a certain type of container, package or label. Paragraph (f) applies, on the other hand, wherever there is a label or container on which representations are made, even though the original contract, either by express terms or usage of trade, may not have required either the labelling or the representation. This follows from the general obligation of good faith which requires that a buyer should not be placed in the position of reselling or using goods delivered under false representations appearing on the package or container. No problem of extra consideration arises in this connection since, under this Article, an obligation is imposed by the original contract not to deliver mislabeled articles, and the obligation is imposed where mercantile good faith so requires and without reference to the doctrine of consideration.

11. Exclusion or modification of the warranty of merchantability, or of any part of it, is dealt with in the section to which the text of the present section makes explicit precautionary references. That section must be read with particular reference to its subsection (4) on limitation of remedies. The warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.

12. Subsection (3) is to make explicit that usage of trade and course of dealing can create warranties and that they are implied rather than express warranties and thus subject to exclusion or modification under Section 2-316. A typical instance would be the obligation to provide pedigree papers to evidence conformity of the animal to the contract in the case of a pedigreed dog or blooded bull.

13. In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense. Equally, evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury.

Cross References:

Point 1: Section 2-316.

Point 3: Sections 1-203 and 2-104.

Point 5: Section 2-315.

Point 11: Section 2-316.

Point 12: Sections 1-201, 1-205 and 2-316.

Definitional Cross References:

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Seller". Section 2-103.

CASE NOTES

ANALYSIS

Automobiles.

Blood transfusions.

Choice of law.

Damages.

In general.

Limitation of actions.

Practice and procedure.

Reliance.

Review.

Warranty of habitability.

Water.

Automobiles.

Automobile dealer had duty to exercise reasonable care in making predelivery inspection and servicing of the automobile which it had agreed with manufacturer to perform. D.C. Code § 28:2-314. *Williams v. Steuart Motor Co.*, 494 F.2d 1074, 1974 U.S. App. LEXIS 9864 (C.A.D.C. 1974).

When purchaser acquired new automobile there was by operation of law an implied warranty from both the manufacturer and dealer that the automobile was fit and suitable for the ordinary purposes for which an automobile is sold and used. D.C. Code § 28:2-314. *Williams v. Steuart Motor Co.*, 494 F.2d 1074, 1974 U.S. App. LEXIS 9864 (C.A.D.C. 1974).

A defect which caused a malfunction in the motor and rendered the vehicle inoperable and therefore unusable fell within the ambit of the implied warranty of fitness or merchantability. *Patton v. Chrysler Motors Corp.*, 119 WLR 1045 (Super. Ct. 1991).

Blood transfusions.

Blood bank did not breach duty of providing adequate blood supply from safe as possible donors in failing to screen donors that were members of high risk groups for AIDS or in failing to conduct tests to attempt to eliminate AIDS-contaminated blood, and thus, parents of infant who contracted AIDS as result of blood transfusions given at birth could not maintain negligence action against blood bank; at time blood was collected, risk of transmission of AIDS through blood transfusion was little known, blood bank professionals and government agencies concerned with spread of AIDS rejected program of screening homosexuals out of donor population, and no organization advocated use of Hepatitis B core antibody test for screening blood for AIDS and further, donor

who donated contaminated blood which child received would have tested negative for Hepatitis-B at time of donation. *Kozup v. Georgetown University*, 663 F. Supp. 1048, 1987 U.S. Dist. LEXIS 6122 (1987), affirmed in part and vacated in part by 851 F.2d 437, 271 U.S. App. D.C. 182, 1988 U.S. App. LEXIS 9639, 6 U.C.C. Rep. Serv. 2d (CBC) 1080 (1988).

Parents of infant child who contracted AIDS after receiving blood transfusions at birth could not maintain products liability action against hospital which administered blood or blood bank which collected it; at time of blood transfusion, there was scientific inability to screen carriers of AIDS, and furnishing of blood was more in nature of service than of sale of goods. *Kozup v. Georgetown University*, 663 F. Supp. 1048, 1987 U.S. Dist. LEXIS 6122 (1987), affirmed in part and vacated in part by 851 F.2d 437, 271 U.S. App. D.C. 182, 1988 U.S. App. LEXIS 9639, 6 U.C.C. Rep. Serv. 2d (CBC) 1080 (1988).

Hospital and blood bank were not "merchants" as defined under District of Columbia Consumer Protection Procedures Act, and thus, parents of infant who contracted AIDS as result of blood transfusions given at birth could not maintain claim against hospital and blood bank under Act; though blood bank charged hospital for provision of blood and hospital passed those charges on to its patients, nonprofit entities were not converted into "merchants" based upon fact that organizations managed businesses in order to survive and continue to perform functions for which they were founded. D.C. Code 1981, §§ 28-3901 et seq., 28-3901(a)(3, 6). *Kozup v. Georgetown University*, 663 F. Supp. 1048, 1987 U.S. Dist. LEXIS 6122 (1987), affirmed in part and vacated in part by 851 F.2d 437, 271 U.S. App. D.C. 182, 1988 U.S. App. LEXIS 9639, 6 U.C.C. Rep. Serv. 2d (CBC) 1080 (1988).

Hospital's furnishing of blood transfusion was more in nature of a service than a sale of goods; thus, court would not extend implied warranty of merchantability to such transaction by analogy or by characterizing such transaction as a "sale." D.C. Code § 28:2-314(2)(c). *Fisher v. Sibley Memorial Hosp.*, 403 A.2d 1130, 1979 D.C. App. LEXIS 408 (1979).

Choice of law.

In action by property insurer, as subrogee for insured buyer of drill rig, against rig's manu-

facturer and seller seeking recovery for damage to rig caused by fire which occurred in District of Columbia, no conflict of laws existed with respect to economic loss rule as would require District of Columbia district court to apply District's choice of law rules, where the District of Columbia and Pennsylvania, where parties' relationship purportedly was centered, adopted the economic loss rule. *Liberty Mut. Ins. Co. v. Equip. Corp. of Am.*, 646 F.Supp.2d 51, 2009 U.S. Dist. LEXIS 73024 (2009).

No true conflict existed between District of Columbia law and Maryland law with respect to plaintiffs' breach of warranty claims, and federal court sitting in diversity in the District of Columbia would apply District of Columbia law to such claims; pertinent Uniform Commercial Code sections had been adopted and codified in both jurisdictions. *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 1995 U.S. Dist. LEXIS 2197 (1995).

Even if there was genuine conflict between warranty law of District of Columbia and of Maryland, federal court sitting in the District of Columbia would apply District of Columbia law; allegedly defective product was sold and delivered in District, and express and implied warranties were made to buyer in District. *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 1995 U.S. Dist. LEXIS 2197 (1995).

Damages.

With respect to negligence and strict liability claims involving alleged defect in riding lawn tractor, no true conflict existed between law of District of Columbia and law of Maryland, even though Maryland imposed cap on noneconomic damages; policy underlying cap would not be advanced by application of Maryland law inasmuch as none of defendants was located in Maryland, did business in Maryland, or engaged in conduct in Maryland relating to plaintiffs' claims. *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 1995 U.S. Dist. LEXIS 2197 (1995).

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect. *Weakley v. Burnham Corp.*, 871 A.2d 1167, 2005 D.C. App. LEXIS 157 (2005).

Where concrete subcontractor's measure of damages against concrete supplier for breaches of contract and warranty arising from delivery and use of defective concrete was not limited to any particular remedy for repair of in-place, defective concrete roof, use of actual costs as measure of damages was proper under applicable statute. D.C. Code § 28:2-714. *District Concrete Co. v. Bernstein Concrete Corp.*, 418 A.2d 1030, 1980 D.C. App. LEXIS 345 (1980).

In action by concrete subcontractor against concrete supplier for breaches of contract and warranty arising from delivery and use of de-

fective concrete, no error occurred in including "delay" damages, field overhead, even though project itself was completed on schedule, where there was no question that defect caused delay and that expenses resulting from need to keep facilities and personnel on site for extended period of time were incurred as result, subcontractor's calculations of cost of this delay were sufficiently detailed to support award, and these expenses were within ambit of Uniform Commercial Code section governing incidental damages. D.C. Code § 28:2-715(1). *District Concrete Co. v. Bernstein Concrete Corp.*, 418 A.2d 1030, 1980 D.C. App. LEXIS 345 (1980).

In general.

Under District of Columbia law, an action for strict products liability and breach of the implied warranties of merchantability is construed as a single tort only when a third party is bringing the action against a manufacturer of a product and there is thus no privity of contract. *Liberty Mut. Ins. Co. v. Equip. Corp. of Am.*, 646 F.Supp.2d 51, 2009 U.S. Dist. LEXIS 73024 (2009).

Manufacturer has implied duty to seller to indemnify him where manufacturer provides defective product and seller's liability stems solely from failure to discover defect. *Park v. Forman Bros., Inc.*, 785 F. Supp. 1029, 1992 U.S. Dist. LEXIS 3216 (1992).

Implied warranty/strict liability in tort principles apply to converted condominium properties. D.C. Code 1981, §§ 45-1801 et seq., 45-1847(b). *Towers Tenant Asso. v. Towers Ltd. Partnership*, 563 F. Supp. 566, 1983 U.S. Dist. LEXIS 17156 (1983).

Where distributor of carbon dioxide negotiated the purchase of brewer's surplus carbon dioxide, sales of carbon dioxide by brewer, which was a beer manufacturer and not merchant of carbon dioxide, was not subject to implied warranties of merchantability. D.C. Code § 28:2-314. *Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F. Supp. 522, 1971 U.S. Dist. LEXIS 12653 (1971).

Seller's implied warranty of merchantability of gas air conditioner was effective prior to expiration of seller's express manufacturer's warranty where such express warranty contained no language, which excluded or modified the implied warranty, and was not inconsistent with the implied warranty. D.C. Code §§ 28:2-314, 28:2-316, 28:2-316(2), 28:2-317. *Lee v. Air Care, Inc.*, 325 A.2d 598, 1974 D.C. App. LEXIS 279 (1974).

Test in determining breach of implied warranty where there is injury caused by food or drink served in a restaurant is what should reasonably be expected by the consumer to be in the food served him rather than whether the food is wholesome, untainted, or contains a foreign substance. D.C. Code §§ 28:2-101 et

seq., 28:2-314. *Hochberg v. O'Donnell's Restaurant, Inc.*, 272 A.2d 846, 1971 D.C. App. LEXIS 265 (App. 1971).

Limitation of actions.

Discovery rule did not apply to District of Columbia statute of limitations governing breach of warranty products liability claims arising under Uniform Commercial Code. D.C. Code 1981, § 28:2-725(1, 2). *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 1995 U.S. Dist. LEXIS 2197 (1995).

Practice and procedure.

Evidence warranted submission to jury of issues of whether automobile manufacturer breached the implied warranty of fitness for use by the installation of the defective accelerator return spring and whether the dealer breached its warranty by the failure to discover the defect. D.C. Code § 28:2-314. *Williams v. Stuart Motor Co.*, 494 F.2d 1074, 1974 U.S. App. LEXIS 9864 (C.A.D.C. 1974).

In order to state a claim of breach of the implied warranty of merchantability, the plaintiff must demonstrate that the offensive object or substance in the purchased food is not one that a consumer would reasonably expect to find in the particular type of dish or style of food served. *Hoyte v. Yum! Brands, Inc.*, 489 F.Supp.2d 24, 2007 U.S. Dist. LEXIS 32162 (2007).

Plaintiff failed to allege injury from consuming food containing trans fat purchased from national restaurant chain, as required to state a claim for breach of statutory and common law implied warranty of merchantability, notwithstanding claim that he was placed in a zone of "physical endangerment" when sold food products containing trans fats; plaintiff did not allege that the food he ordered was in any way unpalatable or that he suffered any immediate ill effects after he ate his order, he claimed no emotional harm, pain or suffering, and he did not specify what "economic injury" he allegedly suffered. *Hoyte v. Yum! Brands, Inc.*, 489 F.Supp.2d 24, 2007 U.S. Dist. LEXIS 32162 (2007).

District of Columbia (D.C.) cases show tendency to merge claims for implied warranty of merchantability with strict liability; however, merger is available only when no issues unique to warranty, like disclaimer or notice, are presented. D.C. Code 1981 § 28:2-314. *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 1997 U.S. Dist. LEXIS 7077 (1997).

In action by concrete subcontractor against concrete supplier for breaches of contract and warranty arising from delivery and use of defective concrete, record did not support supplier's contention that amount of water necessary to create resulting condition would make concrete, at delivery, visibly defective, so that sub-

contractor, by acceptance and use of product, assumed responsibility for ensuing damages. *District Concrete Co. v. Bernstein Concrete Corp.*, 418 A.2d 1030, 1980 D.C. App. LEXIS 345 (1980).

To state a valid cause of action for breach of an implied warranty of merchantability as regards giving of blood transfusion in hospital, it must be demonstrated that giving of blood transfusion constitutes a sale of goods carrying an implied warranty of fitness for ordinary uses. D.C. Code § 28:2-314(2)(c). *Fisher v. Sibley Memorial Hosp.*, 403 A.2d 1130, 1979 D.C. App. LEXIS 408 (1979).

Finding, in action by buyers of gas air conditioner against seller for breach of implied warranty of merchantability, that seller had breached such warranty and had notice of and sufficient time to remedy breach was not clearly erroneous. D.C. Code §§ 28:2-314, 28:2-316, 28:2-316(2), 28:2-317. *Lee v. Air Care, Inc.*, 325 A.2d 598, 1974 D.C. App. LEXIS 279 (1974).

Reliance.

Former cigarette smoker did not rely on manufacturers' alleged deliberate concealment of information on addictive and harmful qualities of smoking in making decisions with respect to cigarette smoking, and thus could not maintain action under District of Columbia law for fraud, where she had no contact with manufacturers apart from seeing advertisements and she did not start to smoke, or continue to smoke, because of advertisements. *Smith v. Brown & Williamson Tobacco Corp.*, 108 F.Supp.2d 12, 2000 U.S. Dist. LEXIS 11574 (2000).

If a lot of bacon be advertised in a newspaper by the vendor as "prime," and the vendee examine it and afterwards agree to purchase it, and it proves to be unsound, he cannot recover damages upon the warranty, although he has paid a sound price for it. *McVeigh v. Messersmith*, 16 F.Cas. 351, 1837 U.S. App. LEXIS 295 (1837).

Although seller purchased hearing aid relying partially upon statements of seller's salesman and partially upon her own experience, this did not prevent warranty that aid was sufficient from arising. *Hagedorn v. Taggart*, 114 A.2d 430, 1955 D.C. App. LEXIS 254 (Cr.App. 1955).

In order to give rise to a warranty, the buyer's reliance need not necessarily be a total reliance, and the buyer may rely on his own judgment as to some matters and on the skill and judgment of the seller as to others. *Hagedorn v. Taggart*, 114 A.2d 430, 1955 D.C. App. LEXIS 254 (Cr.App. 1955).

Review.

Allegations that provider of components used in electronic train control system provided such

equipment, software and support services to Washington Metropolitan Area Transit Authority (WMATA) was sufficient to state that provider dealt "in goods of the kind," and thus, was a merchant, under District of Columbia's Uniform Commercial Code (UCC), for purposes of breaches of implied warranties of merchantability and fitness for a particular purpose claims brought by rail passengers and estates of deceased rail passengers arising from train collision. *Jenkins v. Wash. Metro. Area Transit Auth. (In re Fort Totten Metrorail Cases)*, 793 F.Supp.2d 133, 2011 U.S. Dist. LEXIS 68913 (2009).

Where, in action by concrete subcontractor against concrete supplier for breaches of contract and warranty arising from delivery and use of defective concrete, trial judge's order made six specific findings before adopting subcontractor's proposed findings and conclusions, and judge chose not to adopt one portion of proposal that was inconsistent with his own findings, the findings and conclusions represented judge's own determinations, and thus the usual "clearly erroneous" standard of review applied. D.C. Code § 17-305(a). *District Concrete Co. v. Bernstein Concrete Corp.*, 418 A.2d 1030, 1980 D.C. App. LEXIS 345 (1980).

Warranty of habitability.

In order to fulfill warranty of habitability, landlords must substantially comply with Dis-

trict of Columbia housing regulations. *Towers Tenant Asso. v. Towers Ltd. Partnership*, 563 F. Supp. 566, 1983 U.S. Dist. LEXIS 17156 (1983).

Association representing tenants of building on or before date on which property was converted to condominium ownership stated claim upon which relief could be granted for breach of implied warranty to repair and renovate leased premises to keep dwelling in compliance with local codes. *Towers Tenant Asso. v. Towers Ltd. Partnership*, 563 F. Supp. 566, 1983 U.S. Dist. LEXIS 17156 (1983).

Water.

Owner of residential buildings did not show that water authority that sold and distributed potable water to the buildings through its pipe system breached the implied warranty of merchantability set forth in the District of Columbia's version of the Uniform Commercial Code (UCC), even though owner argued that the water was excessively corrosive to copper plumbing and had caused pinhole leaks to develop in the buildings' pipes; the water was safe for drinking, cooking, and plumbing, the primary purpose of the water was not to keep the buildings' pipes from corroding, and persuasive testimony indicated that all types of pipes could experience leaks from water, which was a naturally corrosive substance. *Cormier, et al. v. D.C. Water and Sewage Authority*, 139 WLR 2157 (Super. Ct. 2011).

§ 28:2-315. Implied warranty: fitness for particular purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

(Dec. 30, 1963, 77 Stat. 648, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28-3904.

Prior Codifications. — 1981 Ed., § 28:2-315.

1973 Ed., § 28:2-315.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 15 (1), (4), (5), Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes:

1. Whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. Under this section the buyer need not bring home to the seller actual knowledge

of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, of course, must actually be relying on the seller.

2. A "particular purpose" differs from the ordinary purpose for which the goods are used

in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

A contract may of course include both a warranty of merchantability and one of fitness for a particular purpose.

The provisions of this Article on the cumulation and conflict of express and implied warranties must be considered on the question of inconsistency between or among warranties. In such a case any question of fact as to which warranty was intended by the parties to apply must be resolved in favor of the warranty of fitness for particular purpose as against all other warranties except where the buyer has taken upon himself the responsibility of furnishing the technical specifications.

3. In connection with the warranty of fitness for a particular purpose the provisions of this Article on the allocation or division of risks are particularly applicable in any transaction in which the purpose for which the goods are to be used combines requirements both as to the quality of the goods themselves and compliance with certain laws or regulations. How the risks are divided is a question of fact to be determined, where not expressly contained in the agreement, from the circumstances of contracting, usage of trade, course of performance and the like, matters which may constitute the "otherwise agreement" of the parties by which they may divide the risk or burden.

4. The absence from this section of the language used in the Uniform Sales Act in referring to the seller, "whether he be the grower or

manufacturer or not," is not intended to impose any requirement that the seller be a grower or manufacturer. Although normally the warranty will arise only where the seller is a merchant with the appropriate "skill or judgment," it can arise as to nonmerchants where this is justified by the particular circumstances.

5. The elimination of the "patent or other trade name" exception constitutes the major extension of the warranty of fitness which has been made by the cases and continued in this Article. Under the present section the existence of a patent or other trade name and the designation of the article by that name, or indeed in any other definite manner, is only one of the facts to be considered on the question of whether the buyer actually relied on the seller, but it is not of itself decisive of the issue. If the buyer himself is insisting on a particular brand he is not relying on the seller's skill and judgment and so no warranty results. But the mere fact that the article purchased has a particular patent or trade name is not sufficient to indicate nonreliance if the article has been recommended by the seller as adequate for the buyer's purposes.

6. The specific reference forward in the present section to the following section on exclusion or modification of warranties is to call attention to the possibility of eliminating the warranty in any given case. However it must be noted that under the following section the warranty of fitness for a particular purpose must be excluded or modified by a conspicuous writing.

Cross References:

Point 2: Sections 2-314 and 2-317.

Point 3: Section 2-303.

Point 6: Section 2-316.

Definitional Cross References:

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

CASE NOTES

ANALYSIS

Evidence.

Implied warranty of quality, fitness, or condition.

In general.

Products liability actions.

Warranty of habitability.

Evidence.

In action by concrete subcontractor against concrete supplier for breaches of contract and warranty arising from delivery and use of defective concrete, evidence supported trial court's conclusion that supplier was liable under alternative theories of breach of contract and breach of implied and express warranties. D.C. Code §§ 28:2-313 to 28:2-315. District

Concrete Co. v. Bernstein Concrete Corp., 418 A.2d 1030, 1980 D.C. App. LEXIS 345 (1980).

Implied warranty of quality, fitness, or condition.

In view of fact that true strength of concrete would not be revealed until after 28-day curing period had elapsed, buyer's use of concrete originating at seller's plant even though tests performed at jobsite indicated that concrete contained air in excess of normal bounds did not constitute negligent or malicious act on part of buyer so as to absolve seller from breach of warranty. D.C. Code §§ 28:2-313 to 28:2-315, 28:2-714, 28:2-715. Bevard v. Howat Concrete Co., 433 F.2d 1202, 1970 U.S. App. LEXIS 8259 (C.A.D.C. 1970).

Under District of Columbia's Uniform Com-

mercial Code (UCC), there was no implied warranty of fitness for a particular purpose as to allegedly defectively manufactured valves used in heating, ventilation, and air conditioning (HVAC) units, where company that had bought the valves and installed them in multifamily housing buildings bought the valves from a third party, manufacturer of the valves had no knowledge of company's particular purpose, and company did not rely on manufacturer's expertise when it bought the valves. *Quality Air Servs., LLC v. Milwaukee Valve Co.*, 671 F.Supp.2d 36, 2009 U.S. Dist. LEXIS 110363 (2009).

Under the law of the District of Columbia, a breach of warranty claim is not actionable in coordination with a products liability claim. *Webster v. Pacesetter, Inc.*, 259 F.Supp.2d 27, 2003 U.S. Dist. LEXIS 6284 (2003).

Under District of Columbia law, contract for sale of goods includes implied warranty of merchantability if seller has reason to know of any particular purpose for which goods are required and that buyer is relying on seller's skill to furnish suitable goods; however, parties may delete implied warranty by including exclusion clause within contract that specifically mentions merchantability and is sufficiently conspicuous. D.C. Code 1981, §§ 28:2-315, 28:2-316(2). *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Implied warranty/strict liability in tort principles apply to converted condominium properties. D.C. Code 1981, §§ 45-1801 et seq., 45-1847(b). *Towers Tenant Asso. v. Towers Ltd. Partnership*, 563 F. Supp. 566, 1983 U.S. Dist. LEXIS 17156 (1983).

An implied warranty of workmanlike services, the essence of which is the service contract and the concomitant obligation to perform that service contract in a safe manner, does not extend to a sales contract such as existed between sand and gravel company and concrete company, one of whose trucks struck scaffolding erected by sand and gravel company causing injury to sand and gravel company's employee. *Phoenix Assurance Co. v. Potomac Sand & Gravel Co.*, 343 F. Supp. 658, 1972 U.S. Dist. LEXIS 13706 (1972), affirmed without opinion by 487 F.2d 1213, 159 U.S. App. D.C. 342 (1973).

Under the law of sales one who manufactures or sells a commodity impliedly warrants that the commodity will be fit for its intended purpose, but such warranty does not extend to include a guaranty that the seller's premises are fit for receiving the commodity, because tort law principles adequately provide for those safeguards under the duties which a landowner owes to business invitees, such as the duty to warn against dangerous conditions on the premises. *Phoenix Assurance Co. v. Potomac*

Sand & Gravel Co., 343 F. Supp. 658, 1972 U.S. Dist. LEXIS 13706 (1972), affirmed without opinion by 487 F.2d 1213, 159 U.S. App. D.C. 342 (1973).

In relation to action by insurer of concrete company against sand and gravel company arising out of settlement by insurer in prior case involving injury to sand and gravel company's employee, who fell from scaffolding, which was struck by truck of concrete company, sales contract relationship between concrete company and sand and gravel company did not include an implied warranty of fitness as to premises of sand and gravel company, where the accident occurred. *Phoenix Assurance Co. v. Potomac Sand & Gravel Co.*, 343 F. Supp. 658, 1972 U.S. Dist. LEXIS 13706 (1972), affirmed without opinion by 487 F.2d 1213, 159 U.S. App. D.C. 342 (1973).

In general.

Allegations that provider of components used in electronic train control system provided such equipment, software and support services to Washington Metropolitan Area Transit Authority (WMATA) was sufficient to state that provider dealt "in goods of the kind," and thus, was a merchant, under District of Columbia's Uniform Commercial Code (UCC), for purposes of breaches of implied warranties of merchantability and fitness for a particular purpose claims brought by rail passengers and estates of deceased rail passengers arising from train collision. *Jenkins v. Wash. Metro. Area Transit Auth.* (In re Fort Totten Metrorail Cases), 793 F.Supp.2d 133, 2011 U.S. Dist. LEXIS 68913 (2009).

Hospital and blood bank were not "merchants" as defined under District of Columbia Consumer Protection Procedures Act, and thus, parents of infant who contracted AIDS as result of blood transfusions given at birth could not maintain claim against hospital and blood bank under Act; though blood bank charged hospital for provision of blood and hospital passed those charges on to its patients, nonprofit entities were not converted into "merchants" based upon fact that organizations managed businesses in order to survive and continue to perform functions for which they were founded. D.C. Code 1981, §§ 28-3901 et seq., 28-3901(a)(3, 6). *Kozup v. Georgetown University*, 663 F. Supp. 1048, 1987 U.S. Dist. LEXIS 6122 (1987), affirmed in part and vacated in part by 851 F.2d 437, 271 U.S. App. D.C. 182, 1988 U.S. App. LEXIS 9639, 6 U.C.C. Rep. Serv. 2d (CBC) 1080 (1988).

While developer and its general partners may or may not have been liable under products liability principles for conditions that pre-existed their involvement with building which was converted to condominium ownership, they were responsible for quality and results of work

they, in fact, undertook. D.C. Code 1981, §§ 45-1801 et seq., 45-1847(b). *Towers Tenant Assn. v. Towers Ltd. Partnership*, 563 F. Supp. 566, 1983 U.S. Dist. LEXIS 17156 (1983).

Products liability actions.

Under the law of the District of Columbia, to prevail on a claim for strict liability in tort, a plaintiff must prove that: (1) the seller was engaged in the business of selling the product that caused the harm; (2) the product was sold in a defective condition unreasonably dangerous to the consumer or user; (3) the product was one which the seller expected to and did reach the plaintiff consumer or user without any substantial change from the condition in which it was sold; and (4) the defect was a direct and proximate cause of the plaintiffs injuries. *Webster v. Pacesetter, Inc.*, 259 F.Supp.2d 27, 2003 U.S. Dist. LEXIS 6284 (2003).

Cardiac patient failed to establish that pacemaker's atrial lead had a design defect, as required to support patient's products liability claim under the law of the District of Columbia against pacemaker manufacturer, which arose when pacemaker's atrial lead allegedly perforated patient's heart chamber, causing cardiac tamponade; expert for patient failed to identify the alleged design defect that resulted in the injury, patient's claim as to danger based on death rates from perforation and tamponade was totally devoid of any factual foundation, patient provided no evidence that there was a safer, alternative design that could have been used, and patient failed to prove that alleged defect was a proximate cause of his injuries. *Webster v. Pacesetter, Inc.*, 259 F.Supp.2d 27, 2003 U.S. Dist. LEXIS 6284 (2003).

Under District of Columbia law, to recover under products liability theory, plaintiff must show, inter alia, that product in question was defective, and that defect caused the alleged harm. *Dyson v. Winfield*, 113 F.Supp.2d 35, 2000 U.S. Dist. LEXIS 14357 (2000), affirmed by 21 Fed. Appx. 2, 2001 U.S. App. LEXIS 24091 (D.C. Cir. 2001).

Breach of warranty claim is not actionable in coordination with a products liability claim, as the differences between strict liability in tort

and implied warranty, if any, are conceptual; thus, if there are no issues unique to the warranty claim, the warranty claim effectively merges with the strict liability claim. *Dyson v. Winfield*, 113 F.Supp.2d 35, 2000 U.S. Dist. LEXIS 14357 (2000), affirmed by 21 Fed. Appx. 2, 2001 U.S. App. LEXIS 24091 (D.C. Cir. 2001).

Plaintiffs in products liability action involving allegedly defective riding lawn tractor were not entitled to jury charge on doctrine of res ipsa loquitur; plaintiffs could not show that injury sustained as result of rollover did not result from some factor other than defendants' negligence, that injuries did not normally happen absent negligence, or that there was no intervening cause. *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 1995 U.S. Dist. LEXIS 2197 (1995).

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect. *Weakley v. Burnham Corp.*, 871 A.2d 1167, 2005 D.C. App. LEXIS 157 (2005).

Since strict liability theory and implied warranty of merchantability theory represented but one tort, it was error to have given instructions on both theories in products liability action; instructions gave rise to inconsistent findings that product was not unreasonably dangerous but that product was so unreasonably fit for its intended purpose as to cause injury. *Bowler v. Stewart-Warner Corp.*, 563 A.2d 344, 1989 D.C. App. LEXIS 158 (1989).

Warranty of habitability.

Breach of warranty of habitability gives rise to affirmative cause of action for damages on part of tenant as against careless landlord. *Bowler v. Stewart-Warner Corp.*, 563 A.2d 344, 1989 D.C. App. LEXIS 158 (1989).

Association representing tenants of building on or before date on which property was converted to condominium ownership stated claim upon which relief could be granted for breach of implied warranty to repair and renovate leased premises to keep dwelling in compliance with local codes. *Bowler v. Stewart-Warner Corp.*, 563 A.2d 344, 1989 D.C. App. LEXIS 158 (1989).

§ 28:2-316. Exclusion or modification of warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (section 28:2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any

implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof".

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (sections 28:2-718 and 28:2-719).

(Dec. 30, 1963, 77 Stat. 648, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-314, 28:2-316.1, and 28:3904.

Prior Codifications. — 1981 Ed., § 28:2-316.
1973 Ed., § 28:2-316.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None. See sections 15 and 71, Uniform Sales Act.

Purposes:

1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.

2. The seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence and against unauthorized representations by the customary "lack of authority" clauses. This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty.

Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.

3. Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.

4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.

5. Subsection (2) presupposes that the implied warranty in question exists unless excluded or modified. Whether or not language of disclaimer satisfies the requirements of this section, such language may be relevant under other sections to the question whether the warranty was ever in fact created. Thus, unless the provisions of this Article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had "reason to know" under the section on implied warranty of fitness for a particular purpose.

6. The exceptions to the general rule set forth in paragraphs (a), (b) and (c) of subsection (3) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's at-

tention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.

7. Paragraph (a) of subsection (3) deals with general terms such as "as is," "as they stand," "with all faults," and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by paragraph (a) are in fact merely a particularization of paragraph (c) which provides for exclusion or modification of implied warranties by usage of trade.

8. Under paragraph (b) of subsection (3) warranties may be excluded or modified by the circumstances where the buyer examines the goods or a sample or model of them before entering into the contract. "Examination" as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty. See Sections 2-314 and 2-715 and comments thereto.

In order to bring the transaction within the scope of "refused to examine" in paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language "refused to examine" in this paragraph is intended to make clear the necessity for such demand.

Application of the doctrine of "caveat emptor" in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this Article. Thus, if the offer of examination is accompanied by words as to their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an "express" warranty. In such cases the question is one of fact as to whether a warranty of merchantability has been expressly incorporated in the

agreement. Disclaimer of such an express warranty is governed by subsection (1) of the present section.

The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. A failure to notice defects which are obvious cannot excuse the buyer. However, an examination under circumstances which do not permit chemical or other testing of the goods would not exclude defects which could be ascertained only by such testing. Nor can latent defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.

9. The situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, but this is a frequent circumstance by which the implied warranties may be excluded. The warranty of fitness for a particular purpose would not normally arise since in such a situation there is usually no reliance on the seller by the buyer. The warranty of merchantability in such a transaction, however, must be considered in connection with the next section on the cumulation and conflict of warranties. Under paragraph (c) of that section in case of such an inconsistency the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications. Thus, where the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply to the transaction unless consistent with the specifications.

Cross References:

Point 2: Sections 2-202, 2-718, and 2-719.

Point 7: Sections 1-205 and 2-208.

Definitional Cross References:

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Course of dealing". Section 1-205.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Seller". Section 2-103.

"Usage of trade". Section 1-205.

CASE NOTES

In general.

Under District of Columbia law, contract for sale of goods includes implied warranty of merchantability if seller has reason to know of any particular purpose for which goods are required and that buyer is relying on seller's skill to

furnish suitable goods; however, parties may delete implied warranty by including exclusion clause within contract that specifically mentions merchantability and is sufficiently conspicuous. D.C. Code 1981, §§ 28:2-315, 28:2-316(2). *Potomac Plaza Terraces v. QSC Prods.*,

868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Under District of Columbia law, written warranty which announced that "THE FOLLOWING IS MADE AND GIVEN IN LIEU OF ANY AND ALL OTHER WARRANTIES AND GUARANTEES, EITHER EXPRESS OR IMPLIED, INCLUDING OF MERCHANTABILITY" was both sufficiently conspicuous and specific to exclude implied warranty of merchantability. D.C. Code 1981, § 28:2-316(2). *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Under District of Columbia law, roofing materials which were not furniture, furnishings, or personal effects were not "consumer goods" coming within exception to statute allowing implied merchantability for sale of goods to be waived by parties, and statement in warranty given by seller of roofing materials which specifically and conspicuously waived implied warranty of merchantability was valid. D.C. Code 1981, §§ 28:2-316(2), 28:2-316.1(1). *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Warranty and limitation of liability clauses which restrict buyer's remedies to repair and replacement of nonconforming parts and limit manufacturer seller's liability regardless of its negligence in causing such nonconformities are valid and enforceable. D.C. Code §§ 28:2-316(4), 28:2-719(1)(a), (3). *Potomac Electric Power Co. v. Westinghouse Electric Corp.*, 385 F. Supp. 572, 1974 U.S. Dist. LEXIS 11937 (1974), reversed without opinion at 527 F.2d 853, 174 U.S. App. D.C. 70, 1975 U.S. App. LEXIS 16789 (1975).

Manufacturer seller and buyer could, under provisions of the UCC, agree, as they did, to limit buyer's remedy for breach of guaranty that maximum heat rate of turbine generator would not exceed a specific limit to repair and replacement of nonconforming parts. D.C. Code §§ 28:2-316(1, 4), 28:2-719. *Potomac Electric Power Co. v. Westinghouse Electric Corp.*, 385 F. Supp. 572, 1974 U.S. Dist. LEXIS 11937 (1974), reversed without opinion at 527 F.2d 853, 174 U.S. App. D.C. 70, 1975 U.S. App. LEXIS 16789 (1975).

§ 28:2-316.01. Limitation of exclusion or modification of warranties consumers.

(1) The provisions of section 28:2-316 do not apply to the sale of consumer goods, as defined by section 28:9-109, services, or both.

(2) Any oral or written language used by a seller of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability or fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, is unenforceable. However, such merchant may recover from the manufacturer any damages resulting from breach of the implied warranty of merchantability or fitness for a particular purpose.

(3) The provisions of subsection (2) do not apply to particular defects and limitations of consumer goods and services noted conspicuously in writing at the time of sale.

(4) Any oral or written language used by a manufacturer of consumer goods, which attempts to limit or modify a consumer's remedies for breach of the manufacturer's express warranties is unenforceable, unless the manufacturer provided reasonable and expeditious means of performing the warranty obligations.

(Mar. 16, 1982, D.C. Law 4-85, § 42, 29 DCR 309.)

Prior Codifications. — 1981 Ed., § 28:2-316.1.

Legislative history of Law 4-85. — For legislative history of D.C. Law 4-85, see Historical and Statutory Notes following § 28:2-107.

Editor's notes. — Section 39(c) of D.C. Law 15-354 provided that the section designation of § 28-2-316.1 of the District of Columbia Official Code is redesignated as § 28-316.01.

CASE NOTES

ANALYSIS

Construction and application.
Consumer goods.
Law governing.

Construction and application.

Limitations of duration constitute a modification of an implied warranty within the meaning of this section. *Patton v. Chrysler Motors Corp.*, 119 WLR 1045 (Super. Ct. 1991).

Consumer goods.

Under District of Columbia law, roofing materials which were not furniture, furnishings, or personal effects were not "consumer goods" coming within exception to statute allowing implied merchantability for sale of goods to be waived by parties, and statement in warranty given by seller of roofing materials which specifically and conspicuously waived implied warranty of merchantability was valid. D.C. Code

1981, §§ 28:2-316(2), 28:2-316.1(1). *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Under District of Columbia law, "consumer goods" which come within exception to rule that implied warranty of merchantability can be deleted by parties to sale of goods through exclusion clause are products used or bought for use primarily for personal, family, or household purposes. D.C. Code 1981, §§ 28:2-316.1(1), 28:9-109. *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Law governing.

Where a D.C. resident purchased a car in Virginia, this section was applicable to the transaction, not Virginia law, and the implied warranties of merchantability could not be limited to the duration of the express warranty. *Patton v. Chrysler Motors Corp.*, 119 WLR 1045 (Super. Ct. 1991).

§ 28:2-317. Cumulation and conflict of warranties express or implied.

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

- (a) Exact or technical specifications displace an inconsistent sample or model or general language of description.
- (b) A sample from an existing bulk displaces inconsistent general language of description.
- (c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

(Dec. 30, 1963, 77 Stat. 649, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28-3904.

Prior Codifications. — 1981 Ed., § 28:2-317.

1973 Ed., § 28:2-317.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: On cumulation of warranties see Sections 14, 15, and 16, Uniform Sales Act.

Changes: Completely rewritten into one section.

Purposes of Changes:

1. The present section rests on the basic policy of this Article that no warranty is created except by some conduct (either affirmative ac-

tion or failure to disclose) on the part of the seller. Therefore, all warranties are made cumulative unless this construction of the contract is impossible or unreasonable.

This Article thus follows the general policy of the Uniform Sales Act except that in case of the sale of an article by its patent or trade name the elimination of the warranty of fitness depends solely on whether the buyer has relied on the

seller's skill and judgment; the use of the patent or trade name is but one factor in making this determination.

2. The rules of this section are designed to aid in determining the intention of the parties as to which of inconsistent warranties which have arisen from the circumstances of their transaction shall prevail. These rules of intention are to be applied only where factors making for an equitable estoppel of the seller do not exist and where he has in perfect good faith made warranties which later turn out to be inconsistent. To the extent that the seller has led the buyer to believe that all of the warranties can be performed, he is estopped from setting up any essential inconsistency as a defense.

3. The rules in subsections (a), (b) and (c) are designed to ascertain the intention of the parties by reference to the factor which probably claimed the attention of the parties in the first instance. These rules are not absolute but may be changed by evidence showing that the conditions which existed at the time of contracting make the construction called for by the section inconsistent or unreasonable.

Cross Reference:

Point 1: Section 2-315.

Definitional Cross Reference:

"Party". Section 1-201.

CASE NOTES

In general.

Seller's implied warranty of merchantability of gas air conditioner was effective prior to expiration of seller's express manufacturer's warranty where such express warranty contained no language, which excluded or modified

the implied warranty, and was not inconsistent with the implied warranty. D.C. Code §§ 28:2-314, 28:2-316, 28:2-316(2), 28:2-317. *Lee v. Air Care, Inc.*, 325 A.2d 598, 1974 D.C. App. LEXIS 279 (1974).

§ 28:2-318. Third party beneficiaries of warranties express or implied.

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

(Dec. 30, 1963, 77 Stat. 649, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28-3904.

Prior Codifications. — 1981 Ed., § 28:2-318.

1973 Ed., § 28:2-318.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. The last sentence of this section does not mean that a seller is precluded from excluding or disclaiming a warranty which might otherwise arise in connection with the sale provided such exclusion or modification is permitted by Section 2-316. Nor does that sentence preclude the seller from limiting the remedies of his own buyer and of any beneficiaries, in any manner provided in Sections 2-718 or 2-719. To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited,

such provisions are equally operative against beneficiaries of warranties under this section. What this last sentence forbids is exclusion of liability by the seller to the persons to whom the warranties which he has made to his buyer would extend under this section. [Mississippi has adopted the first alternative.]

2. The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity." It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily upon the mer-

chant-seller's warranty under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose. Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him [As amended in 1966].

3. The first alternative expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain. The second

alternative is designed for states where the case law has already developed further and for those that desire to expand the class of beneficiaries. The third alternative goes further, following the trend of modern decisions as indicated by Restatement of Torts 2d s 402A (Tentative Draft No. 10, 1965) in extending the rule beyond injuries to the person [As amended in 1966].

Cross References:

Point 1: Sections 2-316, 2-718 and 2-719.

Point 2: Section 2-314.

Definitional Cross References:

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

CASE NOTES

In general.

Homeowner could not recover from contractor and its owner for breach of contract based on failure of contractor to complete installation of heating and air conditioning system in home where there was no evidence presented of reasonable cost of completing contract which would have been appropriate measure of damages. *Adams v. A.B. & A., Inc.*, 613 A.2d 858, 1992 D.C. App. LEXIS 118 (1992).

Homeowner could not recover from contrac-

tor and its owner on claims asserted under Consumer Protection Procedures Act in connection with failure of contractor to complete installation of heating and air conditioning system in home where contractor and owner did not receive, either before or during trial, timely notice that specific Act claims now raised as basis of verdict were being litigated. *D.C. Code 1981, § 28-3904(n, x). Adams v. A.B. & A., Inc.*, 613 A.2d 858, 1992 D.C. App. LEXIS 118 (1992).

§ 28:2-319. F.O.B. and F.A.S. terms.

(1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this article (section 28:2-504) and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this article (section 28:2-503);

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this article on the form of bill of lading (section 28:2-323).

(2) Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1) (a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this article (section 28:2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

(Dec. 30, 1963, 77 Stat. 649, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-311.

1973 Ed., § 28:2-319.

Prior Codifications. — 1981 Ed., § 28:2-319.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. This section is intended to negate the uncommercial line of decision which treats an "F.O.B." term as "merely a price term." The distinctions taken in subsection (1) handle most of the issues which have on occasion led to the unfortunate judicial language just referred to. Other matters which have led to sound results being based on unhappy language in regard to F.O.B. clauses are dealt with in this Act by Section 2-311(2) (seller's option re arrangements relating to shipment) and Sections 2-614 and 615 (substituted performance and seller's excuse).

2. Subsection (1)(c) not only specifies the duties of a seller who engages to deliver "F.O.B. vessel," or the like, but ought to make clear that no agreement is soundly drawn when it looks to reshipment from San Francisco or New York, but speaks merely of "F.O.B." the place.

3. The buyer's obligations stated in subsection (1)(c) and subsection (3) are, as shown in the text, obligations of cooperation. The last sentence of subsection (3) expressly, though perhaps unnecessarily, authorizes the seller, pending instructions, to go ahead with such

preparatory moves as shipment from the interior to the named point of delivery. The sentence presupposes the usual case in which instructions "fail"; a prior repudiation by the buyer, giving notice that breach was intended, would remove the reason for the sentence, and would normally bring into play, instead, the second sentence of Section 2-704, which duly calls for lessening damages.

4. The treatment of "F.O.B. vessel" in conjunction with F.A.S. fits, in regard to the need for payment against documents, with standard practice and case-law; but "F.O.B. vessel" is a term which by its very language makes express the need for an "on board" document. In this respect, that term is stricter than the ordinary overseas "shipment" contract (C.I.F., etc., Section 2-320).

Cross References:

Sections 2-311(3), 2-323, 2-503 and 2-504.

Definitional Cross References:

"Agreed". Section 1-201.

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

"Term". Section 1-201.

§ 28:2-320. C.I.F. and C. & F. terms.

(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C.

& F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to

(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

(4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

(Dec. 30, 1963, 77 Stat. 650, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-320. 1973 Ed., § 28:2-320.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes: To make it clear that:

1. The C.I.F. contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer upon shipment if the seller has properly performed all his obligations with respect to the goods. Delivery to the carrier is delivery to the buyer for purposes of risk and "title". Delivery of possession of the goods is accomplished by delivery of the bill of lading, and upon tender of the required documents the buyer must pay the agreed price without awaiting the arrival of the goods and if they have been lost or damaged after proper shipment he must seek his remedy against the carrier or insurer. The buyer has no

right of inspection prior to payment or acceptance of the documents.

2. The seller's obligations remain the same even though the C.I.F. term is "used only in connection with the stated price and destination".

3. The insurance stipulated by the C.I.F. term is for the buyer's benefit, to protect him against the risk of loss or damage to the goods in transit. A clause in a C.I.F. contract "insurance—for the account of sellers" should be viewed in its ordinary mercantile meaning that the sellers must pay for the insurance and not that it is intended to run to the seller's benefit.

4. A bill of lading covering the entire transportation from the port of shipment is explicitly required but the provision on this point must be

read in the light of its reason to assure the buyer of as full protection as the conditions of shipment reasonably permit, remembering always that this type of contract is designed to move the goods in the channels commercially available. To enable the buyer to deal with the goods while they are afloat the bill of lading must be one that covers only the quantity of goods called for by the contract. The buyer is not required to accept his part of the goods without a bill of lading because the latter covers a larger quantity, nor is he required to accept a bill of lading for the whole quantity under a stipulation to hold the excess for the owner. Although the buyer is not compelled to accept either goods or documents under such circumstances he may of course claim his rights in any goods which have been identified to his contract.

5. The seller is given the option of paying or providing for the payment of freight. He has no option to ship "freight collect" unless the agreement so provides. The rule of the common law that the buyer need not pay the freight if the goods do not arrive is preserved.

Unless the shipment has been sent "freight collect" the buyer is entitled to receive documentary evidence that he is not obligated to pay the freight; the seller is therefore required to obtain a receipt "showing that the freight has been paid or provided for." The usual notation in the appropriate space on the bill of lading that the freight has been prepaid is a sufficient receipt, as at common law. The phrase "provided for" is intended to cover the frequent situation in which the carrier extends credit to a shipper for the freight on successive shipments and receives periodical payments of the accrued freight charges from him.

6. The requirement that unless otherwise agreed the seller must procure insurance "of a kind and on terms then current at the port for shipment in the usual amount, in the currency of the contract, sufficiently shown to cover the same goods covered by the bill of lading", applies to both marine and war risk insurance. As applied to marine insurance, it means such insurance as is usual or customary at the port for shipment with reference to the particular kind of goods involved, the character and equipment of the vessel, the route of the voyage, the port of destination and any other considerations that affect the risk. It is the substantial equivalent of the ordinary insurance in the particular trade and on the particular voyage and is subject to agreed specifications of type or extent of coverage. The language does not mean that the insurance must be adequate to cover all risks to which the goods may be subject in transit. There are some types of loss or damage that are not covered by the usual marine insurance and are excepted in bills of lading or in applicable statutes from the causes of loss or

damage for which the carrier or the vessel is liable. Such risks must be borne by the buyer under this Article.

Insurance secured in compliance with a C.I.F. term must cover the entire transportation of the goods to the named destination.

7. An additional obligation is imposed upon the seller in requiring him to procure customary war risk insurance at the buyer's expense. This changes the common law on the point. The seller is not required to assume the risk of including in the C.I.F. price the cost of such insurance, since it often fluctuates rapidly, but is required to treat it simply as a necessary for the buyer's account. What war risk insurance is "current" or usual turns on the standard forms of policy or rider in common use.

8. The C.I.F. contract calls for insurance covering the value of the goods at the time and place of shipment and does not include any increase in market value during transit or any anticipated profit to the buyer on a sale by him.

The contract contemplates that before the goods arrive at their destination they may be sold again and again on C.I.F. terms and that the original policy of insurance and bill of lading will run with the interest in the goods by being transferred to each successive buyer. A buyer who becomes the seller in such an intermediate contract for sale does not thereby, if his sub-buyer knows the circumstances, undertake to insure the goods again at an increased price fixed in the new contract or to cover the increase in price by additional insurance, and his buyer may not reject the documents on the ground that the original policy does not cover such higher price. If such a sub-buyer desires additional insurance he must procure it for himself.

Where the seller exercises an option to ship "freight collect" and to credit the buyer with the freight against the C.I.F. price, the insurance need not cover the freight since the freight is not at the buyer's risk. On the other hand, where the seller prepays the freight upon shipping under a bill of lading requiring prepayment and providing that the freight shall be deemed earned and shall be retained by the carrier "ship and/or cargo lost or not lost," or using words of similar import, he must procure insurance that will cover the freight, because notwithstanding that the goods are lost in transit the buyer is bound to pay the freight as part of the C.I.F. price and will be unable to recover it back from the carrier.

9. Insurance "for the account of whom it may concern" is usual and sufficient. However, for a valid tender the policy of insurance must be one which can be disposed of together with the bill of lading and so must be "sufficiently shown to cover the same goods covered by the bill of lading." It must cover separately the quantity of goods called for by the buyer's contract and

not merely insure his goods as part of a larger quantity in which others are interested, a case provided for in American mercantile practice by the use of negotiable certificates of insurance which are expressly authorized by this section. By usage these certificates are treated as the equivalent of separate policies and are good tender under C.I.F. contracts. The term "certificate of insurance", however, does not of itself include certificates or "cover notes" issued by the insurance broker and stating that the goods are covered by a policy. Their sufficiency as substitutes for policies will depend upon proof of an established usage or course of dealing. The present section rejects the English rule that not only brokers' certificates and "cover notes" but also certain forms of American insurance certificates are not the equivalent of policies and are not good tender under a C.I.F. contract.

The seller's failure to tender a proper insurance document is waived if the buyer refuses to make payment on other and untenable grounds at a time when proper insurance could have been obtained and tendered by the seller if timely objection had been made. Even a failure to insure on shipment may be cured by seasonable tender of a policy retroactive in effect; e.g., one insuring the goods "lost or not lost." The provisions of this Article on cure of improper tender and on waiver of buyer's objections by silence are applicable to insurance tenders under a C.I.F. term. Where there is no waiver by the buyer as described above, however, the fact that the goods arrive safely does not cure the seller's breach of his obligations to insure them and tender to the buyer a proper insurance document.

10. The seller's invoice of the goods shipped under a C.I.F. contract is regarded as a usual and necessary document upon which reliance may properly be placed. It is the document which evidences points of description, quality and the like which do not readily appear in other documents. This Article rejects those statements to the effect that the invoice is a usual but not a necessary document under a C.I.F. term.

11. The buyer needs all of the documents required under a C.I.F. contract, in due form and with necessary endorsements, so that before the goods arrive he may deal with them by negotiating the documents or may obtain prompt possession of the goods after their arrival. If the goods are lost or damaged in transit the documents are necessary to enable him promptly to assert his remedy against the carrier or insurer. The seller is therefore obligated to do what is mercantilely reasonable in the circumstances and should make every reasonable exertion to send forward the documents as soon as possible after the shipment. The requirement that the documents be forwarded

with "commercial promptness" expresses a more urgent need for action than that suggested by the phrase "reasonable time".

12. Under a C.I.F. contract the buyer, as under the common law, must pay the price upon tender of the required documents without first inspecting the goods, but his payment in these circumstances does not constitute an acceptance of the goods nor does it impair his right of subsequent inspection or his options and remedies in the case of improper delivery. All remedies and rights for the seller's breach are reserved to him. The buyer must pay before inspection and assert his remedy against the seller afterward unless the nonconformity of the goods amounts to a real failure of consideration, since the purpose of choosing this form of contract is to give the seller protection against the buyer's unjustifiable rejection of the goods at a distant port of destination which would necessitate taking possession of the goods and suing the buyer there.

13. A valid C.I.F. contract may be made which requires part of the transportation to be made on land and part on the sea, as where the goods are to be brought by rail from an inland point to a seaport and thence transported by vessel to the named destination under a "through" or combination bill of lading issued by the railroad company. In such a case shipment by rail from the inland point within the contract period is a timely shipment notwithstanding that the loading of the goods on the vessel is delayed by causes beyond the seller's control.

14. Although subsection (2) stating the legal effects of the C.I.F. term is an "unless otherwise agreed" provision, the express language used in an agreement is frequently a precautionary, fuller statement of the normal C.I.F. terms and hence not intended as a departure or variation from them. Moreover, the dominant outlines of the C.I.F. term are so well understood commercially that any variation should, whenever reasonably possible, be read as falling within those dominant outlines rather than as destroying the whole meaning of a term which essentially indicates a contract for proper shipment rather than one for delivery at destination. Particularly careful consideration is necessary before a printed form or clause is construed to mean agreement otherwise and where a C.I.F. contract is prepared on a printed form designed for some other type of contract, the C.I.F. terms must prevail over printed clauses repugnant to them.

15. Under subsection (4) the fact that the seller knows at the time of the tender of the documents that the goods have been lost in transit does not affect his rights if he has performed his contractual obligations. Similarly, the seller cannot perform under a C.I.F. term by purchasing and tendering landed goods.

16. Under the C. & F. term, as under the C.I.F. term, title and risk of loss are intended to pass to the buyer on shipment. A stipulation in a C. & F. contract that the seller shall effect insurance on the goods and charge the buyer with the premium (in effect that he shall act as the buyer's agent for that purpose) is entirely in keeping with the pattern. On the other hand, it often happens that the buyer is in a more advantageous position than the seller to effect insurance on the goods or that he has in force an "open" or "floating" policy covering all shipments made by him or to him, in either of which events the C. & F. term is adequate without mention of insurance.

17. It is to be remembered that in a French contract the term "C.A.F." does not mean "Cost and Freight" but has exactly the same meaning

as the term "C.I.F." since it is merely the French equivalent of that term. The "A" does not stand for "and" but for "assurance" which means insurance.

Cross References:

Point 4: Section 2-323.

Point 6: Section 2-509(1)(a).

Point 9: Sections 2-508 and 2-605(1)(a).

Point 12: Sections 2-321(3), 2-512 and 2-513(3) and Article 5.

Definitional Cross References:

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Rights". Section 1-201.

"Seller". Section 2-103.

"Term". Section 1-201.

§ 28:2-321. C.I.F. or C. & F.: "net landed weights"; "payment on arrival"; warranty of condition on arrival.

Under a contract containing a term C.I.F. or C. & F.

(1) Where the price is based on or is to be adjusted according to "net landed weights", "delivered weights", "out turn" quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

(2) An agreement described in subsection (1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

(3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived.

(Dec. 30, 1963, 77 Stat. 650, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-513.

Prior Codifications. — 1981 Ed., § 28:2-321.

1973 Ed., § 28:2-321.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

This section deals with two variations of the C.I.F. contract which have evolved in mercantile practice but are entirely consistent with the basis C.I.F. pattern. Subsections (1) and (2), which provide for a shift to the seller of the risk

of quality and weight deterioration during shipment, are designed to conform the law to the best mercantile practice and usage without changing the legal consequences of the C.I.F. or C. & F. term as to the passing of marine risks to the buyer at the point of shipment. Subsection (3) provides that where under the contract documents are to be presented for payment

after arrival of the goods, this amounts merely to a postponement of the payment under the C.I.F. contract and is not to be confused with the "no arrival, no sale" contract. If the goods are lost, delivery of the documents and payment against them are due when the goods should have arrived. The clause for payment on or after arrival is not to be construed as such a condition precedent to payment that if the goods are lost in transit the buyer need never pay and the seller must bear the loss.

Cross Reference:

Section 2-324.

Definitional Cross References:

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Goods". Section 2-105.

"Seller". Section 2-103.

"Term". Section 1-201.

§ 28:2-322. Delivery "ex-ship".

(1) Unless otherwise agreed a term for delivery of goods "ex-ship" (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

(2) Under such a term unless otherwise agreed

(a) the seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and

(b) the risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded.

(Dec. 30, 1963, 77 Stat. 651, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-322. 1973 Ed., § 28:2-322.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. The delivery term, "exship", as between seller and buyer, is the reverse of the F.A.S. term covered.

2. Delivery need not be made from any particular vessel under a clause calling for delivery "exship", even though a vessel on which shipment is to be made originally is named in the contract, unless the agreement by appropriate language restricts the clause to delivery from a named vessel.

3. The appropriate place and manner of unloading at the port of destination depend upon the nature of the goods and the facilities and usages of the port.

4. A contract fixing a price "ex ship" with payment "cash against documents" calls only for such documents as are appropriate to the contract. Tender of a delivery order and of a receipt for the freight after the arrival of the carrying vessel is adequate. The seller is not required to tender a bill of lading as a document of title nor is he required to insure the goods for the buyer's benefit, as the goods are not at the buyer's risk during the voyage.

Cross Reference:

Point 1: Section 2-319(2).

Definitional Cross References:

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

"Term". Section 1-201.

§ 28:2-323. Form of bill of lading required in overseas shipment; "overseas".

(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain

a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C. & F., received for shipment.

(2) Where in a case within subsection (1) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set

(a) due tender of a single part is acceptable within the provisions of this article on cure of improper delivery (subsection (1) of section 28:2-508); and

(b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

(Dec. 30, 1963, 77 Stat. 651, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-103, 28:2-503, and 28:7-102.

Prior Codifications. — 1981 Ed., § 28:2-323.
1973 Ed., § 28:2-323.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. Subsection (1) follows the "American" rule that a regular bill of lading indicating delivery of the goods at the dock for shipment is sufficient, except under a term "F.O.B. vessel." See Section 2-319 and comment thereto.

2. Subsection (2) deals with the problem of bills of lading covering deep water shipments, issued not as a single bill of lading but in a set of parts, each part referring to the other parts and the entire set constituting in commercial practice and at law a single bill of lading. Commercial practice in international commerce is to accept and pay against presentation of the first part of a set if the part is sent from overseas even though the contract of the buyer requires presentation of a full set of bills of lading provided adequate indemnity for the missing parts is forthcoming.

This subsection codifies that practice as between buyer and seller. Article 5 (Section 5-113)

authorizes banks presenting drafts under letters of credit to give indemnities against the missing parts, and this subsection means that the buyer must accept and act on such indemnities if he in good faith deems them adequate. But neither this subsection nor Article 5 decides whether a bank which has issued a letter of credit is similarly bound. The issuing bank's obligation under a letter of credit is independent and depends on its own terms. See Article 5.

Cross References:

Sections 2-508(2), 5-113.

Definitional Cross References:

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Financing agency". Section 2-104.

"Person". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

"Term". Section 1-201.

§ 28:2-324. "No arrival, no sale" term.

Under a term "no arrival, no sale" or terms of like meaning, unless otherwise agreed,

(a) the seller must properly ship conforming goods and if they arrive by

any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and

(b) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (section 28:2-613).

(Dec. 30, 1963, 77 Stat. 651, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-613. 1973 Ed., § 28:2-324.

Prior Codifications. — 1981 Ed., § 28:2-324.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. The “no arrival, no sale” term in a “destination” overseas contract leaves risk of loss on the seller but gives him an exemption from liability for nondelivery. Both the nature of the case and the duty of good faith require that the seller must not interfere with the arrival of the goods in any way. If the circumstances impose upon him the responsibility for making or arranging the shipment, he must have a shipment made despite the exemption clause. Further, the shipment made must be a conforming one, for the exemption under a “no arrival, no sale” term applies only to the hazards of transportation and the goods must be proper in all other respects.

The reason of this section is that where the seller is reselling goods bought by him as shipped by another and this fact is known to the buyer, to that the seller is not under any obligation to make the shipment himself, the seller is entitled under the “no arrival, no sale” clause to exemption from payment of damages for non-delivery if the goods do not arrive or if the goods which actually arrive are non-conforming. This does not extend to sellers who arrange shipment by their own agents, in which case the clause is limited to casualty due to marine hazards. But sellers who make known that they are contracting only with respect to what will be delivered to them by parties over whom they assume no control are entitled to the full quantum of the exemption.

2. The provisions of this Article on identification must be read together with the present section in order to bring the exemption into application. Until there is some designation of the goods in a particular shipment or on a particular ship as being those to which the contract refers there can be no application of an exemption for their non-arrival.

3. The seller’s duty to tender the agreed or declared goods if they do arrive is not impaired

because of their delay in arrival or by their arrival after transshipment.

4. The phrase “to arrive” is often employed in the same sense as “no arrival, no sale” and may then be given the same effect. But a “to arrive” term, added to a C.I.F. or C. & F. contract, does not have the full meaning given by this section to “no arrival, no sale”. Such a “to arrive” term is usually intended to operate only to the extent that the risks are not covered by the agreed insurance and the loss or casualty is due to such uncovered hazards. In some instances the “to arrive” term may be regarded as a time of payment term, or, in the case of the reselling seller discussed in point 1 above, as negating responsibility for conformity of the goods, if they arrive, to any description which was based on his good faith belief of the quality. Whether this is the intention of the parties is a question of fact based on all the circumstances surrounding the resale and in case of ambiguity the rules of Sections 2-316 and 2-317 apply to preclude dishonor.

5. Paragraph (b) applies where goods arrive impaired by damage or partial loss during transportation and makes the policy of this Article on casualty to identified goods applicable to such a situation. For the term cannot be regarded as intending to give the seller an unforeseen profit through casualty; it is intended only to protect him from loss due to causes beyond his control.

Cross References:

Point 1: Section 1-203.

Point 2: Section 2-501(a) and (c).

Point 5: Section 2-613.

Definitional Cross References:

“Buyer”. Section 2-103.

“Conforming”. Section 2-106.

“Contract”. Section 1-201.

“Fault”. Section 1-201.

“Goods”. Section 2-105.

“Sale”. Section 2-106.

“Seller”. Section 2-103.

“Term”. Section 1-201.

§ 28:2-325. “Letter of credit” term; “confirmed credit”.

(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer’s obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.

(3) Unless otherwise agreed the term “letter of credit” or “banker’s credit” in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term “confirmed credit” means that the credit must also carry the direct obligation of such an agency which does business in the seller’s financial market.

(Dec. 30, 1963, 77 Stat. 652, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-103. 1973 Ed., § 28:2-325.

Prior Codifications. — 1981 Ed., § 28:2-325.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes: To express the established commercial and banking understanding as to the meaning and effects of terms calling for “letters of credit” or “confirmed credit”:

1. Subsection (2) follows the general policy of this Article and Article 3 (Section 3-802) on conditional payment, under which payment by check or other short-term instrument is not ordinarily final as between the parties if the recipient duly presents the instrument and honor is refused. Thus the furnishing of a letter of credit does not substitute the financing agency’s obligation for the buyer’s, but the seller must first give the buyer reasonable notice of his intention to demand direct payment from him.

2. Subsection (3) requires that the credit be irrevocable and be a prime credit as determined by the standing of the issuer. It is not necessary, unless otherwise agreed, that the credit be a negotiation credit; the seller can finance him-

self by an assignment of the proceeds under Section 5-116(2).

3. The definition of “confirmed credit” is drawn on the supposition that the credit is issued by a bank which is not doing direct business in the seller’s financial market; there is no intention to require the obligation of two banks both local to the seller.

Cross References:

Sections 2-403, 2-511(3) and 3-802 and Article 5.

Definitional Cross References:

“Buyer”. Section 2-103.
 “Contract for sale”. Section 2-106.
 “Draft”. Section 3-104.
 “Financing agency”. Section 2-104.
 “Notifies”. Section 1-201.
 “Overseas”. Section 2-323.
 “Purchaser”. Section 1-201.
 “Seasonably”. Section 1-204.
 “Seller”. Section 2-103.
 “Term”. Section 1-201.

§ 28:2-326. Sale on approval and sale or return; rights of creditors.

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

- (a) a “sale on approval” if the goods are delivered primarily for use, and
- (b) a “sale or return” if the goods are delivered primarily for resale.

(2) Goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Repealed.

(4) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this article (section 28:2-201) and as contradicting the sale aspect of the contract within the provisions of this article on parol or extrinsic evidence (section 28:2-202).

(Dec. 30, 1963, 77 Stat. 652, Pub. L. 88-243, § 1; Oct. 26, 2000, D.C. Law 13-201, § 201(c)(3), 47 DCR 7576.)

Section references. — This section is referred to in §§ 28:1-201, 28:2-103, and 28:2A-103.

Prior Codifications. — 1981 Ed., § 28:2-326.

1973 Ed., § 28:2-326.

Effect of amendments. — D.C. Law 13-

201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:2-103.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 19(3), Uniform Sales Act.

Changes: Completely rewritten in this and the succeeding section.

Purposes of Changes: To make it clear that:

1. Both a "sale on approval" and "sale or return" should be distinguished from other types of transactions with which they frequently have been confused. A "sale on approval," sometimes also called a sale "on trial" or "on satisfaction," deals with a contract under which the seller undertakes a risk in order to satisfy its prospective buyer with the appearance or performance of the goods that are sold. The goods are delivered to the proposed purchaser but they remain the property of the seller until the buyer accepts them. The price has already been agreed. The buyer's willingness to receive and test the goods is the consideration for the seller's engagement to deliver and sell. A "sale or return," on the other hand, typically is a sale to a merchant whose unwillingness to buy is overcome by the seller's engagement to take back the goods (or any commercial unit of goods) in lieu of payment if they fail to be resold. A sale or return is a present sale of goods which may be undone at the buyer's option. Accordingly, subsection (2) provides that goods delivered on approval are not subject to the prospective buyer's creditors until acceptance, and goods delivered in a sale or return are subject to the buyer's creditors while in the buyer's possession.

These two transactions are so strongly delineated in practice and in general understanding that every presumption runs against a delivery

to a consumer being a "sale or return" and against a delivery to a merchant for resale being a "sale on approval."

2. The right to return the goods for failure to conform to the contract of sale does not make the transaction a "sale on approval" or "sale or return" and has nothing to do with this section or Section 2-327. This section is not concerned with remedies for breach of contract. It deals instead with a power given by the contract to turn back the goods even though they are wholly as warranted. This section nevertheless presupposes that a contract for sale is contemplated by the parties, although that contract may be of the particular character that this section addresses (i.e., a sale on approval or a sale or return).

If a buyer's obligation as a buyer is conditioned not on his personal approval but on the article's passing a described objective test, the risk of loss by casualty pending the test is properly the seller's and proper return is at his expense. On the point of "satisfaction" as meaning "reasonable satisfaction" where an industrial machine is involved, this Article takes no position.

3. Subsection (3) resolves a conflict in the pre-UCC case law by recognizing that an "or return" provision is so definitely at odds with any ordinary contract for sale of goods that if a written agreement is involved the "or return" term must be contained in a written memorandum. The "or return" aspect of a sales contract must be treated as a separate contract under the Statute of Frauds section and as contradicting the sale insofar as questions of parole or extrinsic evidence are concerned.

4. Certain true consignment transactions were dealt with in former Sections 2-326(3) and 9-114. These provisions have been deleted and have been replaced by new provisions in Article 9. See, e.g., Sections 9-109(a)(4); 9-103(b); 9-319.

Cross References:

Point 2: Article 9.

Point 3: Sections 2-201 and 2-202.

Definitional Cross References:

"Between merchants". Section 2-104.

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract for sale". Section 2-106.

"Creditor". Section 1-201.

"Goods". Section 2-105.

"Sale". Section 2-106.

"Seller". Section 2-103.

§ 28:2-327. Special incidents of sale on approval and sale or return.

(1) Under a sale on approval unless otherwise agreed

(a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and

(b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and

(c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.

(2) Under a sale or return unless otherwise agreed

(a) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and

(b) the return is at the buyer's risk and expense.

(Dec. 30, 1963, 77 Stat. 652, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-509.

1973 Ed., § 28:2-327.

Prior Codifications. — 1981 Ed., § 28:2-327.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 19(3), Uniform Sales Act.

Changes: Completely rewritten in preceding and this section.

Purposes of Changes: To make it clear that:

1. In the case of a sale on approval:

If all of the goods involved conform to the contract, the buyer's acceptance of part of the goods constitutes acceptance of the whole. Acceptance of part falls outside the normal intent of the parties in the "on approval" situation and the policy of this Article allowing partial acceptance of a defective delivery has no application here. A case where a buyer takes home two dresses to select one commonly involves two distinct contracts; if not, it is covered by the words "unless otherwise agreed".

2. In the case of a sale or return, the return of any unsold unit merely because it is unsold is the normal intent of the "sale or return" provision, and therefore the right to return for this reason alone is independent of any other action under the contract which would turn on wholly different considerations. On the other hand, where the return of goods is for breach, including return of items resold by the buyer and returned by the ultimate purchasers because of defects, the return procedure is governed not by the present section but by the provisions on the effects and revocation of acceptance.

3. In the case of a sale on approval the risk rests on the seller until acceptance of the goods by the buyer, while in a sale or return the risk remains throughout on the buyer.

4. Notice of election to return given by the

buyer in a sale on approval is sufficient to relieve him of any further liability. Actual return by the buyer to the seller is required in the case of a sale or return contract. What constitutes due "giving" of notice, as required in "on approval" sales, is governed by the provisions on good faith and notice. "Seasonable" is used here as defined in Section 1-204. Nevertheless, the provisions of both this Article and of the contract on this point must be read with commercial reason and with full attention to good faith.

Cross References:

Point 1: Sections 2-501, 2-601 and 2-603.

Point 2: Sections 2-607 and 2-608.

Point 4: Sections 1-201 and 1-204.

Definitional Cross References:

"Agreed". Section 1-201.

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Notifies". Section 1-201.

"Notification". Section 1-201.

"Sale on approval". Section 2-326.

"Sale or return". Section 2-326.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

CASE NOTES

In general.

On delivery of goods, identification of goods to contract ceases to have significance as concept except in case of sale on approval; on delivery, buyer does not have just special property and insurable interest in goods but actual title to goods themselves; after seller completes its performance with respect to delivery, thereby relinquishing possession of goods,

goods must necessarily be identified to contract. U.C.C. §§ 2-327(1)(a), 2-401(1), 2-501, 2-501(1); N.Y. C.L.S. Uniform Commercial Code §§ 2-327(1)(a), 2-401(1), 2-501, 2-501(1); D.C. Code 1981, §§ 28:2-327(1)(a), 28:2-401(1), 28:2-501, 28:2-501(1). In re Alcom Am. Corp., 156 B.R. 873, 1993 Bankr. LEXIS 1048 (1993), affirmed by 48 F.3d 539, 310 U.S. App. D.C. 363, 1995 U.S. App. LEXIS 4231 (1995).

§ 28:2-328. Sale by auction.

(1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

(Dec. 30, 1963, 77 Stat. 653, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-255, § 27(11), 44 DCR 1271.)

Prior Codifications. — 1981 Ed., § 28:2-328.

1973 Ed., § 28:2-328.

Legislative history of Law 11-255. — Law 11-255, the “Second Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-905, which was referred to

the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 21, Uniform Sales Act.

Changes: Completely rewritten.

Purposes of Changes: To make it clear that:

1. The auctioneer may in his discretion either reopen the bidding or close the sale on the bid on which the hammer was falling when a bid is made at that moment. The recognition of a bid of this kind by the auctioneer in his discretion does not mean a closing in favor of such a bidder, but only that the bid has been accepted as a continuation of the bidding. If recognized, such a bid discharges the bid on which the hammer was falling when it was made.

2. An auction “with reserve” is the normal procedure. The crucial point, however, for determining the nature of an auction is the “putting up” of the goods. This Article accepts the view that the goods may be withdrawn before they are actually “put up,” regardless of whether the auction is advertised as one without reserve, without liability on the part of the auction announcer to persons who are present.

This is subject to any peculiar facts which might bring the case within the “firm offer” principle of this Article, but an offer to persons generally would require unmistakable language in order to fall within that section. The prior announcement of the nature of the auction either as with reserve or without reserve will, however, enter as an “explicit term” in the “putting up” of the goods and conduct thereafter must be governed accordingly. The present section continues the prior rule permitting withdrawal of bids in auctions both with and without reserve; and the rule is made explicit that the retraction of a bid does not revive a prior bid.

Cross Reference:

Point 2: Section 2-205.

Definitional Cross References:

“Buyer”. Section 2-103.

“Good faith”. Section 1-201.

“Goods”. Section 2-105.

“Lot”. Section 2-105.

“Notice”. Section 1-201.

“Sale”. Section 2-106.

“Seller”. Section 2-103.

Part 4. Title, Creditors and Good Faith Purchasers.

§ 28:2-401. Passing of title; reservation for security; limited application of this section.

Each provision of this article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this article and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (section 28:2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this subtitle. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the article on secured transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time

and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale".

(Dec. 30, 1963, 77 Stat. 653, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:1-201 and 28:2-106.

1973 Ed., § 28:2-401.

Prior Codifications. — 1981 Ed., § 28:2-401.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: See generally, Sections 17, 18, 19 and 20, Uniform Sales Act.

Purposes: To make it clear that:

1. This Article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not "title" to the goods has passed. That the rules of this section in no way alter the rights of either the buyer, seller or third parties declared elsewhere in the Article is made clear by the preamble of this section. This section, however, in no way intends to indicate which line of interpretation should be followed in cases where the applicability of "public" regulation depends upon a "sale" or upon location of "title" without further definition. The basic policy of this Article that known purpose and reason should govern interpretation cannot extend beyond the scope of its own provisions. It is therefore necessary to state what a "sale" is and when title passes under this Article in case the courts deem any public regulation to incorporate the defined term of the "private" law.

2. "Future" goods cannot be the subject of a present sale. Before title can pass the goods must be identified in the manner set forth in Section 2-501. The parties, however, have full liberty to arrange by specific terms for the passing of title to goods which are existing.

3. The "special property" of the buyer in goods identified to the contract is excluded from the definition of "security interest"; its incidents are defined in provisions of this Article such as those on the rights of the seller's creditors, on good faith purchase, on the buyer's right to goods on the seller's insolvency, and on the buyer's right to specific performance or replevin.

4. The factual situations in subsections (2) and (3) upon which passage of title turn actually base the test upon the time when the seller has finally committed himself in regard to specific goods. Thus in a "shipment" contract he commits himself by the act of making the shipment. If shipment is not contemplated subsection (3) turns on the seller's final commitment, i.e. the delivery of documents or the making of the contract.

Cross References:

Point 2: Sections 2-102, 2-501 and 2-502.

Point 3: Sections 1-201, 2-402, 2-403, 2-502 and 2-716.

Definitional Cross References:

"Agreement". Section 1-201.

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Party". Section 1-201.

"Purchaser". Section 1-201.

"Receipt" of goods. Section 2-103.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Sale". Section 2-106.

"Security interest". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

CASE NOTES

ANALYSIS

Delivery.

Identification of goods to contract.

Delivery.

Title to hardware and copy of computer software passed to buyer at time of delivery of goods, where parties did not explicitly agree otherwise. D.C. Code 1981, § 28:2-401. *Synergistic Technologies v. IDB Mobile Communications*, 871 F. Supp. 24, 1994 U.S. Dist. LEXIS 18176 (1994).

Identification of goods to contract.

On delivery of goods, identification of goods to contract ceases to have significance as concept except in case of sale on approval; on delivery, buyer does not have just special property and insurable interest in goods but actual title to goods themselves; after seller completes its performance with respect to delivery, thereby relinquishing possession of goods, goods must necessarily be identified to contract. U.C.C. §§ 2-327(1)(a), 2-401(1), 2-501, 2-501(1); N.Y. C.L.S. Uniform Commercial Code §§ 2-327(1)(a), 2-401(1), 2-501, 2-501(1); D.C. Code 1981, §§ 28:2-327(1)(a), 28:2-401(1), 28:2-501, 28:2-501(1). In re *Alcom Am. Corp.*, 156 B.R. 873, 1993 Bankr. LEXIS 1048 (1993), affirmed by 48 F.3d 539, 310 U.S. App. D.C. 363, 1995 U.S. App. LEXIS 4231 (1995).

Identification of goods to contract establishes earliest point at which title to goods can pass to buyer. U.C.C. §§ 2-401(1), 2-501, 2-501(1); N.Y. C.L.S. Uniform Commercial Code §§ 2-401(1), 2-501, 2-501(1); D.C. Code 1981, §§ 28:2-401(1), 28:2-501, 28:2-501(1). In re *Alcom Am. Corp.*, 156 B.R. 873, 1993 Bankr. LEXIS 1048 (1993), affirmed by 48 F.3d 539, 310 U.S. App. D.C. 363, 1995 U.S. App. LEXIS 4231 (1995).

Provision of Uniform Commercial Code stating that title to goods cannot pass under contract for sale prior to their identification to

contract does not prohibit passage of title in any event before identification; language limits ability of parties to pass title under contract for sale or, in other words, to pass title by agreement in contract itself. U.C.C. §§ 2-401(1-3), 2-401 comment; N.Y. C.L.S. Uniform Commercial Code §§ 2-401(1-3), 2-401 comment; D.C. Code 1981, § 28:2-401(1-3). In re *Alcom Am. Corp.*, 156 B.R. 873, 1993 Bankr. LEXIS 1048 (1993), affirmed by 48 F.3d 539, 310 U.S. App. D.C. 363, 1995 U.S. App. LEXIS 4231 (1995).

Provision of Uniform Commercial Code stating that title to goods cannot pass under contract for sale prior to their identification to contract does not purport to limit the passage of title through physical delivery of goods or through their constructive delivery; thus, provision does not contradict itself, but instead, identification is earliest that title can pass, and shipment or delivery is latest. U.C.C. §§ 2-401(1-3), 2-401 comment; N.Y. C.L.S. Uniform Commercial Code §§ 2-401(1-3), 2-401 comment; D.C. Code 1981, § 28:2-401(1-3). In re *Alcom Am. Corp.*, 156 B.R. 873, 1993 Bankr. LEXIS 1048 (1993), affirmed by 48 F.3d 539, 310 U.S. App. D.C. 363, 1995 U.S. App. LEXIS 4231 (1995).

After Chapter 11 debtor completed its performance with respect to delivery of ethanol to carrier for delivery to buyer, thereby relinquishing possession of goods, ethanol was necessarily identified to contract; identification to contract occurred when title passed to buyer of ethanol on ethanol's delivery to carrier, rather than on buyer's receipt of documents verifying quality of ethanol. U.C.C. §§ 2-401(1), 2-501, 2-501(1); N.Y. C.L.S. Uniform Commercial Code §§ 2-401(1), 2-501, 2-501(1); D.C. Code 1981, §§ 28:2-401(1), 28:2-501, 28:2-501(1). In re *Alcom Am. Corp.*, 156 B.R. 873, 1993 Bankr. LEXIS 1048 (1993), affirmed by 48 F.3d 539, 310 U.S. App. D.C. 363, 1995 U.S. App. LEXIS 4231 (1995).

§ 28:2-402. Rights of seller's creditors against sold goods.

(1) Except as provided in subsections (2) and (3), rights of unsecured

creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this article (sections 28:2-502 and 28:2-716).

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

(3) Nothing in this article shall be deemed to impair the rights of creditors of the seller

(a) under the provisions of the article on secured transactions (Article 9); or

(b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this article constitute the transaction a fraudulent transfer or voidable preference.

(Dec. 30, 1963, 77 Stat. 654, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:1-105 and 28:7-504. 1973 Ed., § 28:2-402.

Prior Codifications. — 1981 Ed., § 28:2-402.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Subsection (2)—Section 26, Uniform Sales Act; Subsections (1) and (3)—none.

Changes: Rephrased.

Purposes of Changes and New Matter: To avoid confusion on ordinary issues between current sellers and buyers and issues in the field of preference and hindrance by making it clear that:

1. Local law on questions of hindrance of creditors by the seller's retention of possession of the goods are outside the scope of this Article, but retention of possession in the current course of trade is legitimate. Transactions which fall within the law's policy against improper preferences are reserved from the protection of this Article.

2. The retention of possession of the goods by a merchant seller for a commercially reason-

able time after a sale or identification in current course is exempted from attack as fraudulent. Similarly, the provisions of subsection (3) have no application to identification or delivery made in the current course of trade, as measured against general commercial understanding of what a "current" transaction is.

Definitional Cross References:

"Contract for sale". Section 2-106.

"Creditor". Section 1-201.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Money". Section 1-201.

"Reasonable time". Section 1-204.

"Rights". Section 1-201.

"Sale". Section 2-106.

"Seller". Section 2-103.

§ 28:2-403. Power to transfer; good faith purchase of goods; "entrusting".

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has

power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

- (a) the transferor was deceived as to the identity of the purchaser, or
- (b) the delivery was in exchange for a check which is later dishonored, or
- (c) it was agreed that the transaction was to be a "cash sale", or
- (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the articles on secured transactions (Article 9), bulk sales (Article 6) and documents of title (Article 7).

(Dec. 30, 1963, 77 Stat. 654, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-239, § 3(c), 44 DCR 936.)

Section references. — This section is referred to in §§ 28:2-103, 28:2-702, 28:2A-103, and 28:7-503.

Prior Codifications. — 1981 Ed., § 28:2-403.

1973 Ed., § 28:2-403.

Legislative history of Law 11-239. — Law 11-239, the "Uniform Commercial Code—Bulk Sales Act of 1996," was introduced in Council

and assigned Bill No. 11-575, which was referred to the Committee on Consumer and Regulatory Affairs. The Bill was adopted on first and second readings on November 11, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-499 and transmitted to both Houses of Congress for its review. D.C. Law 11-239 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 20(4), 23, 24, 25, Uniform Sales Act; Section 9, especially 9(2), Uniform Trust Receipts Act; Section 9, Uniform Conditional Sales Act.

Changes: Consolidated and rewritten.

Purposes of Changes: To gather together a series of prior uniform statutory provisions and the case-law thereunder and to state a unified and simplified policy on good faith purchase of goods.

1. The basic policy of our law allowing transfer of such title as the transferor has is generally continued and expanded under subsection (1). In this respect the provisions of the section are applicable to a person taking by any form of "purchase" as defined by this Act. Moreover the policy of this Act expressly providing for the application of supplementary general principles of law to sales transactions wherever appropriate joins with the present section to con-

tinue unimpaired all rights acquired under the law of agency or of apparent agency or ownership or other estoppel, whether based on statutory provisions or on case law principles. The section also leaves unimpaired the powers given to selling factors under the earlier Factors Acts. In addition subsection (1) provides specifically for the protection of the good faith purchaser for value in a number of specific situations which have been troublesome under prior law.

On the other hand, the contract of purchase is of course limited by its own terms as in a case of pledge for a limited amount or of sale of a fractional interest in goods.

2. The many particular situations in which a buyer in ordinary course of business from a dealer has been protected against reservation of property or other hidden interest are gathered by subsections (2)-(4) into a single principle protecting persons who buy in ordinary

course out of inventory. Consignors have no reason to complain, nor have lenders who hold a security interest in the inventory, since the very purpose of goods in inventory is to be turned into cash by sale.

The principle is extended in subsection (3) to fit with the abolition of the old law of "cash sale" by subsection (1)(c). It is also freed from any technicalities depending on the extended law of larceny; such extension of the concept of theft to include trick, particular types of fraud, and the like is for the purpose of helping conviction of the offender; it has no proper application to the long-standing policy of civil protection of buyers from persons guilty of such trick or fraud. Finally, the policy is extended, in the interest of simplicity and sense, to any entrusting by a bailor; this is in consonance with the explicit provisions of Section 7-205 on the powers of a warehouseman who is also in the business of buying and selling fungible goods of the kind he warehouses. As to entrusting by a secured party, subsection (2) is limited by the more specific provisions of Section 9-307(1), which deny protection to a person buying farm products from a person engaged in farming operations.

3. The definition of "buyer in ordinary course of business" (Section 1-201) is effective here and preserves the essence of the healthy limitations engrafted by the case-law on the older statutes. The older loose concept of good faith and wide definition of value combined to create apparent

good faith purchasers in many situations in which the result outraged common sense;

the court's solution was to protect the original title especially by use of "cash sale" or of overtechnical construction of the enabling clauses of the statutes. But such rulings then turned into limitations on the proper protection of buyers in the ordinary market. Section 1-201(9) cuts down the category of buyer in ordinary course in such fashion as to take care of the results of the cases, but with no price either in confusion or in injustice to proper dealings in the normal market.

4. Except as provided in subsection (1), the rights of purchasers other than buyers in ordinary course are left to the Articles on Secured Transactions, Documents of Title, and Bulk Sales.

Cross References:

Point 1: Sections 1-103 and 1-201.

Point 2: Sections 1-201, 2-402, 7-205 and 9-307(1).

Points 3 and 4: Sections 1-102, 1-201, 2-104, 2-707 and Articles 6, 7 and 9.

Definitional Cross References:

"Buyer in ordinary course of business". Section 1-201.

"Good faith". Sections 1-201 and 2-103.

"Goods". Section 2-105.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Signed". Section 1-201.

"Term". Section 1-201.

"Value". Section 1-201.

CASE NOTES

ANALYSIS

Damages.

Good faith.

Person with voidable title.

Title, generally.

Damages.

Appropriate measure of damages in action in detinue is fair market value of property at time party is deprived of its use, and market that determines measure of recovery is that to which party would have to resort in order to replace subject matter. *Reliance Ins. Co. v. Market Motors, Inc.*, 498 A.2d 571, 1985 D.C. App. LEXIS 506 (1985).

Appropriate measure of damages awarded to retail dealer who prevails in action in detinue is generally wholesale value of property at time retailer was deprived of its use. *Reliance Ins. Co. v. Market Motors, Inc.*, 498 A.2d 571, 1985 D.C. App. LEXIS 506 (1985).

Retail dealer may in some circumstances recover damages for lost profits in action in detinue, but only where retailer establishes that retailer had contracted to sell property at

issue and was unable to obtain similar goods for delivery to purchaser. *Reliance Ins. Co. v. Market Motors, Inc.*, 498 A.2d 571, 1985 D.C. App. LEXIS 506 (1985).

Good faith.

"Good faith" in case of merchant means honesty in fact and observance of reasonable commercial standards of fair dealing in trade. D.C. Code 1981, § 28:2-103(1)(b). *Reliance Ins. Co. v. Market Motors, Inc.*, 498 A.2d 571, 1985 D.C. App. LEXIS 506 (1985).

Person with voidable title.

Automobile dealer who sold purchaser stolen automobile was not a "person with voidable title" within Commercial Code. D.C. Code § 28:2-403(1). *Schrier v. Home Indem. Co.*, 273 A.2d 248, 1971 D.C. App. LEXIS 267 (App. 1971).

Title, generally.

For purposes of determining art gallery's liability for personal property tax on consigned art objects, fact that art gallery could pass legal title to consigned items sold by gallery could not

be regarded as incident of gallery's ownership of such items since as one entrusted with goods, it was required by statute to pass legal title to good faith purchasers. D.C. Code §§ 28:2-403(2), 47-1212. *District of Columbia v. Powers Gallery, Inc.*, 335 A.2d 244, 1975 D.C. App. LEXIS 356 (1975).

Sale of stolen property does not divest person from whom property was stolen of title even though sale is made to a bona fide purchaser for value. D.C. Code § 28:2-403(1). *Schrier v. Home Indem. Co.*, 273 A.2d 248, 1971 D.C. App. LEXIS 267 (App. 1971).

Part 5. Performance.

§ 28:2-501. Insurable interest in goods; manner of identification of goods.

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

(Dec. 30, 1963, 77 Stat. 655, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-103 and 28:2-401.

1973 Ed., § 28:2-501.

Prior Codifications. — 1981 Ed., § 28:2-501.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: See Sections 17 and 19, Uniform Sales Act.

Purposes:

1. The present section deals with the manner of identifying goods to the contract so that an insurable interest in the buyer and the rights set forth in the next section will accrue. Generally speaking, identification may be made in

any manner "explicitly agreed to" by the parties. The rules of paragraphs (a), (b) and (c) apply only in the absence of such "explicit agreement".

2. In the ordinary case identification of particular existing goods as goods to which the contract refers is unambiguous and may occur in one of many ways. It is possible, however, for

the identification to be tentative or contingent. In view of the limited effect given to identification by this Article, the general policy is to resolve all doubts in favor of identification.

3. The provision of this section as to "explicit agreement" clarifies the present confusion in the law of sales which has arisen from the fact that under prior uniform legislation all rules of presumption with reference to the passing of title or to appropriation (which in turn depended upon identification) were regarded as subject to the contrary intention of the parties or of the party appropriating. Such uncertainty is reduced to a minimum under this section by requiring "explicit agreement" of the parties before the rules of paragraphs (a), (b) and (c) are displaced—as they would be by a term giving the buyer power to select the goods. An "explicit" agreement, however, need not necessarily be found in the terms used in the particular transaction. Thus, where a usage of the trade has previously been made explicit by reduction to a standard set of "rules and regulations" currently incorporated by reference into the contracts of the parties, a relevant provision of those "rules and regulations" is "explicit" within the meaning of this section.

4. In view of the limited function of identification there is no requirement in this section that the goods be in deliverable state or that all of the seller's duties with respect to the processing of the goods be completed in order that identification occur. For example, despite identification the risk of loss remains on the seller under the risk of loss provisions until completion of his duties as to the goods and all of his remedies remain dependent upon his not defaulting under the contract.

5. Undivided shares in an identified fungible bulk, such as grain in an elevator or oil in a storage tank, can be sold. The mere making of

the contract with reference to an undivided share in an identified fungible bulk is enough under subsection (a) to effect an identification if there is no explicit agreement otherwise. The seller's duty, however, to segregate and deliver according to the contract is not affected by such an identification but is controlled by other provisions of this Article.

6. Identification of crops under paragraph (c) is made upon planting only if they are to be harvested within the year or within the next normal harvest season. The phrase "next normal harvest season" fairly includes nursery stock raised for normally quick "harvest," but plainly excludes a "timber" crop to which the concept of a harvest "season" is inapplicable.

Paragraph (c) is also applicable to a crop of wool or the young of animals to be born within twelve months after contracting. The product of a lumbering, mining or fishing operating, though seasonal, is not within the concept of "growing". Identification under a contract for all or part of the output of such an operation can be effected early in the operation.

Cross References:

Point 1: Section 2-502.

Point 4: Sections 2-509, 2-510 and 2-703.

Point 5: Sections 2-105, 2-308, 2-503 and 2-509.

Point 6: Sections 2-105(1), 2-107(1) and 2-402.

Definitional Cross References:

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Future goods". Section 2-105.

"Goods". Section 2-105.

"Notification". Section 1-201.

"Party". Section 1-201.

"Sale". Section 2-106.

"Security interest". Section 1-201.

"Seller". Section 2-103.

CASE NOTES

Identification of goods.

Identification of goods to contract establishes earliest point at which title to goods can pass to buyer. U.C.C. §§ 2-401(1), 2-501, 2-501(1); N.Y. C.L.S. Uniform Commercial Code §§ 2-401(1), 2-501, 2-501(1); D.C. Code 1981, §§ 28:2-401(1), 28:2-501, 28:2-501(1). In re Alcom Am. Corp., 156 B.R. 873, 1993 Bankr. LEXIS 1048 (1993), affirmed by 48 F.3d 539, 310 U.S. App. D.C. 363, 1995 U.S. App. LEXIS 4231 (1995).

On delivery of goods, identification of goods to contract ceases to have significance as concept except in case of sale on approval; on delivery, buyer does not have just special property and insurable interest in goods but actual title to goods themselves; after seller completes its performance with respect to delivery, thereby relinquishing possession of goods,

goods must necessarily be identified to contract. U.C.C. §§ 2-327(1)(a), 2-401(1), 2-501, 2-501(1); N.Y. C.L.S. Uniform Commercial Code §§ 2-327(1)(a), 2-401(1), 2-501, 2-501(1); D.C. Code 1981, §§ 28:2-327(1)(a), 28:2-401(1), 28:2-501, 28:2-501(1). In re Alcom Am. Corp., 156 B.R. 873, 1993 Bankr. LEXIS 1048 (1993), affirmed by 48 F.3d 539, 310 U.S. App. D.C. 363, 1995 U.S. App. LEXIS 4231 (1995).

After Chapter 11 debtor completed its performance with respect to delivery of ethanol to carrier for delivery to buyer, thereby relinquishing possession of goods, ethanol was necessarily identified to contract; identification to contract occurred when title passed to buyer of ethanol on ethanol's delivery to carrier, rather than on buyer's receipt of documents verifying quality of ethanol. U.C.C. §§ 2-401(1), 2-501,

2-501(1); N.Y. C.L.S. Uniform Commercial Code §§ 2-401(1), 2-501, 2-501(1); D.C. Code 1981, §§ 28:2-401(1), 28:2-501, 28:2-501(1). In re Alcom Am. Corp., 156 B.R. 873, 1993 Bankr.

LEXIS 1048 (1993), affirmed by 48 F.3d 539, 310 U.S. App. D.C. 363, 1995 U.S. App. LEXIS 4231 (1995).

§ 28:2-502. Buyer's right to goods on seller's repudiation, failure to deliver, or insolvency.

(1) Subject to subsections (2) and (3) and even though the goods have not been shipped, a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of § 28:2-501 may, on making and keeping good a tender of any unpaid portion of their price, recover them from the seller if:

(a) in the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or

(b) in all cases, the seller becomes insolvent within 10 days after receipt of the first installment on their price.

(2) The buyer's right to recover the goods under subsection (1)(a) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

(3) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

(Dec. 30, 1963, 77 Stat. 655, Pub. L. 88-243, § 1; Oct. 26, 2000, D.C. Law 13-201, § 201(c)(4), 47 DCR 7576.)

Section references. — This section is referred to in §§ 28:2-402 and 28:2-711.

Prior Codifications. — 1981 Ed., § 28:2-502.

1973 Ed., § 28:2-502.

Effect of amendments. — D.C. Law 13-

201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:2-103.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Compare Sections 17, 18 and 19, Uniform Sales Act.

Purposes:

1. This section gives an additional right to the buyer as a result of identification of the goods to the contract in the manner provided in Section 2-501. The buyer is given a right to recover the goods, conditioned upon making and keeping good a tender of any unpaid portion of the price, in two limited circumstances. First, the buyer may recover goods bought for personal, family, or household purposes if the seller repudiates the contract or fails to deliver the goods. Second, in any case, the buyer may recover the goods if the seller becomes insolvent within 10 days after the seller receives the first installment on their price. The buyer's right to recover the goods under this section is an exception to the usual rule, under which the

disappointed buyer must resort to an action to recover damages.

2. The question of whether the buyer also acquires a security interest in identified goods and has rights to the goods when insolvency takes place after the ten-day period provided in this section depends upon compliance with the provisions of the Article on Secured Transactions (Article 9).

3. Under subsection (2), the buyer's right to recover consumer goods under subsection (1)(a) vests upon acquisition of a special property, which occurs upon identification of the goods to the contract. See Section 2-501. Inasmuch as a secured party normally acquires no greater rights in its collateral than its debtor had or had power to convey, see Section 2-403(1) (first sentence), a buyer who acquires a right to recover under this section will take free of a security interest created by the seller if it

attaches to the goods after the goods have been identified to the contract. The buyer will take free, even if the buyer does not buy in ordinary course and even if the security interest is perfected. Of course, to the extent that the buyer pays the price after the security interest attaches, the payments will constitute proceeds of the security interest.

4. Subsection (3) is included to preclude the possibility of unjust enrichment, which would exist if the buyer were permitted to recover goods even though they were greatly superior in quality or quantity to that called for by the contract for sale.

Cross References:

Point 1: Sections 1-201 and 2-702.

Point 2: Article 9.

Definitional Cross References:

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Insolvent". Section 1-201.

"Right". Section 1-201.

"Seller". Section 2-103.

§ 28:2-503. Manner of seller's tender of delivery.

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this article, and in particular

(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

(b) tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents

(a) he must tender all such documents in correct form except as provided in this article with respect to bills of lading in a set (subsection (2) of section 28:2-323); and

(b) tender through customary banking channels is sufficient and dishonor

of a draft accompanying the documents constitutes non-acceptance or rejection.

(Dec. 30, 1963, 77 Stat. 655, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-319 and 28:2-509.

Prior Codifications. — 1981 Ed., § 28:2-503.

1973 Ed., § 28:2-503.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: See Sections 11, 19, 20, 43(3) and (4), 46 and 51, Uniform Sales Act.

Changes: The general policy of the above sections is continued and supplemented but subsection (3) changes the rule of prior section 19(5) as to what constitutes a “destination” contract and subsection (4) incorporates a minor correction as to tender of delivery of goods in the possession of a bailee.

Purposes of Changes:

1. The major general rules governing the manner of proper or due tender of delivery are gathered in this section. The term “tender” is used in this Article in two different senses. In one sense it refers to “due tender” which contemplates an offer coupled with a present ability to fulfill all the conditions resting on the tendering party and must be followed by actual performance if the other party shows himself ready to proceed. Unless the context unmistakably indicates otherwise this is the meaning of “tender” in this Article and the occasional addition of the word “due” is only for clarity and emphasis. At other times it is used to refer to an offer of goods or documents under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligation. Used in either sense, however, “tender” connotes such performance by the tendering party as puts the other party in default if he fails to proceed in some manner.

2. The seller’s general duty to tender and deliver is laid down in Section 2-301 and more particularly in Section 2-507. The seller’s right to a receipt if he demands one and receipts are customary is governed by Section 1-205. Subsection (1) of the present section proceeds to set forth two primary requirements of tender: first, that the seller “put and hold conforming goods at the buyer’s disposition” and, second, that he “give the buyer any notice reasonably necessary to enable him to take delivery.”

In cases in which payment is due and demanded upon delivery the “buyer’s disposition” is qualified by the seller’s right to retain control of the goods until payment by the provision of this Article on delivery on condition. However, where the seller is demanding payment on

delivery he must first allow the buyer to inspect the goods in order to avoid impairing his tender unless the contract for sale is on C.I.F., C.O.D., cash against documents or similar terms negating the privilege of inspection before payment.

In the case of contracts involving documents the seller can “put and hold conforming goods at the buyer’s disposition” under subsection (1) by tendering documents which give the buyer complete control of the goods under the provisions of Article 7 on due negotiation.

3. Under paragraph (a) of subsection (1) usage of the trade and the circumstances of the particular case determine what is a reasonable hour for tender and what constitutes a reasonable period of holding the goods available.

4. The buyer must furnish reasonable facilities for the receipt of the goods tendered by the seller under subsection (1), paragraph (b). This obligation of the buyer is no part of the seller’s tender.

5. For the purposes of subsections (2) and (3) there is omitted from this Article the rule under prior uniform legislation that a term requiring the seller to pay the freight or cost of transportation to the buyer is equivalent to an agreement by the seller to deliver to the buyer or at an agreed destination. This omission is with the specific intention of negating the rule, for under this Article the “shipment” contract is regarded as the normal one and the “destination” contract as the variant type. The seller is not obligated to deliver at a named destination and bear the concurrent risk of loss until arrival, unless he has specifically agreed so to deliver or the commercial understanding of the terms used by the parties contemplates such delivery.

6. Paragraph (a) of subsection (4) continues the rule of the prior uniform legislation as to acknowledgment by the bailee. Paragraph (b) of subsection (4) adopts the rule that between the buyer and the seller the risk of loss remains on the seller during a period reasonable for securing acknowledgment of the transfer from the bailee, while as against all other parties the buyer’s rights are fixed as of the time the bailee receives notice of the transfer.

7. Under subsection (5) documents are never “required” except where there is an express

contract term or it is plainly implicit in the peculiar circumstances of the case or in a usage of trade. Documents may, of course, be "authorized" although not required, but such cases are not within the scope of this subsection. When documents are required, there are three main requirements of this subsection: (1) "All": each required document is essential to a proper tender; (2) "Such": the documents must be the ones actually required by the contract in terms of source and substance; (3) "Correct form": All documents must be in correct form.

When a prescribed document cannot be procured, a question of fact arises under the provision of this Article on substituted performance as to whether the agreed manner of delivery is actually commercially impracticable and whether the substitute is commercially reasonable.

Cross References:

Point 2: Sections 1-205, 2-301, 2-310, 2-507 and 2-513 and Article 7.

Point 5: Sections 2-308, 2-310 and 2-509.

Point 7: Section 2-614(1).

Specific matters involving tender are covered in many additional sections of this Article. See Sections 1-205, 2-301, 2-306 to 2-319, 2-321(3), 2-504, 2-507(2), 2-511(1), 2-513, 2-612 and 2-614.

Definitional Cross References:

"Agreement". Section 1-201.

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Dishonor". Section 3-508.

"Document of title". Section 1-201.

"Draft". Section 3-104.

"Goods". Section 2-105.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Receipt" of goods. Section 2-103.

"Rights". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

"Written". Section 1-201.

CASE NOTES

In general.

Where a contract for the delivery of goods contains no specific requirement for tender, the law does not require tender to be made unless

necessary to put a party in default. *Steiner v. U.S.*, 36 F.Supp. 496, 1941 U.S. Dist. LEXIS 3902 (D.D.C.1941).

§ 28:2-504. Shipment by seller.

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment. Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

(Dec. 30, 1963, 77 Stat. 656, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-319.

1973 Ed., § 28:2-504.

Prior Codifications. — 1981 Ed., § 28:2-504.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 46, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To continue the general policy of the prior uniform statutory provision while incorporating certain modifications with respect to the requirement that the contract with the carrier be made expressly on behalf of the buyer and as to the necessity of giving notice of the shipment to the buyer, so that:

1. The section is limited to "shipment" contracts as contracted with "destination" contracts or contracts for delivery at the place where the goods are located. The general principles embodied in this section cover the special cases of F.O.B. point of shipment contracts and C.I.F. and C.&F. contracts. Under the preceding section on manner of tender of delivery, due tender by the seller requires that he comply with the requirements of this section in appropriate cases.

2. The contract to be made with the carrier under paragraph (a) must conform to all express terms of the agreement, subject to any substitution necessary because of failure of agreed facilities as provided in the later provision on substituted performance. However, under the policies of this Article on good faith and commercial standards and on buyer's rights on improper delivery, the requirements of explicit provisions must be read in terms of their commercial and not their literal meaning. This policy is made express with respect to bills of lading in a set in the provision of this Article on form of bills of lading required in overseas shipment.

3. In the absence of agreement, the provision of this Article on options and cooperation respecting performance gives the seller the choice of any reasonable carrier, routing and other arrangements. Whether or not the shipment is at the buyer's expense the seller must see to any arrangements, reasonable in the circumstances, such as refrigeration, watering of live stock, protection against cold, the sending along of any necessary help, selection of specialized cars and the like for paragraph (a) is intended to cover all necessary arrangements whether made by contract with the carrier or otherwise. There is, however, a proper relaxation of such requirements if the buyer is himself in a position to make the appropriate arrangements and the seller gives him reasonable notice of the need to do so. It is an improper contract under paragraph (a) for the seller to agree with the carrier to a limited valuation below the true value and thus cut off the buyer's opportunity to recover from the carrier in the event of loss, when the risk of

shipment is placed on the buyer by his contract with the seller.

4. Both the language of paragraph (b) and the nature of the situation it concerns indicate that the requirement that the seller must obtain and deliver promptly to the buyer in due form any document necessary to enable him to obtain possession of the goods is intended to cumulate with the other duties of the seller such as those covered in paragraph (a).

In this connection, in the case of pool car shipments a delivery order furnished by the seller on the pool car consignee, or on the carrier for delivery out of a larger quantity, satisfies the requirements of paragraph (b) unless the contract requires some other form of document.

5. This Article, unlike the prior uniform statutory provision, makes it the seller's duty to notify the buyer of shipment in all cases. The consequences of his failure to do so, however, are limited in that the buyer may reject on this ground only where material delay or loss ensues.

A standard and acceptable manner of notification in open credit shipments is the sending of an invoice and in the case of documentary contracts is the prompt forwarding of the documents as under paragraph (b) of this section. It is also usual to send on a straight bill of lading but this is not necessary to the required notification. However, should such a document prove necessary or convenient to the buyer, as in the case of loss and claim against the carrier, good faith would require the seller to send it on request.

Frequently the agreement expressly requires prompt notification as by wire or cable. Such a term may be of the essence and the final clause of paragraph (c) does not prevent the parties from making this a particular ground for rejection. To have this vital and irreparable effect upon the seller's duties, such a term should be part of the "dickered" terms written in any "form," or should otherwise be called seasonably and sharply to the seller's attention.

6. Generally, under the final sentence of the section, rejection by the buyer is justified only when the seller's dereliction as to any of the requirements of this section in fact is followed by material delay or damage. It rests on the seller, so far as concerns matters not within the peculiar knowledge of the buyer, to establish that his error has not been followed by events which justify rejection.

Cross References:

Point 1: Sections 2-319, 2-320 and 2-503(2).

Point 2: Sections 1-203, 2-323(2), 2-601 and 2-614(1).

Point 3: Section 2-311(2).

Point 5: Section 1-203.

Definitional Cross References:

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

"Usage of trade". Section 1-205.

§ 28:2-505. Seller's shipment under reservation.

(1) Where the seller has identified goods to the contract by or before shipment:

(a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

(b) a non-negotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (subsection (2) of section 28:2-507) a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within the preceding section but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

(Dec. 30, 1963, 77 Stat. 656, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-509. 1973 Ed., § 28:2-505.

Prior Codifications. — 1981 Ed., § 28:2-505.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 20(2), (3), (4), Uniform Sales Act.

Changes: Completely rephrased, the "powers" of the parties in cases of reservation being emphasized primarily rather than the "rightfulness" of reservation.

Purposes of Changes: To continue in general the policy of the prior uniform statutory provision with certain modifications of emphasis and language, so that:

1. The security interest reserved to the seller under subsection (1) is restricted to securing payment or performance by the buyer and the seller is strictly limited in his disposition and control of the goods as against the buyer and third parties. Under this Article, the provision as to the passing of interest expressly applies "despite any reservation of security title" and also provides that the "rights, obligations and remedies" of the parties are not altered by the incidence of title generally. The security inter-

est, therefore, must be regarded as a means given to the seller to enforce his rights against the buyer which is unaffected by and in turn does not affect the location of title generally. The rules set forth in subsection (1) are not to be altered by any apparent "contrary intent" of the parties as to passing of title, since the rights and remedies of the parties to the contract of sale, as defined in this Article, rest on the contract and its performance or breach and not on stereotyped presumptions as to the location of title.

This Article does not attempt to regulate local procedure in regard to the effective maintenance of the seller's security interest when the action is in replevin by the buyer against the carrier.

2. Every shipment of identified goods under a negotiable bill of lading reserves a security interest in the seller under subsection (1) paragraph (a).

It is frequently convenient for the seller to make the bill of lading to the order of a nominee such as his agent at destination, the financing agency to which he expects to negotiate the document or the bank issuing a credit to him. In many instances, also, the buyer is made the order party. This Article does not deal directly with the question as to whether a bill of lading made out by the seller to the order of a nominee gives the carrier notice of any rights which the nominee may have so as to limit its freedom or obligation to honor the bill of lading in the hands of the seller as the original shipper if the expected negotiation fails. This is dealt with in the Article on Documents of Title (Article 7).

3. A non-negotiable bill of lading taken to a party other than the buyer under subsection (1) paragraph (b) reserves possession of the goods as security in the seller but if he seeks to withhold the goods improperly the buyer can tender payment and recover them.

4. In the case of a shipment by non-negotiable bill of lading taken to a buyer, the seller, under subsection (1) retains no security interest or possession as against the buyer and by the shipment he de facto loses control as against the carrier except where he rightfully and effectively stops delivery in transit. In cases in which the contract gives the seller the right to payment against delivery, the seller, by making an immediate demand for payment, can show that his delivery is conditional, but this does

not prevent the buyer's power to transfer full title to a sub-buyer in ordinary course or other purchaser under Section 2-403.

5. Under subsection (2) an improper reservation by the seller which would constitute a breach in no way impairs such of the buyer's rights as result from identification of the goods. The security title reserved by the seller under subsection (1) does not protect his holding of the document or the goods for the purpose of exacting more than is due him under the contract.

Cross References:

Point 1: Section 1-201.

Point 2: Article 7.

Point 3: Sections 2-501(2) and 2-504.

Point 4: Sections 2-403, 2-507(2) and 2-705.

Point 5: Sections 2-310, 2-319(4), 2-320(4), 2-501 and 2-502 and Article 7.

Definitional Cross References:

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Consignee". Section 7-102.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Financing agency". Section 2-104.

"Goods". Section 2-105.

"Holder". Section 1-201.

"Person". Section 1-201.

"Security interest". Section 1-201.

"Seller". Section 2-103.

§ 28:2-506. Rights of financing agency.

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

(Dec. 30, 1963, 77 Stat. 657, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-506. 1973 Ed., § 28:2-506.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. "Financing agency" is broadly defined in this Article to cover every normal instance in which a party aids or intervenes in the financ-

ing of a sales transaction. The term as used in subsection (1) is not in any sense intended as a limitation and covers any other appropriate situation which may arise outside the scope of the definition.

2. "Paying" as used in subsection (1) is typi-

fied by the letter of credit, or "authority to pay" situation in which a banker, by arrangement with the buyer or other consignee, pays on his behalf a draft for the price of the goods. It is immaterial whether the draft is formally drawn on the party paying or his principal, whether it is a sight draft paid in cash or a time draft "paid" in the first instance by acceptance, or whether the payment is viewed as absolute or conditional. All of these cases constitute "payment" under this subsection. Similarly, "purchasing for value" is used to indicate the whole area of financing by the seller's banker, and the principle of subsection (1) is applicable without any niceties of distinction between "purchase," "discount," "advance against collection" or the like. But it is important to notice that the only right to have the draft honored that is acquired is that against the buyer; if any right against any one else is claimed it will have to be under some separate obligation of that other person. A letter of credit does not necessarily protect purchasers of drafts. See Article 5. And for the relations of the parties to documentary drafts see Part 5 of Article 4.

3. Subsection (1) is made applicable to payments or advances against a draft which "relates to" a shipment of goods and this has been chosen as a term of maximum breadth. In particular the term is intended to cover the case of a draft against an invoice or against a delivery order. Further, it is unnecessary that there be an explicit assignment of the invoice attached to the draft to bring the transaction within the reason of this subsection.

4. After shipment, "the rights of the shipper in the goods" are merely security rights and are subject to the buyer's right to force delivery upon tender of the price. The rights acquired by the financing agency are similarly limited and, moreover, if the agency fails to procure any outstanding negotiable document of title, it may find its exercise of these rights hampered or even defeated by the seller's disposition of the document to a third party. This section does not attempt to create any new rights in the financing agency against the carrier which would force the latter to honor a stop order from the agency, a stranger to the shipment, or any new rights against a holder to whom a document of title has been duly negotiated under Article 7.

Cross References:

Point 1: Section 2-104(2) and Article 4.

Point 2: Part 5 of Article 4, and Article 5.

Point 4: Sections 2-501 and 2-502(1) and Article 7.

Definitional Cross References:

"Buyer". Section 2-103.

"Document of title". Section 1-201.

"Draft". Section 3-104.

"Financing agency". Section 2-104.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Honor". Section 1-201.

"Purchase". Section 1-201.

"Rights". Section 1-201.

"Value". Section 1-201.

§ 28:2-507. Effect of seller's tender; delivery on condition.

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

(Dec. 30, 1963, 77 Stat. 657, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-505.

Prior Codifications. — 1981 Ed., § 28:2-507.

1973 Ed., § 28:2-507.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: See Sections 11, 41, 42 and 69, Uniform Sales Act.

Purposes:

1. Subsection (1) continues the policies of the prior uniform statutory provisions with respect to tender and delivery by the seller. Under this

Article the same rules in these matters are applied to present sales and to contracts for sale. But the provisions of this subsection must be read within the framework of the other sections of this Article which bear upon the question of delivery and payment.

2. The “unless otherwise agreed” provision of subsection (1) is directed primarily to cases in which payment in advance has been promised or a letter of credit term has been included. Payment “according to the contract” contemplates immediate payment, payment at the end of an agreed credit term, payment by a time acceptance or the like. Under this Act, “contract” means the total obligation in law which results from the parties’ agreement including the effect of this Article. In this context, therefore, there must be considered the effect in law of such provisions as those on means and manner of payment and on failure of agreed means and manner of payment.

3. Subsection (2) deals with the effect of a conditional delivery by the seller and in such a situation makes the buyer’s “right as against the seller” conditional upon payment. These words are used as words of limitation to conform with the policy set forth in the bona fide

purchase sections of this Article. Should the seller after making such a conditional delivery fail to follow up his rights, the condition is waived. The provision of this Article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here.

Cross References:

Point 1: Sections 2-310, 2-503, 2-511, 2-601 and 2-711 to 2-713.

Point 2: Sections 1-201, 2-511 and 2-614.

Point 3: Sections 2-401, 2-403, and 2-702(1)(b).

Definitional Cross References:

“Buyer”. Section 2-103.

“Contract”. Section 1-201.

“Delivery”. Section 1-201.

“Document of title”. Section 1-201.

“Goods”. Section 2-105.

“Rights”. Section 1-201.

“Seller”. Section 2-103.

§ 28:2-508. Cure by seller of improper tender or delivery; replacement.

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

(Dec. 30, 1963, 77 Stat. 657, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-323.

Prior Codifications. — 1981 Ed., § 28:2-508.

1973 Ed., § 28:2-508.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. Subsection (1) permits a seller who has made a non-conforming tender in any case to make a conforming delivery within the contract time upon seasonable notification to the buyer. It applies even where the seller has taken back the non-conforming goods and refunded the purchase price. He may still make a good tender within the contract period. The closer, however, it is to the contract date, the greater is the necessity for extreme promptness on the seller’s part in notifying of his intention to cure, if such notification is to be “seasonable” under this subsection.

The rule of this subsection, moreover, is qualified by its underlying reasons. Thus if, after contracting for June delivery, a buyer later makes known to the seller his need for shipment early in the month and the seller ships accordingly, the “contract time” has been cut down by the supervening modification and the time for cure of tender must be referred to this modified time term.

2. Subsection (2) seeks to avoid injustice to the seller by reason of a surprise rejection by the buyer. However, the seller is not protected unless he had “reasonable grounds to believe” that the tender would be acceptable. Such reasonable grounds can lie in prior course of dealing, course of performance or usage of trade as

well as in the particular circumstances surrounding the making of the contract. The seller is charged with commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract as, for example, strict conformity of documents in an overseas shipment or the sale of precision parts or chemicals for use in manufacture. Further, if the buyer gives notice either implicitly, as by a prior course of dealing involving rigorous inspections, or expressly, as by the deliberate inclusion of a "no replacement" clause in the contract, the seller is to be held to rigid compliance. If the clause appears in a "form" contract evidence that it is out of line with trade usage or the prior course of dealing and was not called to the seller's attention may be sufficient to show that the seller had reasonable grounds to believe that the tender would be acceptable.

3. The words "a further reasonable time to substitute a conforming tender" are intended as words of limitation to protect the buyer. What is

a "reasonable time" depends upon the attending circumstances. Compare Section 2-511 on the comparable case of a seller's surprise demand for legal tender.

4. Existing trade usages permitting variations without rejection but with price allowance enter into the agreement itself as contractual limitations of remedy and are not covered by this section.

Cross References:

Point 2: Section 2-302.

Point 3: Section 2-511.

Point 4: Sections 1-205 and 2-721.

Definitional Cross References:

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Money". Section 1-201.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

CASE NOTES

ANALYSIS

In general.

Rescission or revocation of acceptance by buyer.

In general.

Airplane seller, who made nonconforming tender more than five weeks before expiration of contract and 30-day delivery period, had sufficient time under District of Columbia law to cure deficiency within period of contract. D.C. Code 1981, § 28:2-508. *Marlowe v. Argentine Naval Com.*, 808 F.2d 120, 1986 U.S. App. LEXIS 36438 (C.A.D.C. 1986).

Rescission or revocation of acceptance by buyer.

Purchasers of home could not seek rescission of contract of sale as remedy for vendor's alleged breach of contract in failing to correct wet basement problem before settlement, even if vendor and real estate agents had fraudulently misrepresented that the problem had been corrected, where purchasers treated the property as their own and affirmed the contract through continued performance; purchasers had been aware that at least three agreed-upon repairs had not been completed before settlement, but they nevertheless proceeded with settlement and accepted the property with these problems, in exchange for payment from vendors and agents, and did not seek rescission for a year and a half after they had moved in. *Dean v. Garland*, 779 A.2d 911, 2001 D.C. App. LEXIS 189 (2001), writ of certiorari denied by 536 U.S. 924, 122 S. Ct. 2591, 153 L. Ed. 2d 780, 2002 U.S. LEXIS 4497, 70 U.S.L.W. 3774 (2002).

One cannot rescind for breach of contract and at the same time recover damages for the breach. *Dean v. Garland*, 779 A.2d 911, 2001 D.C. App. LEXIS 189 (2001), writ of certiorari denied by 536 U.S. 924, 122 S. Ct. 2591, 153 L. Ed. 2d 780, 2002 U.S. LEXIS 4497, 70 U.S.L.W. 3774 (2002).

Rescission is an equitable remedy, and a party seeking rescission must restore the other party to that party's position at the time the contract was made, even when the party against whom rescission is sought has committed fraud. *Dean v. Garland*, 779 A.2d 911, 2001 D.C. App. LEXIS 189 (2001), writ of certiorari denied by 536 U.S. 924, 122 S. Ct. 2591, 153 L. Ed. 2d 780, 2002 U.S. LEXIS 4497, 70 U.S.L.W. 3774 (2002).

Inherent in the remedy of rescission is the return of the parties to their pre-contract positions. *Dean v. Garland*, 779 A.2d 911, 2001 D.C. App. LEXIS 189 (2001), writ of certiorari denied by 536 U.S. 924, 122 S. Ct. 2591, 153 L. Ed. 2d 780, 2002 U.S. LEXIS 4497, 70 U.S.L.W. 3774 (2002).

If the defrauded party treats the property as his own and affirms the contract through continued performance, that party is precluded from seeking rescission. *Dean v. Garland*, 779 A.2d 911, 2001 D.C. App. LEXIS 189 (2001), writ of certiorari denied by 536 U.S. 924, 122 S. Ct. 2591, 153 L. Ed. 2d 780, 2002 U.S. LEXIS 4497, 70 U.S.L.W. 3774 (2002).

Seller's proffered removal of television chassis for a short period in order to determine cause of color malfunction and ascertain extent of adjustment or correction needed to effect full

operational efficiency presented no great inconvenience to buyer, and refusal of buyer's daughter, on buyer's behalf, to allow this precluded

rescission. D.C. Code 1961, §§ 28:2-508, 28:2-608(1)(A). *Wilson v. Scampoli*, 228 A.2d 848, 1967 D.C. App. LEXIS 156 (App. 1967).

§ 28:2-509. Risk of loss in the absence of breach.

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (section 28:2-505); but

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

(a) on his receipt of a negotiable document of title covering the goods; or

(b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of section 28:2-503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this article on sale on approval (section 28:2-327) and on effect of breach on risk of loss (section 28:2-510).

(Dec. 30, 1963, 77 Stat. 657, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-509.

1973 Ed., § 28:2-509.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 22, Uniform Sales Act.

Changes: Rewritten, subsection (3) of this section modifying prior law.

Purposes of Changes: To make it clear that:

1. The underlying theory of these sections on risk of loss is the adoption of the contractual approach rather than an arbitrary shifting of the risk with the "property" in the goods. The scope of the present section, therefore, is limited strictly to those cases where there has been no breach by the seller. Where for any reason his delivery or tender fails to conform to the contract, the present section does not apply and the situation is governed by the provisions on effect of breach on risk of loss.

2. The provisions of subsection (1) apply

where the contract "requires or authorizes" shipment of the goods. This language is intended to be construed parallel to comparable language in the section on shipment by seller. In order that the goods be "duly delivered to the carrier" under paragraph (a) a contract must be entered into with the carrier which will satisfy the requirements of the section on shipment by the seller and the delivery must be made under circumstances which will enable the seller to take any further steps necessary to a due tender. The underlying reason of this subsection does not require that the shipment be made after contracting, but where, for example, the seller buys the goods afloat and later diverts the shipment to the buyer, he must identify the goods to the contract before the risk of loss can pass. To transfer the risk it is enough

that a proper shipment and a proper identification come to apply to the same goods although, aside from special agreement, the risk will not pass retroactively to the time of shipment in such a case.

3. Whether the contract involves delivery at the seller's place of business or at the situs of the goods, a merchant seller cannot transfer risk of loss and it remains upon him until actual receipt by the buyer, even though full payment has been made and the buyer has been notified that the goods are at his disposal. Protection is afforded him, in the event of breach by the buyer, under the next section.

The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.

4. Where the agreement provides for delivery of the goods as between the buyer and seller without removal from the physical possession of a bailee, the provisions on manner of tender of delivery apply on the point of transfer of risk. Due delivery of a negotiable document of title covering the goods or acknowledgment by the bailee that he holds for the buyer completes the "delivery" and passes the risk.

5. The provisions of this section are made subject by subsection (4) to the "contrary agreement" of the parties. This language is intended as the equivalent of the phrase "unless otherwise agreed" used more frequently throughout this Act. "Contrary" is in no way used as a word of limitation and the buyer and seller are left free to readjust their rights and risks as declared by this section in any manner agreeable to them. Contrary agreement can also be found in the circumstances of the case, a trade usage or practice, or a course of dealing or performance.

Cross References:

Point 1: Section 2-510(1).

Point 2: Sections 2-503 and 2-504.

Point 3: Sections 2-104, 2-503 and 2-510.

Point 4: Section 2-503(4).

Point 5: Section 1-201.

Definitional Cross References:

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Party". Section 1-201.

"Receipt" of goods. Section 2-103.

"Sale on approval". Section 2-326.

"Seller". Section 2-103.

§ 28:2-510. Effect of breach on risk of loss.

(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

(2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

(Dec. 30, 1963, 77 Stat. 658, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-509.

Prior Codifications. — 1981 Ed., § 28:2-510.

1973 Ed., § 28:2-510.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes: To make clear that:

1. Under subsection (1) the seller by his individual action cannot shift the risk of loss to the buyer unless his action conforms with all

the conditions resting on him under the contract.

2. The "cure" of defective tenders contemplated by subsection (1) applies only to those situations in which the seller makes changes in goods already tendered, such as repair, partial substitution, sorting out from an improper mixture and the like since "cure" by repossession and new tender has no effect on the risk of loss of the goods originally tendered. The seller's privilege of cure does not shift the risk, however, until the cure is completed.

Where defective documents are involved a cure of the defect by the seller or a waiver of the defects by the buyer will operate to shift the risk under this section. However, if the goods have been destroyed prior to the cure or the buyer is unaware of their destruction at the time he waives the defect in the documents, the risk of the loss must still be borne by the seller, for the risk shifts only at the time of cure, waiver of documentary defects or acceptance of the goods.

3. In cases where there has been a breach of the contract, if the one in control of the goods is the aggrieved party, whatever loss or damage may prove to be uncovered by his insurance falls upon the contract breaker under subsections (2) and (3) rather than upon him. The word "effective" as applied to insurance coverage in those subsections is used to meet the case of supervening insolvency of the insurer. The "deficiency" referred to in the text means such deficiency in the insurance coverage as exists without subrogation. This section merely distributes the risk of loss as stated and is not intended to be disturbed by any subrogation of an insurer.

Cross Reference:

Section 2-509.

Definitional Cross References:

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Seller". Section 2-103.

§ 28:2-511. Tender of payment by buyer; payment by check.

(1) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(3) Subject to the provisions of this subtitle on the effect of an instrument on an obligation (section 28:3-310), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

(Dec. 30, 1963, 77 Stat. 658, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(c), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:2-511.

1973 Ed., § 28:2-511.

Legislative history of Law 10-249. — Law 10-249, the "Uniform Commercial Code—Negotiable Instruments Act of 1994," was introduced in Council and assigned Bill No. 10-240, which was referred to the Committee on Consumer

and Regulatory Affairs. The Bill was adopted on first and second readings on November 19, 1994, and December 6, 1994, respectively. Signed by the Mayor on January 18, 1995, it was assigned Act No. 10-396 and transmitted to both Houses of Congress for its review. D.C. Law 10-249 became effective on March 23, 1995.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 42, Uniform Sales Act.

Changes: Rewritten by this section and Section 2-507.

Purposes of Changes:

1. The requirement of payment against delivery in subsection (1) is applicable to noncom-

mercial sales generally and to ordinary sales at retail although it has no application to the great body of commercial contracts which carry credit terms. Subsection (1) applies also to documentary contracts in general and to contracts which look to shipment by the seller but contain no term on time and manner of pay-

ment, in which situations the payment may, in proper case, be demanded against delivery of appropriate documents.

In the case of specific transactions such as C.O.D. sales or agreements providing for payment against documents, the provisions of this subsection must be considered in conjunction with the special sections of the Article dealing with such terms. The provision that tender of payment is a condition to the seller's duty to tender and complete "any delivery" integrates this section with the language and policy of the section on delivery in several lots which call for separate payment. Finally, attention should be directed to the provision on right to adequate assurance of performance which recognizes, even before the time for tender, an obligation on the buyer not to impair the seller's expectation of receiving payment in due course.

2. Unless there is agreement otherwise the concurrence of the conditions as to tender of payment and tender of delivery requires their performance at a single place or time. This Article determines that place and time by determining in various other sections the place and time for tender of delivery under various circumstances and in particular types of transactions. The sections dealing with time and place of delivery together with the section on right to inspection of goods answer the subsidiary question as to when payment may be demanded before inspection by the buyer.

3. The essence of the principle involved in subsection (2) is avoidance of commercial surprise at the time of performance. The section on substituted performance covers the peculiar case in which legal tender is not available to the commercial community.

4. Subsection (3) is concerned with the rights and obligations as between the parties to a sales transaction when payment is made by check. This Article recognizes that the taking of a seemingly solvent party's check is commercially normal and proper and, if due diligence is exercised in collection, is not to be penalized in any way. The conditional character of the payment under this section refers only to the effect of the transaction "as between the parties"

thereto and does not purport to cut into the law of "absolute" and "conditional" payment as applied to such other problems as the discharge of sureties or the responsibilities of a drawee bank which is at the same time an agent for collection.

The phrase "by check" includes not only the buyer's own but any check which does not effect a discharge under Article 3 (Section 3-802). Similarly the reason of this subsection should apply and the same result should be reached where the buyer "pays" by sight draft on a commercial firm which is financing him.

5. Under subsection (3) payment by check is defeated if it is not honored upon due presentment. This corresponds to the provisions of article on Commercial Paper. (Section 3-802). But if the seller procures certification of the check instead of cashing it, the buyer is discharged. (Section 3-411).

6. Where the instrument offered by the buyer is not a payment but a credit instrument such as a note or a check postdated by even one day, the seller's acceptance of the instrument insofar as third parties are concerned, amounts to a delivery on credit and his remedies are set forth in the section on buyer's insolvency. As between the buyer and the seller, however, the matter turns on the present subsection and the section on conditional delivery and subsequent dishonor of the instrument gives the seller rights on it as well as for breach of the contract for sale.

Cross References:

Point 1: Sections 2-307, 2-310, 2-320, 2-325, 2-503, 2-513 and 2-609.

Point 2: Sections 2-307, 2-310, 2-319, 2-322, 2-503, 2-504 and 2-513.

Point 3: Section 2-614.

Point 5: Article 3, esp. Sections 3-802 and 3-411.

Point 6: Sections 2-507, 2-702, and Article 3.

Definitional Cross References:

"Buyer". Section 2-103.

"Check". Section 3-104.

"Dishonor". Section 3-508.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Seller". Section 2-103.

§ 28:2-512. Payment by buyer before inspection.

(1) Where the contract requires payment before inspection non-conformity of the goods does not excuse the buyer from so making payment unless

(a) the non-conformity appears without inspection; or

(b) despite tender of the required documents the circumstances would justify injunction against honor under this subtitle (section 28:5-109(b)).

(2) Payment pursuant to subsection (1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies.

(Dec. 30, 1963, 77 Stat. 658, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-238, § 3(c), 44 DCR 923.)

Prior Codifications. — 1981 Ed., § 28:2-512.

1973 Ed., § 28:2-512.

Legislative history of Law 11-238. — Law 11-238, the “Uniform Commercial Code—Letters of Credit Act of 1996,” was introduced in Council and assigned Bill No. 11-574, which was referred to the Committee on Consumer

and Regulatory Affairs. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-498 and transmitted to both Houses of Congress for its review. D.C. Law 11-238 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None, but see Sections 47 and 49, Uniform Sales Act.

Purposes:

1. Subsection (1) of the present section recognizes that the essence of a contract providing for payment before inspection is the intention of the parties to shift to the buyer the risks which would usually rest upon the seller. The basic nature of the transaction is thus preserved and the buyer is in most cases required to pay first and litigate as to any defects later.

2. “Inspection” under this section is an inspection in a manner reasonable for detecting defects in goods whose surface appearance is satisfactory.

3. Clause (a) of this subsection states an exception to the general rule based on common sense and normal commercial practice. The apparent non-conformity referred to is one which is evident in the mere process of taking delivery.

4. Clause (b) is concerned with contracts for payment against documents and incorporates the general clarification and modification of the case law contained in the section on excuse of a financing agency. Section 5-114. [See, now, Section 5-109(b)].

5. Subsection (2) makes explicit the general policy of the Uniform Sales Act that the payment required before inspection in no way impairs the buyer’s remedies or rights in the

event of a default by the seller. The remedies preserved to the buyer are all of his remedies, which include as a matter of reason the remedy for total non-delivery after payment in advance.

The provision on performance or acceptance under reservation of rights does not apply to the situations contemplated here in which payment is made in due course under the contract and the buyer need not pay “under protest” or the like in order to preserve his rights as to defects discovered upon inspection.

6. This section applies to cases in which the contract requires payment before inspection either by the express agreement of the parties or by reason of the effect in law of that contract. The present section must therefore be considered in conjunction with the provision on right to inspection of goods which sets forth the instances in which the buyer is not entitled to inspection before payment.

Cross References:

Point 4: Article 5.

Point 5: Section 1-207.

Point 6: Section 2-513(3).

Definitional Cross References:

“Buyer”. Section 2-103.

“Conform”. Section 2-106.

“Contract”. Section 1-201.

“Financing agency”. Section 2-104.

“Goods”. Section 2-105.

“Remedy”. Section 1-201.

“Rights”. Section 1-201.

§ 28:2-513. Buyer’s right to inspection of goods.

(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

(3) Unless otherwise agreed and subject to the provisions of this article on

C.I.F. contracts (subsection (3) of section 28:2-321), the buyer is not entitled to inspect the goods before payment of the price when the contract provides:

(a) for delivery "C.O.D." or on other like terms; or

(b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

(4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract.

(Dec. 30, 1963, 77 Stat. 658, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-255, § 27(mm), 44 DCR 1271.)

Section references. — This section is referred to in § 28:2-310.

Prior Codifications. — 1981 Ed., § 28:2-513.

1973 Ed., § 28:2-513.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and as-

signed Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 47(2), (3), Uniform Sales Act.

Changes: Rewritten, Subsections (2) and (3) being new.

Purposes of Changes and New Matter: To correspond in substance with the prior uniform statutory provision and to incorporate in addition some of the results of the better case law so that:

1. The buyer is entitled to inspect goods as provided in subsection (1) unless it has been otherwise agreed by the parties. The phrase "unless otherwise agreed" is intended principally to cover such situations as those outlined in subsections (3) and (4) and those in which the agreement of the parties negates inspection before tender of delivery. However, no agreement by the parties can displace the entire right of inspection except where the contract is simply for the sale of "this thing." Even in a sale of boxed goods "as is" inspection is a right of the buyer, since if the boxes prove to contain some other merchandise altogether the price can be recovered back; nor do the limitations of the provision on effect of acceptance apply in such a case.

2. The buyer's right of inspection is available to him upon tender, delivery or appropriation of the goods with notice to him. Since inspection is available to him on tender, where payment is due against delivery he may, unless otherwise agreed, make his inspection before payment of

the price. It is also available to him after receipt of the goods and so may be postponed after receipt for a reasonable time. Failure to inspect before payment does not impair the right to inspect after receipt of the goods unless the case falls within subsection (4) on agreed and exclusive inspection provisions. The right to inspect goods which have been appropriated with notice to the buyer holds whether or not the sale was by sample.

3. The buyer may exercise his right of inspection at any reasonable time or place and in any reasonable manner. It is not necessary that he select the most appropriate time, place or manner to inspect or that his selection be the customary one in the trade or locality. Any reasonable time, place or manner is available to him and the reasonableness will be determined by trade usages, past practices between the parties and the other circumstances of the case.

The last sentence of subsection (1) makes it clear that the place of arrival of shipped goods is a reasonable place for their inspection.

4. Expenses of an inspection made to satisfy the buyer of the seller's performance must be assumed by the buyer in the first instance. Since the rule provides merely for an allocation of expense there is no policy to prevent the parties from providing otherwise in the agreement. Where the buyer would normally bear the expenses of the inspection but the goods are rightly rejected because of what the inspection

reveals, demonstrable and reasonable costs of the inspection are part of his incidental damage caused by the seller's breach.

5. In the case of payment against documents, subsection (3) requires payment before inspection, since shipping documents against which payment is to be made will commonly arrive and be tendered while the goods are still in transit. This Article recognizes no exception in any peculiar case in which the goods happen to arrive before the documents. However, where by the agreement payment is to await the arrival of the goods, inspection before payment becomes proper since the goods are then "available for inspection."

Where by the agreement the documents are to be held until arrival the buyer is entitled to inspect before payment since the goods are then "available for inspection". Proof of usage is not necessary to establish this right, but if inspection before payment is disputed the contrary must be established by usage or by an explicit contract term to that effect.

For the same reason, that the goods are available for inspection, a term calling for payment against storage documents or a delivery order does not normally bar the buyer's right to inspection before payment under subsection (3)(b). This result is reinforced by the buyer's right under subsection (1) to inspect goods which have been appropriated with notice to him.

6. Under subsection (4) an agreed place or method of inspection is generally held to be intended as exclusive. However, where compliance with such an agreed inspection term becomes impossible, the question is basically one of intention. If the parties clearly intend that the method of inspection named is to be a necessary condition without which the entire deal is to fail, the contract is at an end if that method becomes impossible. On the other hand, if the parties merely seek to indicate a convenient and reliable method but do not intend to give up the deal in the event of its failure, any reasonable method of inspection may be substituted under this Article.

Since the purpose of an agreed place of inspection is only to make sure at that point whether or not the goods will be thrown back, the "exclusive" feature of the named place is satisfied under this Article if the buyer's failure to inspect there is held to be an acceptance with the knowledge of such defects as inspection would have revealed within the section on waiver of buyer's objections by failure to particularize. Revocation of the acceptance is limited

to the situations stated in the section pertaining to that subject. The reasonable time within which to give notice of defects within the section on notice of breach begins to run from the point of the "acceptance."

7. Clauses on time of inspection are commonly clauses which limit the time in which the buyer must inspect and give notice of defects. Such clauses are therefore governed by the section of this Article which requires that such a time limitation must be reasonable.

8. Inspection under this Article is not to be regarded as a "condition precedent to the passing of title" so that risk until inspection remains on the seller. Under subsection (4) such an approach cannot be sustained. Issues between the buyer and seller are settled in this Article almost wholly by special provisions and not by the technical determination of the locus of the title. Thus "inspection as a condition to the passing of title" becomes a concept almost without meaning. However, in peculiar circumstances inspection may still have some of the consequences hitherto sought and obtained under that concept.

9. "Inspection" under this section has to do with the buyer's check-up on whether the seller's performance is in accordance with a contract previously made and is not to be confused with the "examination" of the goods or of a sample or model of them at the time of contracting which may affect the warranties involved in the contract.

Cross References:

Generally: Sections 2-310(b), 2-321(3) and 2-606(1)(b).

Point 1: Section 2-607.

Point 2: Sections 2-501 and 2-502.

Point 4: Section 2-715.

Point 5: Section 2-321(3).

Point 6: Sections 2-606 to 2-608.

Point 7: Section 1-204.

Point 8: Comment to Section 2-401.

Point 9: Section 2-316(3)(b).

Definitional Cross References:

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Presumed". Section 1-201.

"Reasonable time". Section 1-204.

"Rights". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

"Term". Section 1-201.

CASE NOTES

Place of inspection.

Where turkey broker's remedy for turkey producer's breach of sales contract was not limited to rescission and sales contract did not provide for inspection upon delivery to broker, trial court's finding that place of inspection was point of delivery rather than ultimate destina-

tion was reversible error in broker's action against producer for breach of contract. D.C. Code §§ 28:2-310, 28:2-513, 28:2-607. *Rubewa Products Co. v. Watson's Quality Turkey Products, Inc.*, 242 A.2d 609, 1968 D.C. App. LEXIS 159 (App. 1968).

§ 28:2-514. When documents deliverable on acceptance; when on payment.

Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment.

(Dec. 30, 1963, 77 Stat. 659, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-514. 1973 Ed., § 28:2-514.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 41, Uniform Bills of Lading Act.

Changes: Rewritten.

Purposes of Changes: To make the provision one of general application so that:

1. It covers any document against which a draft may be drawn, whatever may be the form of the document, and applies to interpret the action of a seller or consignor insofar as it may affect the rights and duties of any buyer, consignee or financing agency concerned with the paper. Supplementary or corresponding provisions are found in Sections 4-503 and 5-112.

2. An "arrival" draft is a sight draft within the purpose of this section.

Cross References:

Point 1: See Sections 2-502, 2-505(2), 2-507(2), 2-512, 2-513, 2-607 concerning protection of rights of buyer and seller, and 4-503 and 5-113 on delivery of documents.

Definitional Cross References:

"Delivery". Section 1-201.

"Draft". Section 3-104.

§ 28:2-515. Preserving evidence of goods in dispute.

In furtherance of the adjustment of any claim or dispute

(a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and

(b) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

(Dec. 30, 1963, 77 Stat. 659, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-515. 1973 Ed., § 28:2-515.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. To meet certain serious problems which arise when there is a dispute as to the quality of the goods and thereby perhaps to aid the parties in reaching a settlement, and to further the use of devices which will promote certainty as to the condition of the goods, or at least aid in preserving evidence of their condition.

2. Under paragraph (a), to afford either party an opportunity for preserving evidence, whether or not agreement has been reached, and thereby to reduce uncertainty in any litigation and, in turn perhaps, to promote agreement.

Paragraph (a) does not conflict with the provisions on the seller's right to resell rejected goods or the buyer's similar right. Apparent conflict between these provisions which will be suggested in certain circumstances is to be resolved by requiring prompt action by the parties. Nor does paragraph (a) impair the effect of a term for payment before inspection. Short of such defects as amount to fraud or substantial failure of consideration, non-conformity is neither an excuse nor a defense to an action for non-acceptance of documents. Normally, therefore, until the buyer has made payment, inspected and rejected the goods, there is no occasion or use for the rights under paragraph (a).

3. Under paragraph (b), to provide for third party inspection upon the agreement of the parties, thereby opening the door to amicable adjustments based upon the findings of such third parties.

The use of the phrase "conformity or condition" makes it clear that the parties' agreement may range from a complete settlement of all aspects of the dispute by a third party to the use of a third party merely to determine and record the condition of the goods so that they

can be resold or used to reduce the stake in controversy. "Conformity", at one end of the scale of possible issues, includes the whole question of interpretation of the agreement and its legal effect, the state of the goods in regard to quality and condition, whether any defects are due to factors which operate at the risk of the buyer, and the degree of nonconformity where that may be material. "Condition", at the other end of the scale, includes nothing but the degree of damage or deterioration which the goods show. Paragraph (b) is intended to reach any point in the gamut which the parties may agree upon.

The principle of the section on reservation of rights reinforces this paragraph in simplifying such adjustments as the parties wish to make in partial settlement while reserving their rights as to any further points. Paragraph (b) also suggests the use of arbitration, where desired, of any points left open, but nothing in this section is intended to repeal or amend any statute governing arbitration. Where any question arises as to the extent of the parties' agreement under the paragraph, the presumption should be that it was meant to extend only to the relation between the contract description and the goods as delivered, since that is what a craftsman in the trade would normally be expected to report upon. Finally, a written and authenticated report of inspection or tests by a third party, whether or not sampling has been practicable, is entitled to be admitted as evidence under this Act, for it is a third party document.

Cross References:

Point 2: Sections 2-513(3), 2-706 and 2-711(2) and Article 5.

Point 3: Sections 1-202 and 1-207.

Definitional Cross References:

"Conform". Section 2-106.

"Goods". Section 2-105.

"Notification". Section 1-201.

"Party". Section 1-201.

Part 6. Breach, Repudiation and Excuse.

§ 28:2-601. Buyer's rights on improper delivery.

Subject to the provisions of this article on breach in installment contracts (section 28:2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (sections 28:2-718 and 28:2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest.

(Dec. 30, 1963, 77 Stat. 659, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-601. 1973 Ed., § 28:2-601.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: No one general equivalent provision but numerous provisions, dealing with situations of non-conformity where buyer may accept or reject, including Sections 11, 44 and 69(1), Uniform Sales Act.

Changes: Partial acceptance in good faith is recognized and the buyer's remedies on the contract for breach of warranty and the like, where the buyer has returned the goods after transfer of title, are no longer barred.

Purposes of Changes: To make it clear that:

1. A buyer accepting a nonconforming tender is not penalized by the loss of any remedy otherwise open to him. This policy extends to cover and regulate the acceptance of a part of any lot improperly tendered in any case where the price can reasonably be apportioned. Partial acceptance is permitted whether the part of the goods accepted conforms or not. The only limitation on partial acceptance is that good faith and commercial reasonableness must be used to avoid undue impairment of the value of the remaining portion of the goods. This is the reason for the insistence on the "commercial unit" in paragraph (c). In this respect, the test is not only what unit has been the basis of contract, but whether the partial acceptance produces so materially adverse an effect on the remainder as to constitute bad faith.

2. Acceptance made with the knowledge of

the other party is final. An original refusal to accept may be withdrawn by a later acceptance if the seller has indicated that he is holding the tender open. However, if the buyer attempts to accept, either in whole or in part, after his original rejection has caused the seller to arrange for other disposition of the goods, the buyer must answer for any ensuing damage since the next section provides that any exercise of ownership after rejection is wrongful as against the seller. Further, he is liable even though the seller may choose to treat his action as acceptance rather than conversion, since the damage flows from the misleading notice. Such arrangements for resale or other disposition of the goods by the seller must be viewed as within the normal contemplation of a buyer who has given notice of rejection. However, the buyer's attempts in good faith to dispose of defective goods where the seller has failed to give instructions within a reasonable time are not to be regarded as an acceptance.

Cross References:

Sections 2-602(2)(a), 2-612, 2-718 and 2-719.

Definitional Cross References:

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Installment contract". Section 2-612.

"Rights". Section 1-201.

CASE NOTES

Cancellation of contract.

Airplane buyer was entitled under District of Columbia law to cancel contract for airplanes that were not delivered within 30-day delivery

period. D.C. Code 1981, § 28:2-601. *Marlowe v. Argentine Naval Com.*, 808 F.2d 120, 1986 U.S. App. LEXIS 36438 (C.A.D.C. 1986).

§ 28:2-602. Manner and effect of rightful rejection.

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (sections 28:2-603 and 28:2-604),

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this article (subsection (3) of section 28:2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this article on seller's remedies in general (section 28:2-703).

(Dec. 30, 1963, 77 Stat. 659, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-606.

1973 Ed., § 28:2-602.

Prior Codifications. — 1981 Ed., § 28:2-602.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 50, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To make it clear that:

1. A tender or delivery of goods made pursuant to a contract of sale, even though wholly non-conforming, requires affirmative action by the buyer to avoid acceptance. Under subsection (1), therefore, the buyer is given a reasonable time to notify the seller of his rejection, but without such seasonable notification his rejection is ineffective. The sections of this Article dealing with inspection of goods must be read in connection with the buyer's reasonable time for action under this subsection. Contract provisions limiting the time for rejection fall within the rule of the section on "Time" and are effective if the time set gives the buyer a reasonable time for discovery of defects. What constitutes a due "notifying" of rejection by the buyer to the seller is defined in Section 1-201.

2. Subsection (2) lays down the normal duties of the buyer upon rejection, which flow from the relationship of the parties. Beyond his duty to hold the goods with reasonable care for the buyer's [seller's] disposition, this section continues the policy of prior uniform legislation in generally relieving the buyer from any duties with respect to them, except when the circumstances impose the limited obligation of salvage upon him under the next section.

3. The present section applies only to rightful rejection by the buyer. If the seller has made a tender which in all respects conforms to the contract, the buyer has a positive duty to accept and his failure to do so constitutes a "wrongful rejection" which gives the seller immediate remedies for breach. Subsection (3) is included here to emphasize the sharp distinction between the rejection of an improper tender and the non-acceptance which is a breach by the buyer.

4. The provisions of this section are to be appropriately limited or modified when a negotiation is in process.

Cross References:

Point 1: Sections 1-201, 1-204(1) and (3), 2-512(2), 2-513(1) and 2-606(1)(b).

Point 2: Section 2-603(1).

Point 3: Section 2-703.

Definitional Cross References:

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Seasonably". Section 1-204.

"Security interest". Section 1-201.

"Seller". Section 2-103.

CASE NOTES

ANALYSIS

Damages.

In general.

Rescission or revocation of acceptance by buyer.

Damages.

If buyer affirms sale, his recovery is limited to difference in value of goods as delivered and value they would have had if they had met the warranty. D.C. Code 1961, §§ 28:2-711 to 28:2-

725. Talley v. Campbell Music Co., 219 A.2d 852, 1966 D.C. App. LEXIS 182 (App. 1966).

In general.

Genuine issue of material fact as to whether lease financing agency's conduct in paying for partial shipments of antennas that occurred outside 90-day period required by purchase order amounted to modification of express terms of purchase order precluded summary judgment on agency's claim that its obligation

to pay in tripartite commercial leasing transaction was discharged. Fed.R.Civ.Proc. Rule 56(c), 18 U.S.C. Radiation Sys. v. Amplicon, Inc., 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

Genuine issue of material fact as to whether lease financing agency accepted non-conforming goods in tripartite commercial leasing transaction by not giving seasonable notice of its objection thereto precluded summary judgment for agency. Fed.R.Civ.Proc. Rule 56(c), 18 U.S.C. Radiation Sys. v. Amplicon, Inc., 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

Contractor which had supervisory employee on premises when delivery of fill was made and which did not object to delivery of fill for several days was not entitled to recover from subcontractor which supplied fill cost of removing fill which did not meet specifications. D.C. Code §§ 28:2-602, 28:2-605, 28:2-606. L. J. Robinson, Inc. v. Arber Constr. Co., 292 A.2d 809, 1972 D.C. App. LEXIS 218 (1972).

Rescission or revocation of acceptance by buyer.

Where buyer, although indicating rejection of goods, refused to return goods because of fear of violence at his warehouse in area of city affected by rioting, fact that seller was at first willing to take back goods and, in effect, cancel contract rather than file an action for the price did not bar subsequent action for price follow-

ing buyer's inaction. D.C. Code §§ 28:1-204(3), 28:2-106(4), 28:2-602(1), 28:2-703(f), 28:2-709(1)(A), 28:2-720. Robinson v. Jonathan Logan Financial, 277 A.2d 115, 1971 D.C. App. LEXIS 314 (1971).

Notification of seller by buyer that buyer had problem with manner of delivery of goods did not constitute seasonable notification of rejection. D.C. Code §§ 28:2-602(1), 28:2-606(1)(b). Robinson v. Jonathan Logan Financial, 277 A.2d 115, 1971 D.C. App. LEXIS 314 (1971).

If buyer elects to rescind, he must within a reasonable length of time after delivery offer to return the goods. D.C. Code 1961, §§ 28:2-711 to 28:2-725. Talley v. Campbell Music Co., 219 A.2d 852, 1966 D.C. App. LEXIS 182 (App. 1966).

In case of breach of warranty, buyer need not proceed by way of rescission, but may keep merchandise and seek recoupment by way of diminution of the purchase price under the contract. D.C. Code 1961, §§ 28:2-711 to 28:2-725. Talley v. Campbell Music Co., 219 A.2d 852, 1966 D.C. App. LEXIS 182 (App. 1966).

When a seller delivers damaged or defective merchandise or equipment under a contract of sale and upon notification fails or refuses to correct the deficiency, buyer may elect to affirm contract and sue for damages, or he may rescind contract and recover purchase price paid. Talley v. Campbell Music Co., 219 A.2d 852, 1966 D.C. App. LEXIS 182 (App. 1966).

§ 28:2-603. Merchant buyer's duties as to rightfully rejected goods.

(1) Subject to any security interest in the buyer (subsection (3) of section 28:2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten percent on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

(Dec. 30, 1963, 77 Stat. 660, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-602.

Prior Codifications. — 1981 Ed., § 28:2-603.

1973 Ed., § 28:2-603.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. This section recognizes the duty imposed upon the merchant buyer by good faith and commercial practice to follow any reasonable instructions of the seller as to reshipping, storing, delivery to a third party, reselling or the like. Subsection (1) goes further and extends the duty to include the making of reasonable efforts to effect a salvage sale where the value of the goods is threatened and the seller's instructions do not arrive in time to prevent serious loss.

2. The limitations on the buyer's duty to resell under subsection (1) are to be liberally construed. The buyer's duty to resell under this section arises from commercial necessity and thus is present only when the seller has "no agent or place of business at the market of rejection". A financing agency which is acting in behalf of the seller in handling the documents rejected by the buyer is sufficiently the seller's agent to lift the burden of salvage resale from the buyer. (See provisions of Sections 4-503 and 5-112 on bank's duties with respect to rejected documents.) The buyer's duty to resell is extended only to goods in his "possession or control", but these are intended as words of wide, rather than narrow, import. In effect, the measure of the buyer's "control" is whether he can practicably effect control without undue commercial burden.

3. The explicit provisions for reimbursement and compensation to the buyer in subsection (2) are applicable and necessary only where he is not acting under instructions from the seller. As provided in subsection (1) the seller's instructions to be "reasonable" must on demand of the buyer include indemnity for expenses.

4. Since this section makes the resale of perishable goods an affirmative duty in contrast to a mere right to sell as under the case law, subsection (3) makes it clear that the buyer is liable only for the exercise of good faith in determining whether the value of the goods is sufficiently threatened to justify a quick resale or whether he has waited a sufficient length of time for instructions, or what a reasonable means and place of resale is.

5. A buyer who fails to make a salvage sale when his duty to do so under this section has arisen is subject to damages pursuant to the section on liberal administration of remedies.

Cross References:

Point 2: Section 4-503 and 5-112.

Point 5: Section 1-106. Compare generally section 2-706.

Definitional Cross References:

"Buyer". Section 2-103.

"Good faith". Section 1-201.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Security interest". Section 1-201.

"Seller". Section 2-103.

§ 28:2-604. Buyer's options as to salvage of rightfully rejected goods.

Subject to the provisions of the immediately preceding section on perishables if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

(Dec. 30, 1963, 77 Stat. 660, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-602.

Prior Codifications. — 1981 Ed., § 28:2-604.

1973 Ed., § 28:2-604.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

The basic purpose of this section is twofold: on the one hand it aims at reducing the stake in dispute and on the other at avoiding the pinning of a technical "acceptance" on a buyer who has taken steps towards realization on or preservation of the goods in good faith. This section is essentially a salvage section and the buyer's right to act under it is conditioned upon (1) non-conformity of the goods, (2) due notification of rejection to the seller under the section on manner of rejection, and (3) the absence of any instructions from the seller which the merchant-buyer has a duty to follow under the preceding section.

This section is designed to accord all reason-

able leeway to a rightfully rejecting buyer acting in good faith. The listing of what the buyer may do in the absence of instructions from the seller is intended to be not exhaustive but merely illustrative. This is not a "merchant's" section and the options are pure options given to merchant and nonmerchant buyers alike. The merchant-buyer, however, may in some instances be under a duty rather than an option to resell under the provisions of the preceding section.

Cross References:

Sections 2-602(1), and 2-603(1) and 2-706.

Definitional Cross References:

"Buyer". Section 2-103.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Seller". Section 2-103.

§ 28:2-605. Waiver of buyer's objections by failure to particularize.

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach

(a) where the seller could have cured it if stated seasonably; or

(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payments against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

(Dec. 30, 1963, 77 Stat. 660, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-605. 1973 Ed., § 28:2-605.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. The present section rests upon a policy of permitting the buyer to give a quick and informal notice of defects in a tender without penalizing him for omissions in his statement, while at the same time protecting a seller who is reasonably misled by the buyer's failure to state curable defects.

2. Where the defect in a tender is one which could have been cured by the seller, a buyer who merely rejects the delivery without stating his objections to it is probably acting in commercial bad faith and seeking to get out of a deal which has become unprofitable. Subsec-

tion (1)(a), following the general policy of this Article which looks to preserving the deal wherever possible, therefore insists that the seller's right to correct his tender in such circumstances be protected.

3. When the time for cure is past, subsection (1)(b) makes it plain that a seller is entitled upon request to a final statement of objections upon which he can rely. What is needed is that he make clear to the buyer exactly what is being sought. A formal demand under paragraph (b) will be sufficient in the case of a merchant-buyer.

4. Subsection (2) applies to the particular case of documents the same principle which the section on effects of acceptance applies to the

case of goods. The matter is dealt with in this section in terms of "waiver" of objections rather than of right to revoke acceptance, partly to avoid any confusion with the problems of acceptance of goods and partly because defects in documents which are not taken as grounds for rejection are generally minor ones. The only defects concerned in the present subsection are defects in the documents which are apparent on their face. Where payment is required against the documents they must be inspected before payment, and the payment then constitutes acceptance of the documents. Under the section dealing with this problem, such acceptance of the documents does not constitute an acceptance of the goods or impair any options or remedies of the buyer for their improper delivery. Where the documents are delivered with-

out requiring such contemporary action as payment from the buyer, the reason of the next section on what constitutes acceptance of goods, applies. Their acceptance by non-objection is therefore postponed until after a reasonable time for their inspection. In either situation, however, the buyer "waives" only what is apparent on the face of the documents.

Cross References:

Point 2: Section 2-508.

Point 4: Sections 2-512(2), 2-606(1)(b), 2-607(2).

Definitional Cross References:

"Between merchants". Section 2-104.

"Buyer". Section 2-103.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

"Writing" and "written". Section 1-201.

CASE NOTES

In general.

Contractor which had supervisory employee on premises when delivery of fill was made and which did not object to delivery of fill for several days was not entitled to recover from subcon-

tractor which supplied fill cost of removing fill which did not meet specifications. D.C. Code §§ 28:2-602, 28:2-605, 28:2-606. L. J. Robinson, Inc. v. Arber Constr. Co., 292 A.2d 809, 1972 D.C. App. LEXIS 218 (1972).

§ 28:2-606. What constitutes acceptance of goods.

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of section 28:2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

(Dec. 30, 1963, 77 Stat. 660, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-103 and 28:2-201.

Prior Codifications. — 1981 Ed., § 28:2-606.

1973 Ed., § 28:2-606.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 48, Uniform Sales Act.

Changes: Rewritten, the qualification in paragraph (c) and subsection (2) being new; otherwise the general policy of the prior legislation is continued.

Purposes of Changes and New Matter: To make it clear that:

1. Under this Article "acceptance" as applied to goods means that the buyer, pursuant to the contract, takes particular goods which have been appropriated to the contract as his own,

whether or not he is obligated to do so, and whether he does so by words, action, or silence when it is time to speak. If the goods conform to the contract, acceptance amounts only to the performance by the buyer of one part of his legal obligation.

2. Under this Article acceptance of goods is always acceptance of identified goods which have been appropriated to the contract or are appropriated by the contract. There is no provision for "acceptance of title" apart from acceptance in general, since acceptance of title is not material under this Article to the detailed rights and duties of the parties. (See Section 2-401). The refinements of the older law between acceptance of goods and of title become unnecessary in view of the provisions of the sections on effect and revocation of acceptance, on effects of identification and on risk of loss, and those sections which free the seller's and buyer's remedies from the complications and confusions caused by the question of whether title has or has not passed to the buyer before breach.

3. Under paragraph (a), payment made after tender is always one circumstance tending to signify acceptance of the goods but in itself it can never be more than one circumstance and is not conclusive. Also, a conditional communication of acceptance always remains subject to its expressed conditions.

4. Under paragraph (c), any action taken by the buyer, which is inconsistent with his claim that he has rejected the goods, constitutes an acceptance. However, the provisions of paragraph (c) are subject to the sections dealing with rejection by the buyer which permit the buyer to take certain actions with respect to the

goods pursuant to his options and duties imposed by those sections, without effecting an acceptance of the goods. The second clause of paragraph (c) modifies some of the prior case law and makes it clear that "acceptance" in law based on the wrongful act of the acceptor is acceptance only as against the wrongdoer and then only at the option of the party wronged.

In the same manner in which a buyer can bind himself, despite his insistence that he is rejecting or has rejected the goods, by an act inconsistent with the seller's ownership under paragraph (c), he can obligate himself by a communication of acceptance despite a prior rejection under paragraph (a). However, the sections on buyer's rights on improper delivery and on the effect of rightful rejection, make it clear that after he once rejects a tender, paragraph (a) does not operate in favor of the buyer unless the seller has retendered the goods or has taken affirmative action indicating that he is holding the tender open. See also Comment 2 to Section 2-601.

5. Subsection (2) supplements the policy of the section on buyer's rights on improper delivery, recognizing the validity of a partial acceptance but insisting that the buyer exercise this right only as to whole commercial units.

Cross References:

Point 2: Sections 2-401, 2-509, 2-510, 2-607, 2-608 and Part 7.

Point 4: Sections 2-601 through 2-604.

Point 5: Section 2-601.

Definitional Cross References:

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Goods". Section 2-105.

"Seller". Section 2-103.

CASE NOTES

ANALYSIS

Course of performance.

Notice of rejection.

Waiver of breach.

Course of performance.

Genuine issue of material fact as to whether course of performance by lease financing agency in tripartite commercial leasing transaction modified requirement of purchase order that special delivery and acceptance certificate provided by agency be executed precluded summary judgment for agency on its claim that its obligation to pay was discharged; agency had paid supplier for partial shipments accepted by third party-lessee on certificates other than agency's. Fed.R.Civ.Proc. Rule 56(c), 18 U.S.C. Radiation Sys. v. Amplicon, Inc., 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

Notice of rejection.

Genuine issue of material fact as to whether

lease financing agency accepted non-conforming goods in tripartite commercial leasing transaction by not giving seasonable notice of its objection thereto precluded summary judgment for agency. Fed.R.Civ.Proc. Rule 56(c), 18 U.S.C. Radiation Sys. v. Amplicon, Inc., 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

Notification of seller by buyer that buyer had problem with manner of delivery of goods did not constitute seasonable notification of rejection. D.C. Code§ 28:2-602(1), 28:2-606(1)(b). Robinson v. Jonathan Logan Financial, 277 A.2d 115, 1971 D.C. App. LEXIS 314 (1971).

Waiver of breach.

Contractor which had supervisory employee on premises when delivery of fill was made and which did not object to delivery of fill for several days was not entitled to recover from subcontractor which supplied fill cost of removing fill which did not meet specifications. D.C. Code §§ 28:2-602, 28:2-605, 28:2-606. L. J. Robinson,

Inc. v. Arber Constr. Co., 292 A.2d 809, 1972
D.C. App. LEXIS 218 (1972).

§ 28:2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this article for non-conformity.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (subsection (3) of section 28:2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of section 28:2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsection (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of section 28:2-312).

(Dec. 30, 1963, 77 Stat. 661, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-714.

1973 Ed., § 28:2-607.

Prior Codifications. — 1981 Ed., § 28:2-607.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Subsection (1)—Section 41, Uniform Sales Act; Subsections (2) and (3)—Sections 49 and 69, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To continue the prior basic policies with respect to acceptance of goods while making a number of minor though material changes in the interest of simplicity and commercial convenience so that:

1. Under subsection (1), once the buyer accepts a tender the seller acquires a right to its price on the contract terms. In cases of partial acceptance, the price of any part accepted is, if possible, to be reasonably apportioned, using the type of apportionment familiar to the courts in quantum valebat cases, to be determined in terms of "the contract rate," which is the rate determined from the bargain in fact (the agreement) after the rules and policies of this Article have been brought to bear.

2. Under subsection (2) acceptance of goods precludes their subsequent rejection. Any return of the goods thereafter must be by way of revocation of acceptance under the next section. Revocation is unavailable for a non-conformity known to the buyer at the time of acceptance, except where the buyer has accepted on the reasonable assumption that the non-conformity would be seasonably cured.

3. All other remedies of the buyer remain unimpaired under subsection (2). This is intended to include the buyer's full rights with respect to future installments despite his acceptance of any earlier non-conforming installment.

4. The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a

breach, and thus opens the way for normal settlement through negotiation.

5. Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here;

but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.

6. Subsection (4) unambiguously places the burden of proof to establish breach on the buyer after acceptance. However, this rule becomes one purely of procedure when the tender accepted was non-conforming and the buyer has given the seller notice of breach under subsection (3). For subsection (2) makes it clear that acceptance leaves unimpaired the buyer's right to be made whole, and that right can be exercised by the buyer not only by way of cross-claim for damages, but also by way of recoupment in diminution or extinction of the price.

7. Subsections (3)(b) and (5)(b) give a warrant against infringement an opportunity to defend or compromise third-party claims or be relieved of his liability. Subsection (5)(a) codifies for all warranties the practice of voucher to defend. Compare Section 3-803. Subsection (6) makes these provisions applicable to the buyer's liability for infringement under Section 2-312.

8. All of the provisions of the present section are subject to any explicit reservation of rights.

Cross References:

- Point 1: Section 1-201.
- Point 2: Section 2-608.
- Point 4: Sections 1-204 and 2-605.
- Point 5: Section 2-318.
- Point 6: Section 2-717.
- Point 7: Sections 2-312 and 3-803.
- Point 8: Section 1-207.

Definitional Cross References:

- "Burden of establishing". Section 1-201.
- "Buyer". Section 2-103.
- "Conform". Section 2-106.
- "Contract". Section 1-201.
- "Goods". Section 2-105.
- "Notifies". Section 1-201.
- "Reasonable time". Section 1-204.
- "Remedy". Section 1-201.
- "Seasonably". Section 1-204.

CASE NOTES

ANALYSIS

Damages.

In general.

Notice of breach.

Summary judgment.

Damages.

In the case of an executed contract, seller's measure of damages resulting from a breach by the buyer is the contract price and nothing more, and neither mitigation nor market price at time of the breach need be shown. *Fateh v. Rich*, 481 A.2d 464, 1984 D.C. App. LEXIS 458 (1984).

Jury verdict of \$130,000 in favor of seller of restaurant due to buyers' failure to honor the contract for the purchase of the restaurant business was not unreasonable, even though there was no evidence concerning the market value of the restaurant at time seller regained possession of it, where the contract price was \$330,000, and seller, after purchasers' default under the contract, retook control of the restaurant and sold the physical assets for \$100,000. *Fateh v. Rich*, 481 A.2d 464, 1984 D.C. App. LEXIS 458 (1984).

In general.

To succeed on breach of warranty claim under District of Columbia (D.C.) law, plaintiff must prove notice as well as that defendant breached express promise made about product sold. D.C. Code 1981, §§ 28:2-313, 28:2-607(3)(a). *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 1997 U.S. Dist. LEXIS 7077 (1997).

When delivery and acceptance have already occurred, seller ordinarily has no obligation to protect the property or otherwise mitigate damages in event of a breach of the contract of sale by the buyer and, unless the buyer has valid grounds for rescission of the contract, the seller need not retake or resell the property. *Fateh v. Rich*, 481 A.2d 464, 1984 D.C. App. LEXIS 458 (1984).

Rescission is not the buyer's only remedy for a breach of warranty; the buyer may also affirm the contract and seek damages for its breach. D.C. Code §§ 28:2-310, 28:2-513, 28:2-607. *Rubewa Products Co. v. Watson's Quality Turkey Products, Inc.*, 242 A.2d 609, 1968 D.C. App. LEXIS 159 (App. 1968).

Notice of breach.

For purposes of District of Columbia Code section providing that where a tender has been accepted the buyer must within a "reasonable time" after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy, a "reasonable time" is a question of fact unless all the circum-

stances lead to but one conclusion. D.C. Code 1973, § 28:2-607(3)(a). *Mariner Water Renaturalizer, Inc. v. Aqua Purification Systems, Inc.*, 665 F.2d 1066, 1981 U.S. App. LEXIS 18092 (C.A.D.C. 1981).

Time lapse of five to eight weeks between discovery by buyer of water regulators of breach of warranty and buyer's alleged notification of sellers was not "reasonable" within meaning of District of Columbia Code section providing that where a tender has been accepted, the buyer must within a "reasonable time" after he discovers or reasonably should have discovered any breach notify the seller of the breach or be barred from any remedy; therefore, buyer could not maintain a breach of warranty action against sellers. D.C. Code 1973, § 28:2-607(3)(a). *Mariner Water Renaturalizer, Inc. v. Aqua Purification Systems, Inc.*, 665 F.2d 1066, 1981 U.S. App. LEXIS 18092 (C.A.D.C. 1981).

Constructive notice will satisfy the notice requirement under District of Columbia's Uniform Commercial Code (UCC) section governing breach of warranty claims. *Quality Air Servs., LLC v. Milwaukee Valve Co.*, 671 F.Supp.2d 36, 2009 U.S. Dist. LEXIS 110363 (2009).

Where seller willfully fails to disclose defect in its product, seller cannot raise buyer's failure to inform seller of that defect as affirmative defense to buyer's action under District of Columbia's (D.C.) express warranty statute. D.C. Code 1981, §§ 28:2-313, 28:2-607(3)(a). *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 1997 U.S. Dist. LEXIS 7077 (1997).

District of Columbia's (D.C.) express warranty statute requires buyers who have accepted goods from sellers to notify those sellers within reasonable time when buyer contends that there has been breach by seller of terms and conditions of sale; constructive notice, if established, will satisfy this requirement. D.C. Code 1981, §§ 28:2-313, 28:2-607(3)(a). *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 1997 U.S. Dist. LEXIS 7077 (1997).

Assuming applicability of statute requiring buyer to notify seller of breach within a reasonable time, with respect to carbon dioxide distributor, found liable in damages for delivery of defective carbon dioxide to bottler and bringing third-party complaint against brewer which sold carbon dioxide to distributor which neither sought to return the goods or to receive a rebate because of the defect, notice to brewer, from which distributor was making weekly pickups, of defect in carbon dioxide within a week of the time distributor learned of the defect was reasonable and in compliance with statute. D.C. Code § 28:2-607(3)(a). *Rock Creek Ginger Ale*

Co. v. Thermice Corp., 352 F. Supp. 522, 1971 U.S. Dist. LEXIS 12653 (1971).

Summary judgment.

Genuine issue of material fact existed as to whether manufacturer of valves used in heating, ventilation, and air conditioning (HVAC) systems had constructive notice in a timely manner of its alleged breach of warranties,

precluding summary judgment for manufacturer on breach of warranty claims under District of Columbia's Uniform Commercial Code (UCC) brought by company in the business of installing and repairing HVAC units. *Quality Air Servs., LLC v. Milwaukee Valve Co.*, 671 F.Supp.2d 36, 2009 U.S. Dist. LEXIS 110363 (2009).

§ 28:2-608. Revocation of acceptance in whole or in part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

(Dec. 30, 1963, 77 Stat. 661, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-608. 1973 Ed., § 28:2-608.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 69(1)(d), (3), (4) and (5), Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To make it clear that:

1. Although the prior basic policy is continued, the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him. The non-alternative character of the two remedies is stressed by the terms used in the present section. The section no longer speaks of "rescission," a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract. The remedy under this section is instead referred to simply as "revocation of acceptance" of goods tendered under a contract for sale and involves no suggestion of "election" of any sort.

2. Revocation of acceptance is possible only where the non-conformity substantially impairs the value of the goods to the buyer. For this purpose the test is not what the seller had

reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.

3. "Assurances" by the seller under paragraph (b) of subsection (1) can rest as well in the circumstances or in the contract as in explicit language used at the time of delivery. The reason for recognizing such assurances is that they induce the buyer to delay discovery. These are the only assurances involved in paragraph (b). Explicit assurances may be made either in good faith or bad faith. In either case any remedy accorded by this Article is available to the buyer under the section on remedies for fraud.

4. Subsection (2) requires notification of revocation of acceptance within a reasonable time after discovery of the grounds for such revocation. Since this remedy will be generally resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond the time in which

notification of breach must be given, beyond the time for discovery of non-conformity after acceptance and beyond the time for rejection after tender. The parties may by their agreement limit the time for notification under this section, but the same sanctions and considerations apply to such agreements as are discussed in the comment on manner and effect of rightful rejection.

5. The content of the notice under subsection (2) is to be determined in this case as in others by considerations of good faith, prevention of surprise, and reasonable adjustment. More will generally be necessary than the mere notification of breach required under the preceding section. On the other hand the requirements of the section on waiver of buyer's objections do not apply here. The fact that quick notification of trouble is desirable affords good ground for being slow to bind a buyer by his first statement.

Following the general policy of this Article, the requirements of the content of notification are less stringent in the case of a non-merchant buyer.

6. Under subsection (2) the prior policy is continued of seeking substantial justice in re-

gard to the condition of goods restored to the seller. Thus the buyer may not revoke his acceptance if the goods have materially deteriorated except by reason of their own defects. Worthless goods, however, need not be offered back and minor defects in the articles reoffered are to be disregarded.

7. The policy of the section allowing partial acceptance is carried over into the present section and the buyer may revoke his acceptance, in appropriate cases, as to the entire lot or any commercial unit thereof.

Cross References:

Point 3: Section 2-723.

Point 4: Sections 1-204, 2-602 and 2-607.

Point 5: Sections 2-605 and 2-607.

Point 7: Section 2-601.

Definitional Cross References:

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Conform". Section 2-106.

"Goods". Section 2-105.

"Lot". Section 2-105.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

"Rights". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

CASE NOTES

Waiver of right to rescind.

Purchasers of home could not seek rescission of contract of sale as remedy for vendor's alleged breach of contract in failing to correct wet basement problem before settlement, even if vendor and real estate agents had fraudulently misrepresented that the problem had been corrected, where purchasers treated the property as their own and affirmed the contract through continued performance; purchasers had been aware that at least three agreed-upon repairs had not been completed before settlement, but they nevertheless proceeded with settlement and accepted the property with these problems, in exchange for payment from vendors and agents, and did not seek rescission for a year and a half after they had moved in. *Dean v. Garland*, 779 A.2d 911, 2001 D.C. App. LEXIS 189 (2001), writ of certiorari denied by 536 U.S.

924, 122 S. Ct. 2591, 153 L. Ed. 2d 780, 2002 U.S. LEXIS 4497, 70 U.S.L.W. 3774 (2002).

If the defrauded party treats the property as his own and affirms the contract through continued performance, that party is precluded from seeking rescission. *Dean v. Garland*, 779 A.2d 911, 2001 D.C. App. LEXIS 189 (2001), writ of certiorari denied by 536 U.S. 924, 122 S. Ct. 2591, 153 L. Ed. 2d 780, 2002 U.S. LEXIS 4497, 70 U.S.L.W. 3774 (2002).

Seller's proffered removal of television chassis for a short period in order to determine cause of color malfunction and ascertain extent of adjustment or correction needed to effect full operational efficiency presented no great inconvenience to buyer, and refusal of buyer's daughter, on buyer's behalf, to allow this precluded rescission. D.C. Code 1961, §§ 28:2-508, 28:2-608(1)(A). *Wilson v. Scampoli*, 228 A.2d 848, 1967 D.C. App. LEXIS 156 (App. 1967).

§ 28:2-609. Right to adequate assurance of performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable

suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

(Dec. 30, 1963, 77 Stat. 662, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-210 and 28:2-611. 1973 Ed., § 28:2-609.

Prior Codifications. — 1981 Ed., § 28:2-609.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: See Sections 53, 54(1)(b), 55 and 63(2), Uniform Sales Act.

Purposes:

1. The section rests on the recognition of the fact that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a law suit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain. If either the willingness or the ability of a party to perform declines materially between the time of contracting and the time for performance, the other party is threatened with the loss of a substantial part of what he has bargained for. A seller needs protection not merely against having to deliver on credit to a shaky buyer, but also against having to procure and manufacture the goods, perhaps turning down other customers. Once he has been given reason to believe that the buyer's performance has become uncertain, it is an undue hardship to force him to continue his own performance. Similarly, a buyer who believes that the seller's deliveries have become uncertain cannot safely wait for the due date of performance when he has been buying to assure himself of materials for his current manufacturing or to replenish his stock of merchandise.

2. Three measures have been adopted to meet the needs of commercial men in such situations. First, the aggrieved party is permitted to suspend his own performance and any preparation therefor, with excuse for any resulting necessary delay, until the situation has been

clarified. "Suspend performance" under this section means to hold up performance pending the outcome of the demand, and includes also the holding up of any preparatory action. This is the same principle which governs the ancient law of stoppage and seller's lien, and also of excuse of a buyer from prepayment if the seller's actions manifest that he cannot or will not perform. (Original Act, Section 63(2).)

Secondly, the aggrieved party is given the right to require adequate assurance that the other party's performance will be duly forthcoming. This principle is reflected in the familiar clauses permitting the seller to curtail deliveries if the buyer's credit becomes impaired, which when held within the limits of reasonableness and good faith actually express no more than the fair business meaning of any commercial contract.

Third, and finally, this section provides the means by which the aggrieved party may treat the contract as broken if his reasonable grounds for insecurity are not cleared up within a reasonable time. This is the principle underlying the law of anticipatory breach, whether by way of defective part performance or by repudiation. The present section merges these three principles of law and commercial practice into a single theory of general application to all sales agreements looking to future performance.

3. Subsection (2) of the present section requires that "reasonable" grounds and "adequate" assurance as used in subsection (1) be defined by commercial rather than legal standards. The express reference to commercial standards carries no connotation that the obli-

gation of good faith is not equally applicable here.

Under commercial standards and in accord with commercial practice, a ground for insecurity need not arise from or be directly related to the contract in question. The law as to "dependence" or "independence" of promises within a single contract does not control the application of the present section.

Thus a buyer who falls behind in "his account" with the seller, even though the items involved have to do with separate and legally distinct contracts, impairs the seller's expectation of due performance. Again, under the same test, a buyer who requires precision parts which he intends to use immediately upon delivery, may have reasonable grounds for insecurity if he discovers that his seller is making defective deliveries of such parts to other buyers with similar needs. Thus, too, in a situation such as arose in *Jay Dreher Corporation v. Delco Appliance Corporation*, 93 F.2d 275 (C.C.A.2, 1937), where a manufacturer gave a dealer an exclusive franchise for the sale of his product but on two or three occasions breached the exclusive dealing clause, although there was no default in orders, deliveries or payments under the separate sales contract between the parties, the aggrieved dealer would be entitled to suspend his performance of the contract for sale under the present section and to demand assurance that the exclusive dealing contract would be lived up to. There is no need for an explicit clause tying the exclusive franchise into the contract for the sale of goods since the situation itself ties the agreements together.

The nature of the sales contract enters also into the question of reasonableness. For example, a report, from an apparently trustworthy source that the seller had shipped defective goods or was planning to ship them would normally give the buyer reasonable grounds for insecurity. But when the buyer has assumed the risk of payment before inspection of the goods, as in a sales contract on C.I.F. or similar cash against documents terms, that risk is not to be evaded by a demand for assurance. Therefore no ground for insecurity would exist under this section unless the report went to a ground which would excuse payment by the buyer.

4. What constitutes "adequate" assurance of due performance is subject to the same test of factual conditions. For example, where the buyer can make use of a defective delivery, a mere promise by a seller of good repute that he is giving the matter his attention and that the defect will not be repeated is normally sufficient. Under the same circumstances, however, a similar statement by a known corner-cutter might well be considered insufficient without the posting of a guaranty or, if so demanded by the buyer, a speedy replacement of the delivery

involved. By the same token where a delivery has defects, even though easily curable, which interfere with easy use by the buyer, no verbal assurance can be deemed adequate which is not accompanied by replacement, repair, money-allowance, or other commercially reasonable cure.

A fact situation such as arose in *Corn Products Refining Co. v. Fasola*, 94 N.J.L. 181, 109 A. 505 (1920) officers illustration both of reasonable grounds for insecurity and "adequate" assurance. In that case a contract for the sale of oils on 30 days' credit, 2% off for payment within 10 days, provided that credit was to be extended to the buyer only if his financial responsibility was satisfactory to the seller. The buyer had been in the habit of taking advantage of the discount but at the same time that he failed to make his customary 10 day payment, the seller heard rumors, in fact false, that the buyer's financial condition was shaky. Thereupon, the seller demanded cash before shipment or security satisfactory to him. The buyer sent a good credit report from his banker, expressed willingness to make payments when due on the 30 day terms and insisted on further deliveries under the contract. Under this Article the rumors, although false, were enough to make the buyer's financial condition "unsatisfactory" to the seller under the contract clause. Moreover, the buyer's practice of taking the cash discounts is enough, apart from the contract clause, to lay a commercial foundation for suspicion when the practice is suddenly stopped. These matters, however, go only to the justification of the seller's demand for security, or his "reasonable grounds for insecurity".

The adequacy of the assurance given is not measured as in the type of "satisfaction" situation affected with intangibles, such as in personal service cases, cases involving a third party's judgment as final, or cases in which the whole contract is dependent on one party's satisfaction, as in a sale on approval. Here, the seller must exercise good faith and observe commercial standards. This Article thus approves the statement of the court in *James B. Berry's Sons Co. of Illinois v. Monark Gasoline & Oil Co., Inc.*, 32 F.2d 74, (C.C.A.8, 1929), that the seller's satisfaction under such a clause must be based upon reason and must not be arbitrary or capricious; and rejects the purely personal "good faith" test of the *Corn Products Refining Co.* case, which held that in the seller's sole judgment, if for any reason he was dissatisfied, he was entitled to revoke the credit. In the absence of the buyer's failure to take the 2% discount as was his custom, the banker's report given in that case would have been "adequate" assurance under this Act, regardless of the language of the "satisfaction" clause. However, the seller is reasonably entitled to feel insecure at a sudden expansion of the buyer's use of a

credit term, and should be entitled either to security or to a satisfactory explanation.

The entire foregoing discussion as to adequacy of assurance by way of explanation is subject to qualification when repeated occasions for the application of this section arise. This Act recognizes that repeated delinquencies must be viewed as cumulative. On the other hand, commercial sense also requires that if repeated claims for assurance are made under this section, the basis for these claims must be increasingly obvious.

5. A failure to provide adequate assurance of performance and thereby to re-establish the security of expectation results in a breach only "by repudiation" under subsection (4). Therefore, the possibility is continued of retraction of the repudiation under the section dealing with that problem, unless the aggrieved party has acted on the breach in some manner.

The thirty day limit on the time to provide assurance is laid down to free the question of reasonable time from uncertainty in later litigation.

6. Clauses seeking to give the protected party exceedingly wide powers to cancel or readjust the contract when ground for insecurity arises must be read against the fact that good faith is

a part of the obligation of the contract and not subject to modification by agreement and includes, in the case of a merchant, the reasonable observance of commercial standards of fair dealing in the trade. Such clauses can thus be effective to enlarge the protection given by the present section to a certain extent, to fix the reasonable time within which requested assurance must be given, or to define adequacy of the assurance in any commercially reasonable fashion. But any clause seeking to set up arbitrary standards for action is ineffective under this Article. Acceleration clauses are treated similarly in the Articles on Commercial Paper and Secured Transactions.

Cross References:

Point 3: Section 1-203.

Point 5: Section 2-611.

Point 6: Sections 1-203 and 1-208 and Articles 3 and 9.

Definitional Cross References:

"Aggrieved party". Section 1-201.

"Between merchants". Section 2-104.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Rights". Section 1-201.

"Writing". Section 1-201.

CASE NOTES

ANALYSIS

Demand for adequate assurance of performance.

Good faith.

Demand for adequate assurance of performance.

Business furniture supplier's letter to buyer was not "demand for adequate assurance of performance", but rather, was "anticipatory repudiation" of contract, where seller erroneously stated amount owing, demanded immediate payment of that amount, and then took opportunity of buyer's supposed "delinquency" to refuse to perform except on terms that altered contract significantly. D.C. Code 1981, §§ 28:2-

609, 28:2-610; U.C.C. § 2-610 comment. Design for Business Interiors, Inc. v. Herson's, Inc., 659 F. Supp. 1103, 1986 U.S. Dist. LEXIS 17015 (1986).

Good faith.

Under District of Columbia law, restaurant chain did not breach duty of good faith in terminating agreement with meat supplier without investigation of supplier's financial health due to its justifiable concern about the supplier's ability to meet its financial obligations in light of supplier's payment problems. D.C. Code 1981, §§ 28:2-103(1)(b), 28:2-609(1). Goldstein v. S & A Restaurant Corp., 622 F. Supp. 139, 1985 U.S. Dist. LEXIS 14328 (1985).

§ 28:2-610. Anticipatory repudiation.

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (section 28:2-703 or section 28:2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (section 28:2-704).

(Dec. 30, 1963, 77 Stat. 662, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-709 and 28:5-115.

1973 Ed., § 28:2-610.

Prior Codifications. — 1981 Ed., § 28:2-610.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: See Sections 63(2) and 65, Uniform Sales Act.

Purposes: To make it clear that:

1. With the problem of insecurity taken care of by the preceding section and with provision being made in this Article as to the effect of a defective delivery under an installment contract, anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance.

Under the present section when such a repudiation substantially impairs the value of the contract, the aggrieved party may at any time resort to his remedies for breach, or he may suspend his own performance while he negotiates with, or awaits performance by, the other party. But if he awaits performance beyond a commercially reasonable time he cannot recover resulting damages which he should have avoided.

2. It is not necessary for repudiation that performance be made literally and utterly impossible. Repudiation can result from action which reasonably indicates a rejection of the continuing obligation. And, a repudiation automatically results under the preceding section on insecurity when a party fails to provide adequate assurance of due future performance within thirty days after a justifiable demand therefor has been made. Under the language of this section, a demand by one or both parties for more than the contract calls for in the way of counter-performance is not in itself a repudia-

tion nor does it invalidate a plain expression of desire for future performance. However, when under a fair reading it amounts to a statement of intention not to perform except on conditions which go beyond the contract, it becomes a repudiation.

3. The test chosen to justify an aggrieved party's action under this section is the same as that in the section on breach in installment contracts—namely the substantial value of the contract. The most useful test of substantial value is to determine whether material inconvenience or injustice will result if the aggrieved party is forced to wait and receive an ultimate tender minus the part or aspect repudiated.

4. After repudiation, the aggrieved party may immediately resort to any remedy he chooses provided he moves in good faith (see Section 1-203). Inaction and silence by the aggrieved party may leave the matter open but it cannot be regarded as misleading the repudiating party. Therefore the aggrieved party is left free to proceed at any time with his options under this section, unless he has taken some positive action which in good faith requires notification to the other party before the remedy is pursued.

Cross References:

Point 1: Sections 2-609 and 2-612.

Point 2: Section 2-609.

Point 3: Section 2-612.

Point 4: Section 1-203.

Definitional Cross References:

"Aggrieved party". Section 1-201.

"Contract". Section 1-201.

"Party". Section 1-201.

"Remedy". Section 1-201.

CASE NOTES

ANALYSIS

In general.

Limitation of actions.

Substantial impairment of contract.

In general.

Seller who violates his duty to exercise good

faith in attempting to secure fulfillment of condition precedent to requirements contract, thereby preventing underlying contract from coming into effect, can be held liable under District of Columbia law for difference between cost to buyer of substitute goods and contract price. D.C. Code 1981, §§ 28:2-306(1), 28:2-610, 28:2-711, 28:2-712. *Gatoil (U.S.A.) v. Washing-*

ton Metro. Area Transit Auth., 801 F.2d 451, 1986 U.S. App. LEXIS 30683 (C.A.D.C. 1986).

Business furniture supplier's letter to buyer was not "demand for adequate assurance of performance", but rather, was "anticipatory repudiation" of contract, where seller erroneously stated amount owing, demanded immediate payment of that amount, and then took opportunity of buyer's supposed "delinquency" to refuse to perform except on terms that altered contract significantly. D.C. Code 1981, §§ 28:2-609, 28:2-610; U.C.C. § 2-610 comment. *Design for Business Interiors, Inc. v. Herson's, Inc.*, 659 F. Supp. 1103, 1986 U.S. Dist. LEXIS 17015 (1986).

The other party to a contract has the right under the law of the District of Columbia to recover for breach of contract when the repudiating party has communicated by word or conduct, unequivocally and positively, its intention not to perform. D.C. Code §§ 28:2-209, 28:2-610. *Government of Republic of China v. Compass Communications Corp.*, 473 F. Supp. 1306, 1979 U.S. Dist. LEXIS 10557 (1979).

Limitation of actions.

Under District of Columbia law, statute of

limitations governing claims against employer for fraud and breach of employment agreement did not begin to run until 30 days after employee submitted resignation letter, when resignation became effective, and not on date employer refused to negotiate royalty agreement and employee submitted letter; if employer's refusal to negotiate royalty agreement was anticipatory breach, employee acted in commercially reasonable manner in waiting 30 days before making resignation effective. D.C. Code 1981, §§ 12-301(7, 8), 28:2-610(a). *Computer Data Systems, Inc. v. Kleinberg*, 759 F. Supp. 10, 1990 U.S. Dist. LEXIS 18944 (1990).

Substantial impairment of contract.

Buyer who has contracted for right to receive and inspect goods at his premises before making payment, and is then told that he must pay in advance of delivery as to all performances still owed by seller, has suffered "substantial impairment of contract" within meaning of definition of anticipatory repudiation. D.C. Code 1981, § 28:2-610; U.C.C. § 2-610 comment. *Design for Business Interiors, Inc. v. Herson's, Inc.*, 659 F. Supp. 1103, 1986 U.S. Dist. LEXIS 17015 (1986).

§ 28:2-611. Retraction of anticipatory repudiation.

(1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this article (section 28:2-609).

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

(Dec. 30, 1963, 77 Stat. 662, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-611. 1973 Ed., § 28:2-611.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes: To make it clear that:

1. The repudiating party's right to reinstate the contract is entirely dependent upon the action taken by the aggrieved party. If the latter has cancelled the contract or materially changed his position at any time after the

repudiation, there can be no retraction under this section.

2. Under subsection (2) an effective retraction must be accompanied by any assurances demanded under the section dealing with right to adequate assurance. A repudiation is of course sufficient to give reasonable ground for insecurity and to warrant a request for assur-

ance as an essential condition of the retraction. However, after a timely and unambiguous expression of retraction, a reasonable time for the assurance to be worked out should be allowed by the aggrieved party before cancellation.

Cross Reference:

Point 2: Section 2-609.

Definitional Cross References:

"Aggrieved party". Section 1-201.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Party". Section 1-201.

"Rights". Section 1-201.

§ 28:2-612. "Installment contract"; breach.

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

(Dec. 30, 1963, 77 Stat. 662, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-103, 28:2-601, 28:2-616, 28:2-703, and 28:2-711.

Prior Codifications. — 1981 Ed., § 28:2-612.

1973 Ed., § 28:2-612.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 45(2), Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To continue prior law but to make explicit the more mercantile interpretation of many of the rules involved, so that:

1. The definition of an installment contract is phrased more broadly in this Article so as to cover installment deliveries tacitly authorized by the circumstances or by the option of either party.

2. In regard to the apportionment of the price for separate payment this Article applies the more liberal test of what can be apportioned rather than the test of what is clearly apportioned by the agreement. This Article also recognizes approximate calculation or apportionment of price subject to subsequent adjustment. A provision for separate payment for each lot delivered ordinarily means that the price is at least roughly calculable by units of quantity, but such a provision is not essential to

an "installment contract." If separate acceptance of separate deliveries is contemplated, no generalized contrast between wholly "entire" and wholly "divisible" contracts has any standing under this Article.

3. This Article rejects any approach which gives clauses such as "each delivery is a separate contract" their legalistically literal effect. Such contracts nonetheless call for installment deliveries. Even where a clause speaks of "a separate contract for all purposes", a commercial reading of the language under the section on good faith and commercial standards requires that the singleness of the document and the negotiation, together with the sense of the situation, prevail over any uncommercial and legalistic interpretation.

4. One of the requirements for rejection under subsection (2) is non-conformity substantially impairing the value of the installment in question. However, an installment agreement may require accurate conformity in quality as a condition to the right to acceptance if the need

for such conformity is made clear either by express provision or by the circumstances. In such a case the effect of the agreement is to define explicitly what amounts to substantial impairment of value impossible to cure. A clause requiring accurate compliance as a condition to the right to acceptance must, however, have some basis in reason, must avoid imposing hardship by surprise and is subject to waiver or to displacement by practical construction.

Substantial impairment of the value of an installment can turn not only on the quality of the goods but also on such factors as time, quantity, assortment, and the like. It must be judged in terms of the normal or specifically known purposes of the contract.

The defect in required documents refers to such matters as the absence of insurance documents under a C.I.F. contract, falsity of a bill of lading, or one failing to show shipment within the contract period or to the contract destination. Even in such cases, however, the provisions on cure of tender apply if appropriate documents are readily procurable.

5. Under subsection (2) an installment delivery must be accepted if the non-conformity is curable and the seller gives adequate assurance of cure. Cure of non-conformity of an installment in the first instance can usually be afforded by an allowance against the price, or in the case of reasonable discrepancies in quantity either by a further delivery or a partial rejection. This Article requires reasonable action by a buyer in regard to discrepant delivery and good faith requires that the buyer make any reasonable minor outlay of time or money necessary to cure an overshipment by severing out an acceptable percentage thereof. The seller must take over a cure which involves any material burden; the buyer's obligation reaches only to cooperation. Adequate assurance for purposes of subsection (2) is measured by the same standards as under the section on right to adequate assurance of performance.

6. Subsection (3) is designed to further the continuance of the contract in the absence of an overt cancellation. The question arising when an action is brought as to a single installment only is resolved by making such action waive the right of cancellation. This involves merely a defect in one or more installments, as contrasted with the situation where there is a true

repudiation within the section on anticipatory repudiation. Whether the non-conformity in any given installment justifies cancellation as to the future depends, not on whether such non-conformity indicates an intent or likelihood that the future deliveries will also be defective, but whether the non-conformity substantially impairs the value of the whole contract. If only the seller's security in regard to future installments is impaired, he has the right to demand adequate assurances of proper future performance but has not an immediate right to cancel the entire contract. It is clear under this Article, however, that defects in prior installments are cumulative in effect, so that acceptance does not wash out the defect "waived." Prior policy is continued, putting the rule as to buyer's default on the same footing as that in regard to seller's default.

7. Under the requirement of seasonable notification of cancellation under subsection (3), a buyer who accepts a non-conforming installment which substantially impairs the value of the entire contract should properly be permitted to withhold his decision as to whether or not to cancel pending a response from the seller as to his claim for cure or adjustment. Similarly, a seller may withhold a delivery pending payment for prior ones, at the same time delaying his decision as to cancellation. A reasonable time for notifying of cancellation, judged by commercial standards under the section on good faith, extends of course to include the time covered by any reasonable negotiation in good faith. However, during this period the defaulting party is entitled, on request, to know whether the contract is still in effect, before he can be required to perform further.

Cross References:

Point 2: Sections 2-307 and 2-607.

Point 3: Section 1-203.

Point 5: Sections 2-208 and 2-609.

Point 6: Section 2-610.

Definitional Cross References:

"Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Lot". Section 2-105.

"Notifies". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

CASE NOTES

In general.

Genuine issue of material fact as to whether lease financing agency's conduct in paying for partial shipments of antennas that occurred outside 90-day period required by purchase

order amounted to modification of express terms of purchase order precluded summary judgment on agency's claim that its obligation to pay in tripartite commercial leasing transaction was discharged. Fed.R.Civ.Proc. Rule 56(c),

18 U.S.C. Radiation Sys. v. Amplicon, Inc., 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

Genuine issue of material fact as to whether express terms of purchase order in tripartite commercial leasing transaction were waived by

conduct of parties precluded summary judgment for lease financing agency. Fed.Rules Civ.Proc.Rule 56(c), 18 U.S.C. Radiation Sys. v. Amplicon, Inc., 882 F. Supp. 1101, 1995 U.S. Dist. LEXIS 5952 (1995).

§ 28:2-613. Casualty to identified goods.

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a “no arrival, no sale” term (section 28:2-324) then

(a) if the loss is total the contract is avoided; and

(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

(Dec. 30, 1963, 77 Stat. 663, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-324.

1973 Ed., § 28:2-613.

Prior Codifications. — 1981 Ed., § 28:2-613.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 7 and 8, Uniform Sales Act.

Changes: Rewritten, the basic policy being continued but the test of a “divisible” or “indivisible” sale or contract being abandoned in favor of adjustment in business terms.

Purposes of Changes:

1. Where goods whose continued existence is presupposed by the agreement are destroyed without fault of either party, the buyer is relieved from his obligation but may at his option take the surviving goods at a fair adjustment. “Fault” is intended to include negligence and not merely wilful wrong. The buyer is expressly given the right to inspect the goods in order to determine whether he wishes to avoid the contract entirely or to take the goods with a price adjustment.

2. The section applies whether the goods were already destroyed at the time of contracting without the knowledge of either party or whether they are destroyed subsequently but before the risk of loss passes to the buyer. Where under the agreement, including of

course usage of trade, the risk has passed to the buyer before the casualty, the section has no application. Beyond this, the essential question in determining whether the rules of this section are to be applied is whether the seller has or has not undertaken the responsibility for the continued existence of the goods in proper condition through the time of agreed or expected delivery.

3. The section on the term “no arrival, no sale” makes clear that delay in arrival, quite as much as physical change in the goods, gives the buyer the options set forth in this section.

Cross Reference:

Point 3: Section 2-324.

Definitional Cross References:

“Buyer”. Section 2-103.

“Conform”. Section 2-106.

“Contract”. Section 1-201.

“Fault”. Section 1-201.

“Goods”. Section 2-105.

“Party”. Section 1-201.

“Rights”. Section 1-201.

“Seller”. Section 2-103.

§ 28:2-614. Substituted performance.

(1) Where without fault of either party the agreed berthing, loading, or

unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

(Dec. 30, 1963, 77 Stat. 663, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-614. 1973 Ed., § 28:2-614.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. Subsection (1) requires the tender of a commercially reasonable substituted performance where agreed to facilities have failed or become commercially impracticable. Under this Article, in the absence of specific agreement, the normal or usual facilities enter into the agreement either through the circumstances, usage of trade or prior course of dealing.

This section appears between Section 2-613 on casualty to identified goods and the next section on excuse by failure of presupposed conditions, both of which deal with excuse and complete avoidance of the contract where the occurrence or non-occurrence of a contingency which was a basic assumption of the contract makes the expected performance impossible. The distinction between the present section and those sections lies in whether the failure or impossibility of performance arises in connection with an incidental matter or goes to the very heart of the agreement. The differing lines of solution are contrasted in a comparison of *International Paper Co. v. Rockefeller*, 161 App.Div. 180, 146 N.Y.S. 371 (1914) and *Meyer v. Sullivan*, 40 Cal.App. 723, 181 P. 847 (1919). In the former case a contract for the sale of spruce to be cut from a particular tract of land was involved. When a fire destroyed the trees growing on that tract the seller was held excused since performance was impossible. In the latter case the contract called for delivery of wheat "f.o.b. Kosmos Steamer at Seattle." The war led to cancellation of that line's sailing schedule after space had been duly engaged and the buyer was held entitled to demand substituted delivery at the warehouse on the

line's loading dock. Under this Article, of course, the seller would also be entitled, had the market gone the other way, to make a substituted tender in that manner.

There must, however, be a true commercial impracticability to excuse the agreed to performance and justify a substituted performance. When this is the case a reasonable substituted performance tendered by either party should excuse him from strict compliance with contract terms which do not go to the essence of the agreement.

2. The substitution provided in this section as between buyer and seller does not carry over into the obligation of a financing agency under a letter of credit, since such an agency is entitled to performance which is plainly adequate on its face and without need to look into commercial evidence outside of the documents. See Article 5, especially Sections 5-102, 5-103, 5-109, 5-110, 5-114.

3. Under subsection (2) where the contract is still executory on both sides, the seller is permitted to withdraw unless the buyer can provide him with a commercially equivalent return despite the governmental regulation. Where, however, only the debt for the price remains, a larger leeway is permitted. The buyer may pay in the manner provided by the regulation even though this may not be commercially equivalent provided that the regulation is not "discriminatory, oppressive or predatory."

Cross Reference:

Point 2: Article 5.

Definitional Cross References:

"Buyer". Section 2-103.

"Fault". Section 1-201.

"Party". Section 1-201.

"Seller". Section 2-103.

CASE NOTES

ANALYSIS

Impossibility of performance.
Impracticability of performance.

Impossibility of performance.

In some cases, even an express expectation may not, for purposes of doctrine of impossibility of performance, amount to a condition of performance. D.C. Code § 28:2-614(1) (Supp. V 1966). *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 1966 U.S. App. LEXIS 6004 (C.A.D.C. 1966).

Impracticability of performance.

The concept of impracticability assumes that

performance was physically possible, a rule making nonperformance a condition precedent to recovery would unjustifiably encourage disappointment of expectations, and there is nothing necessarily inconsistent in claiming commercial impracticability for method of performance actually adopted and, accordingly, impossibility issue may be raised in suit to recover cost of alternative method of performance. D.C. Code §§ 28:1-102(3), 28:1-203, 28:2-302, 28:2-614 and (1), 28:2-615(a) (Supp. V 1966). *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 1966 U.S. App. LEXIS 6004 (C.A.D.C. 1966).

§ 28:2-615. Excuse by failure of presupposed conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) the seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

(Dec. 30, 1963, 77 Stat. 663, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-255, § 27(nn), 44 DCR 1271.)

Prior Codifications. — 1981 Ed., § 28:2-615.

1973 Ed., § 28:2-615.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to

the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. This section excuses a seller from timely

delivery of goods contracted for, where his performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the

parties at the time of contracting. The destruction of specific goods and the problem of the use of substituted performance on points other than delay or quantity, treated elsewhere in this Article, must be distinguished from the matter covered by this section.

2. The present section deliberately refrains from any effort at an exhaustive expression of contingencies and is to be interpreted in all cases sought to be brought within its scope in terms of its underlying reason and purpose.

3. The first test for excuse under this Article in terms of basic assumption is a familiar one. The additional test of commercial impracticability (as contrasted with "impossibility," "frustration of performance" or "frustration of the venture") has been adopted in order to call attention to the commercial character of the criterion chosen by this Article.

4. Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section. (See *Ford & Sons, Ltd., v. Henry Leatham & Sons, Ltd.*, 21 Com.Cas. 55 (1915, K.B.D.).)

5. Where a particular source of supply is exclusive under the agreement and fails through casualty, the present section applies rather than the provision on destruction or deterioration of specific goods. The same holds true where a particular source of supply is shown by the circumstances to have been contemplated or assumed by the parties at the time of contracting. (See *Davis Co. v. Hoffmann-LaRoche Chemical Works*, 178 App.Div. 855, 166 N.Y.S. 179 (1917) and *International Paper Co. v. Rockefeller*, 161 App.Div. 180, 146 N.Y.S. 371 (1914).) There is no excuse under this section, however, unless the seller has employed all due measures to assure himself that his source will not fail. (See *Canadian Industrial Alcohol Co., Ltd., v. Dunbar Molasses Co.*, 258 N.Y. 194, 179 N.E. 383, 80 A.L.R. 1173 (1932) and *Washington Mfg. Co. v. Midland Lumber Co.*, 113 Wash. 593, 194 P. 777 (1921).)

In the case of failure of production by an agreed source for causes beyond the seller's control, the seller should, if possible, be excused since production by an agreed source is without more a basic assumption of the contract. Such

excuse should not result in relieving the defaulting supplier from liability nor in dropping into the seller's lap an unearned bonus of damages over. The flexible adjustment machinery of this Article provides the solution under the provision on the obligation of good faith. A condition to his making good the claim of excuse is the turning over to the buyer of his rights against the defaulting source of supply to the extent of the buyer's contract in relation to which excuse is being claimed.

6. In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of "excuse" or "no excuse," adjustment under the various provisions of this Article is necessary, especially the sections on good faith, on insecurity and assurance and on the reading of all provisions in the light of their purposes, and the general policy of this Act to use equitable principles in furtherance of commercial standards and good faith.

7. The failure of conditions which go to convenience or collateral values rather than to the commercial practicability of the main performance does not amount to a complete excuse. However, good faith and the reason of the present section and of the preceding one may properly be held to justify and even to require any needed delay involved in a good faith inquiry seeking a readjustment of the contract terms to meet the new conditions.

8. The provisions of this section are made subject to assumption of greater liability by agreement and such agreement is to be found not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like. Thus the exemptions of this section do not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances. (See *Madeirense Do Brasil, S.A. v. Stulman-Emrick Lumber Co.*, 147 F.2d 399 (C.C.A., 2 Cir., 1945).) The exemption otherwise present through usage of trade under the present section may also be expressly negated by the language of the agreement. Generally, express agreements as to exemptions designed to enlarge upon or supplant the provisions of this section are to be read in the light of mercantile sense and reason, for this section itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which agreement may not go.

Agreement can also be made in regard to the consequences of exemption as laid down in paragraphs (b) and (c) and the next section on procedure on notice claiming excuse.

9. The case of a farmer who has contracted to sell crops to be grown on designated land may

be regarded as falling either within the section on casualty to identified goods or this section, and he may be excused, when there is a failure of the specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract.

Exemption of the buyer in the case of a "requirements" contract is covered by the "Output and Requirements" section both as to assumption and allocation of the relevant risks. But when a contract by a manufacturer to buy fuel or raw material makes no specific reference to a particular venture and no such reference may be drawn from the circumstances, commercial understanding views it as a general deal in the general market and not conditioned on any assumption of the continuing operation of the buyer's plant. Even when notice is given by the buyer that the supplies are needed to fill a specific contract of a normal commercial kind, commercial understanding does not see such a supply contract as conditioned on the continuance of the buyer's further contract for outlet. On the other hand, where the buyer's contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war procurement subcontract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture, the reason of the present section may well apply and entitle the buyer to the exemption.

10. Following its basic policy of using commercial practicability as a test for excuse, this section recognizes as of equal significance either a foreign or domestic regulation and disregards any technical distinctions between "law," "regulation," "order" and the like. Nor does it make the present action of the seller depend upon the eventual judicial determination of the legality of the particular governmental action. The seller's good faith belief in the validity of the regulation is the test under this Article and the best evidence of his good faith is the general commercial acceptance of the regulation. However, governmental interference cannot excuse unless it truly "supervenes" in such a manner as to be beyond the seller's

assumption of risk. And any action by the party claiming excuse which causes or colludes in inducing the governmental action preventing his performance would be in breach of good faith and would destroy his exemption.

11. An excused seller must fulfill his contract to the extent which the supervening contingency permits, and if the situation is such that his customers are generally affected he must take account of all in supplying one. Subsections (a) and (b), therefore, explicitly permit in any proration a fair and reasonable attention to the needs of regular customers who are probably relying on spot orders for supplies. Customers at different stages of the manufacturing process may be fairly treated by including the seller's manufacturing requirements. A fortiori, the seller may also take account of contracts later in date than the one in question. The fact that such spot orders may be closed at an advanced price causes no difficulty, since any allocation which exceeds normal past requirements will not be reasonable. However, good faith requires, when prices have advanced, that the seller exercise real care in making his allocations, and in case of doubt his contract customers should be favored and supplies prorated evenly among them regardless of price. Save for the extra care thus required by changes in the market, this section seeks to leave every reasonable business leeway to the seller.

Cross References:

Point 1: Sections 2-613 and 2-614.

Point 2: Section 1-102.

Point 5: Sections 1-203 and 2-613.

Point 6: Sections 1-102, 1-203 and 2-609.

Point 7: Section 2-614.

Point 8: Sections 1-201, 2-302 and 2-616.

Point 9: Sections 1-102, 2-306 and 2-613.

Definitional Cross References:

"Between merchants". Section 2-104.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Good faith". Section 1-201.

"Merchant". Section 2-104.

"Notifies". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

CASE NOTES

Impracticability of performance.

The concept of impracticability assumes that performance was physically possible, a rule making nonperformance a condition precedent to recovery would unjustifiably encourage disappointment of expectations, and there is nothing necessarily inconsistent in claiming commercial impracticability for method of performance actually adopted and, accordingly, impossibility issue may be raised in suit to

recover cost of alternative method of performance. D.C. Code §§ 28:1-102(3), 28:1-203, 28:2-302, 28:2-614 and (1), 28:2-615(a) (Supp. V 1966). *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 1966 U.S. App. LEXIS 6004 (C.A.D.C. 1966).

It might be an overstatement to say that increased cost and difficulty of performance could never constitute impracticability, but to justify relief under doctrine of impossibility of

performance, there would have to be more of a variation between expected cost and cost of performing by available alternative than was present in case in which promisor could legitimately be presumed to have accepted some degree of abnormal risk and added expense

above and beyond contract price of \$305,842.92 was only \$43,972. D.C. Code § 28:2-615 (Supp. V 1966). *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 1966 U.S. App. LEXIS 6004 (C.A.D.C. 1966).

§ 28:2-616. Procedure on notice claiming excuse.

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this article relating to breach of installment contracts (section 28:2-612), then also as to the whole,

(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to take his available quota in substitution.

(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.

(3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

(Dec. 30, 1963, 77 Stat. 663, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-616. 1973 Ed., § 28:2-616.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

This section seeks to establish simple and workable machinery for providing certainty as to when a supervening and excusing contingency "excuses" the delay, "discharges" the contract, or may result in a waiver of the delay by the buyer. When the seller notifies, in accordance with the preceding section, claiming excuse, the buyer may acquiesce, in which case the contract is so modified. No consideration is necessary in a case of this kind to support such a modification. If the buyer does not elect so to modify the contract, he may terminate it and under subsection (2) his silence after receiving the seller's claim of excuse operates as such a

termination. Subsection (3) denies effect to any contract clause made in advance of trouble which would require the buyer to stand ready to take delivery whenever the seller is excused from delivery by unforeseen circumstances.

Cross References:

Point 1: Sections 2-209 and 2-615.

Definitional Cross References:

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Installment contract". Section 2-612.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Seller". Section 2-103.

"Termination". Section 2-106.

"Written". Section 1-201.

Part 7. Remedies.

§ 28:2-701. Remedies for breach of collateral contracts not impaired.

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this article.

(Dec. 30, 1963, 77 Stat. 664, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-701. 1973 Ed., § 28:2-701.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

Whether a claim for breach of an obligation collateral to the contract for sale requires separate trial to avoid confusion of issues is beyond the scope of this Article; but contractual ar-

rangements which as a business matter enter vitally into the contract should be considered a part thereof in so far as cross-claims or defenses are concerned.

Definitional Cross References:

"Contract for sale". Section 2-106.
"Remedy". Section 1-201.

§ 28:2-702. Seller's remedies on discovery of buyer's insolvency.

(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this article (section 28:2-705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection, the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this article (section 28:2-403). Successful reclamation of goods excludes all other remedies with respect to them.

(Dec. 30, 1963, 77 Stat. 664, Pub. L. 88-243, § 1; Mar. 16, 1982, D.C. Law 4-85, § 5, 29 DCR 309.)

Section references. — This section is referred to in § 28:2-705.

Prior Codifications. — 1981 Ed., § 28:2-702.

1973 Ed., § 28:2-702.

Legislative history of Law 4-85. — For legislative history of D.C. Law 4-85, see Historical and Statutory Notes following § 28:2-107.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Subsection (1)—Sections 53(1)(b), 54(1)(c) and 57,

Uniform Sales Act; Subsection (2)—none; Subsection (3)—Section 76(3), Uniform Sales Act.

Changes: Rewritten, the protection given to a seller who has sold on credit and has delivered goods to the buyer immediately preceding his insolvency being extended.

Purposes of Changes and New Matter: To make it clear that:

1. The seller's right to withhold the goods or to stop delivery except for cash when he discovers the buyer's insolvency is made explicit in subsection (1) regardless of the passage of title, and the concept of stoppage has been extended to include goods in the possession of any bailee who has not yet attorned to the buyer.

2. Subsection (2) takes as its base line the proposition that any receipt of goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent as against the particular seller. This Article makes discovery of the buyer's insolvency and demand within a ten day period a condition of the right to reclaim goods on this ground. The ten day limitation period operates from the time of receipt of the goods.

An exception to this time limitation is made when a written misrepresentation of solvency has been made to the particular seller within three months prior to the delivery. To fall

within the exception the statement of solvency must be in writing, addressed to the particular seller and dated within three months of the delivery.

3. Because the right of the seller to reclaim goods under this section constitutes preferential treatment as against the buyer's other creditors, subsection (3) provides that such reclamation bars all his other remedies as to the goods involved. As amended 1966.

Cross References:

Point 1: Sections 2-401 and 2-705.

Compare Section 2-502.

Definitional Cross References:

"Buyer". Section 2-103.

"Buyer in ordinary course of business". Section 1-201.

"Contract". Section 1-201.

"Good faith". Section 1-201.

"Goods". Section 2-105.

"Insolvent". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Receipt" of goods. Section 2-103.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Seller". Section 2-103.

"Writing". Section 1-201.

CASE NOTES

In general.

In case of a sale of personal property not executed by delivery, but to be consummated by delivery at another place, although in consequence of earnest paid, or otherwise, the property be so vested in the buyer, on complying or offering to comply with the contract on his part, he may recover the same from the seller or his agent; yet, until delivery, and while the goods are (in legal phrase) in transitu, the seller may, on the buyer becoming bankrupt, or being likely to be so, arrest the goods, or order his

agent to arrest them, which order, operating as an indemnity to the agent in addition to that arising from his possession of the goods, will be his guaranty for refusing to deliver them, and, perhaps, under circumstances, the agent would also have a right to demand other security from his principal, which it would be incumbent on him forthwith to give, under pain of a right in the agent to go on and execute the contract by a delivery. *Howatt v. Davis*, 19 Va. 34, 1816 Va. LEXIS 11 (1816).

§ 28:2-703. Seller's remedies in general.

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (section 28:2-612), then also with respect to the whole undelivered balance, the aggrieved seller may

- (a) withhold delivery of such goods;
- (b) stop delivery by any bailee as hereafter provided (section 28:2-705);
- (c) proceed under the next section respecting goods still unidentified to the contract;
- (d) resell and recover damages as hereafter provided (section 28:2-706);
- (e) recover damages for non-acceptance (section 28:2-708) or in a proper case the price (section 28:2-709);

(f) cancel.

(Dec. 30, 1963, 77 Stat. 664, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-602, 28:2-610, and 28:2-706.

Prior Codifications. — 1981 Ed., § 28:2-703.

1973 Ed., § 28:2-703.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: No comparable index section. See Section 53, Uniform Sales Act.

Purposes:

1. This section is an index section which gathers together in one convenient place all of the various remedies open to a seller for any breach by the buyer. This Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case.

2. The buyer's breach which occasions the use of the remedies under this section may involve only one lot or delivery of goods, or may involve all of the goods which are the subject matter of the particular contract. The right of the seller to pursue a remedy as to all the goods when the breach is as to only one or more lots is covered by the section on breach in installment contracts. The present section deals only with the remedies available after the goods involved in the breach have been determined by that section.

3. In addition to the typical case of refusal to pay or default in payment, the language in the preamble, "fails to make a payment due," is intended to cover the dishonor of a check on due presentment, or the non-acceptance of a draft, and the failure to furnish an agreed letter of credit.

4. It should also be noted that this Act requires its remedies to be liberally administered and provides that any right or obligation which it declares is enforceable by action unless a different effect is specifically prescribed (Section 1-106).

Cross References:

Point 2: Section 2-612.

Point 3: Section 2-325.

Point 4: Section 1-106.

Definitional Cross References:

"Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Seller". Section 2-103.

CASE NOTES

In general.

Where buyer, although indicating rejection of goods, refused to return goods because of fear of violence at his warehouse in area of city affected by rioting, fact that seller was at first willing to take back goods and, in effect, cancel contract rather than file an action for the price

did not bar subsequent action for price following buyer's inaction. D.C. Code §§ 28:1-204(3), 28:2-106(4), 28:2-602(1), 28:2-703(f), 28:2-709(1)(A), 28:2-720. *Robinson v. Jonathan Logan Financial*, 277 A.2d 115, 1971 D.C. App. LEXIS 314 (1971).

§ 28:2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.

(1) An aggrieved seller under the preceding section may

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of

effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

(Dec. 30, 1963, 77 Stat. 665, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-610. 1973 Ed., § 28:2-704.

Prior Codifications. — 1981 Ed., § 28:2-704.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 63(3) and 64(4), Uniform Sales Act.

Changes: Rewritten, the seller's rights being broadened.

Purposes of Changes:

1. This section gives an aggrieved seller the right at the time of breach to identify to the contract any conforming finished goods, regardless of their resalability, and to use reasonable judgment as to completing unfinished goods. It thus makes the goods available for resale under the resale section, the seller's primary remedy, and in the special case in which resale is not practicable, allows the action for the price which would then be necessary to give the seller the value of his contract.

2. Under this Article the seller is given express power to complete manufacture or pro-

curement of goods for the contract unless the exercise of reasonable commercial judgment as to the facts as they appear at the time he learns of the breach makes it clear that such action will result in a material increase in damages. The burden is on the buyer to show the commercially unreasonable nature of the seller's action in completing manufacture.

Cross References: Sections 2-703 and 2-706.

Definitional Cross References:

"Aggrieved party". Section 1-201.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Rights". Section 1-201.

"Seller". Section 2-103.

§ 28:2-705. Seller's stoppage of delivery in transit or otherwise.

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (section 28:2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until

(a) receipt of the goods by the buyer; or

(b) acknowledgement to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(d) negotiation to the buyer of any negotiable document of title covering the goods.

(3)(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.

(d) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

(Dec. 30, 1963, 77 Stat. 665, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-702, 28:2-703, 28:2-707, 28:7-403, and 28:7-504.

Prior Codifications. — 1981 Ed., § 28:2-705.

1973 Ed., § 28:2-705.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Sections 57-59, Uniform Sales Act; see also Sections 12, 14 and 42, Uniform Bills of Lading Act and Sections 9, 11 and 49, Uniform Warehouse Receipts Act.

Changes: This section continues and develops the above sections of the Uniform Sales Act in the light of the other uniform statutory provisions noted.

Purposes: To make it clear that:

1. Subsection (1) applies the stoppage principle to other bailees as well as carriers.

It also expands the remedy to cover the situations, in addition to buyer's insolvency, specified in the subsection. But since stoppage is a burden in any case to carriers, and might be a very heavy burden to them if it covered all small shipments in all these situations, the right to stop for reasons other than insolvency is limited to carload, truckload, planeload or larger shipments. The seller shipping to a buyer of doubtful credit can protect himself by shipping C.O.D.

Where stoppage occurs for insecurity it is merely a suspension of performance, and if assurances are duly forthcoming from the buyer the seller is not entitled to resell or divert.

Improper stoppage is a breach by the seller if it effectively interferes with the buyer's right to due tender under the section on manner of tender of delivery. However, if the bailee obeys an unjustified order to stop he may also be liable to the buyer. The measure of his obligation is dependent on the provisions of the Documents of Title Article (Section 7-303). Subsection 3(b) therefore gives him a right of indemnity as against the seller in such a case.

2. "Receipt by the buyer" includes receipt by the buyer's designated representative, the subpurchaser, when shipment is made direct to him and the buyer himself never receives the goods. It is entirely proper under this Article that the seller, by making such direct shipment to the sub-purchaser, be regarded as acquiescing in the latter's purchase and as thus barred from stoppage of the goods as against him.

As between the buyer and the seller, the latter's right to stop the goods at any time until they reach the place of final delivery is recognized by this section.

Under subsection (3)(c) and (d), the carrier is under no duty to recognize the stop order of a person who is a stranger to the carrier's contract. But the seller's right as against the buyer to stop delivery remains, whether or not the carrier is obligated to recognize the stop order. If the carrier does obey it, the buyer cannot complain merely because of that circumstance; and the seller becomes obligated under subsection (3)(b) to pay the carrier any ensuing damages or charges.

3. A diversion of a shipment is not a "reshipment" under subsection (2)(c) when it is merely an incident to the original contract of transportation. Nor is the procurement of "exchange bills" of lading which change only the name of the consignee to that of the buyer's local agent but do not alter the destination of a reshipment.

Acknowledgment by the carrier as a "warehouseman" within the meaning of this Article requires a contract of a truly different character from the original shipment, a contract not in extension of transit but as a warehouseman.

4. Subsection (3)(c) makes the bailee's obedience of a notification to stop conditional upon the surrender of any outstanding negotiable document.

5. Any charges or losses incurred by the carrier in following the seller's orders, whether or not he was obligated to do so, fall to the seller's charge.

6. After an effective stoppage under this section the seller's rights in the goods are the same as if he had never made a delivery.

Cross References:

Sections 2-702 and 2-703.

Point 1: Sections 2-503 and 2-609, and Article 7.

Point 2: Section 2-103 and Article 7.

Definitional Cross References:

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Document of title". Section 1-201.

"Goods". Section 2-105.
 "Insolvent". Section 1-201.
 "Notification". Section 1-201.

"Receipt" of goods. Section 2-103.
 "Rights". Section 1-201.
 "Seller". Section 2-103.

§ 28:2-706. Seller's resale including contract for resale.

(1) Under the conditions stated in section 28:2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this article (section 28:2-710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (section 28:2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of section 28:2-711).

(Dec. 30, 1963, 77 Stat. 665, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-703, 28:2-707, 28:2-711, and 28:2-718.

Prior Codifications. — 1981 Ed., § 28:2-706.
 1973 Ed., § 28:2-706.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 60, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To simplify the prior statutory provision and to make it clear that:

1. The only condition precedent to the seller's right of resale under subsection (1) is a breach by the buyer within the section on the seller's remedies in general or insolvency. Other meticulous conditions and restrictions of the prior uniform statutory provision are disapproved by this Article and are replaced by standards of commercial reasonableness. Under this section the seller may resell the goods after any breach by the buyer. Thus, an anticipatory repudiation by the buyer gives rise to any of the seller's remedies for breach, and to the right of resale. This principle is supplemented by subsection (2) which authorizes a resale of goods which are not in existence or were not identified to the contract before the breach.

2. In order to recover the damages prescribed in subsection (1) the seller must act "in good faith and in a commercially reasonable manner" in making the resale. This standard is intended to be more comprehensive than that of "reasonable care and judgment" established by the prior uniform statutory provision. Failure to act properly under this section deprives the seller of the measure of damages here provided and relegates him to that provided in Section 2-708.

Under this Article the seller resells by authority of law, in his own behalf, for his own benefit and for the purpose of fixing his damages. The theory of a seller's agency is thus rejected.

3. If the seller complies with the prescribed standard of duty in making the resale, he may recover from the buyer the damages provided for in subsection (1). Evidence of market or current prices at any particular time or place is relevant only on the question of whether the seller acted in a commercially reasonable manner in making the resale.

The distinction drawn by some courts between cases where the title had not passed to the buyer and the seller had resold as owner, and cases where the title had passed and the seller had resold by virtue of his lien on the goods, is rejected.

4. Subsection (2) frees the remedy of resale from legalistic restrictions and enables the seller to resell in accordance with reasonable commercial practices so as to realize as high a price as possible in the circumstances. By "public" sale is meant a sale by auction. A "private" sale may be effected by solicitation and negotiation conducted either directly or through a broker. In choosing between a public and pri-

vate sale the character of the goods must be considered and relevant trade practices and usages must be observed.

5. Subsection (2) merely clarifies the common law rule that the time for resale is a reasonable time after the buyer's breach, by using the language "commercially reasonable." What is such a reasonable time depends upon the nature of the goods, the condition of the market and the other circumstances of the case; its length cannot be measured by any legal yardstick or divided into degrees. Where a seller contemplating resale receives a demand from the buyer for inspection under the section of preserving evidence of goods in dispute, the time for resale may be appropriately lengthened.

On the question of the place for resale, subsection (2) goes to the ultimate test, the commercial reasonableness of the seller's choice as to the place for an advantageous resale. This Article rejects the theory that the seller is required to resell at the agreed place for delivery and that a resale elsewhere can be permitted only in exceptional cases.

6. The purpose of subsection (2) being to enable the seller to dispose of the goods to the best advantage, he is permitted in making the resale to depart from the terms and conditions of the original contract for sale to any extent "commercially reasonable" in the circumstances.

7. The provision of subsection (2) that the goods need not be in existence to be resold applies when the buyer is guilty of anticipatory repudiation of a contract for future goods, before the goods or some of them have come into existence. In such a case the seller may exercise the right of resale and fix his damages by "one or more contracts to sell" the quantity of conforming future goods affected by the repudiation. The companion provision of subsection (2) that resale may be made although the goods were not identified to the contract prior to the buyer's breach, likewise contemplates an anticipatory repudiation by the buyer but occurring after the goods are in existence. If the goods so identified conform to the contract, their resale will fix the seller's damages quite as satisfactorily as if they had been identified before the breach.

8. Where the resale is to be by private sale, subsection (3) requires that reasonable notification of the seller's intention to resell must be given to the buyer. The length of notification of a private sale depends upon the urgency of the matter. Notification of the time and place of this type of sale is not required.

Subsection (4)(b) requires that the seller give the buyer reasonable notice of the time and

place of a public resale so that he may have an opportunity to bid or to secure the attendance of other bidders. An exception is made in the case of goods "which are perishable or threaten to decline speedily in value."

9. Since there would be no reasonable prospect of competitive bidding elsewhere, subsection (4) requires that a public resale "must be made at a usual place or market for public sale if one is reasonably available;" i.e., a place or market which prospective bidders may reasonably be expected to attend. Such a market may still be "reasonably available" under this subsection, though at a considerable distance from the place where the goods are located. In such a case the expense of transporting the goods for resale is recoverable from the buyer as part of the seller's incidental damages under subsection (1). However, the question of availability is one of commercial reasonableness in the circumstances and if such "usual" place or market is not reasonably available, a duly advertised public resale may be held at another place if it is one which prospective bidders may reasonably be expected to attend, as distinguished from a place where there is no demand whatsoever for goods of the kind.

Paragraph (a) of subsection (4) qualifies the last sentence of subsection (2) with respect to resales of unidentified and future goods at public sale. If conforming goods are in existence the seller may identify them to the contract after the buyer's breach and then resell them at public sale. If the goods have not been identified, however, he may resell them at public sale only as "future" goods and only where there is a recognized market for public sale of futures in goods of the kind.

The provisions of paragraph (c) of subsection (4) are intended to permit intelligent bidding.

The provision of paragraph (d) of subsection (4) permitting the seller to bid and, if course, to become the purchaser, benefits the original buyer by tending to increase the resale price

and thus decreasing the damages he will have to pay.

10. This Article departs in subsection (5) from the prior uniform statutory provision in permitting a good faith purchaser at resale to take a good title as against the buyer even though the seller fails to comply with the requirements of this section.

11. Under subsection (6), the seller retains profit, if any, without distinction based on whether or not he had a lien since this Article divorces the question of passage of title to the buyer from the seller's right of resale or the consequences of its exercise. On the other hand, where "a person in the position of a seller" or a buyer acting under the section on buyer's remedies, exercises his right of resale under the present section he does so only for the limited purpose of obtaining cash for his "security interest" in the goods. Once that purpose has been accomplished any excess in the resale price belongs to the seller to whom an accounting must be made as provided in the last sentence of subsection (6).

Cross References:

Point 1: Sections 2-610, 2-702 and 2-703.

Point 2: Section 1-201.

Point 3: Sections 2-708 and 2-710.

Point 4: Section 2-328.

Point 8: Section 2-104.

Point 9: Section 2-710.

Point 11: Sections 2-401, 2-707 and 2-711(3).

Definitional Cross References:

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Notification". Section 1-201.

"Person in position of seller". Section 2-707.

"Purchase". Section 1-201.

"Rights". Section 1-201.

"Sale". Section 2-106.

"Security interest". Section 1-201.

"Seller". Section 2-103.

CASE NOTES

ANALYSIS

Mitigation of damages.

Resale profit.

Mitigation of damages.

Where bank disbursed joint venture funds on one signature instead of two as required and joint venturer suffered loss, transfer of investment realty to such joint venturer by other joint venturer, who had diverted the funds, could be said to have been caused by bank's breach of contract, and any profit on immediate resale of

such investment realty would have mitigated damages payable by bank, but profits realized by resale three years later did not. D.C. Code §§ 28:2-706, 28:2-712. *G & R Corp. v. American Sec. & Trust Co.*, 523 F.2d 1164, 1975 U.S. App. LEXIS 11740 (C.A.D.C. 1975).

Resale profit.

Under District of Columbia law, the general rule is that a defaulting buyer is not entitled to recover the profit a seller realizes on a resale. In *re Cooper*, 273 B.R. 297, 2002 Bankr. LEXIS 123 (2002).

§ 28:2-707. “Person in the position of a seller”.

(1) A “person in the position of a seller” includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

(2) A person in the position of a seller may as provided in this article withhold or stop delivery (section 28:2-705) and resell (section 28:2-706) and recover incidental damages (section 28:2-710).

(Dec. 30, 1963, 77 Stat. 666, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-103, 28:2-104, 28:2-706, and 28:5-115.

Prior Codifications. — 1981 Ed., § 28:2-707.
1973 Ed., § 28:2-707.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 52(2), Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To make it clear that:

In addition to following in general the prior uniform statutory provision, the case of a financing agency which has acquired documents by honoring a letter of credit for the buyer or by discounting a draft for the seller has been

included in the term “a person in the position of a seller.”

Cross Reference:

Article 5, Section 2-506.

Definitional Cross References:

“Consignee”. Section 7-102.

“Consignor”. Section 7-102.

“Goods”. Section 2-105.

“Security interest”. Section 1-201.

“Seller”. Section 2-103.

§ 28:2-708. Seller’s damages for non-acceptance or repudiation.

(1) Subject to subsection (2) and to the provisions of this article with respect to proof of market price (section 28:2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this article (section 28:2-710), but less expenses saved in consequence of the buyer’s breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this article (section 28:2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

(Dec. 30, 1963, 77 Stat. 666, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-703 and 28:2-723.

Prior Codifications. — 1981 Ed., § 28:2-708.

1973 Ed., § 28:2-708.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 64, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To make it clear that:

1. The prior uniform statutory provision is followed generally in setting the current market price at the time and place for tender as the standard by which damages for non-acceptance are to be determined. The time and place of tender is determined by reference to the section on manner of tender of delivery, and to the sections on the effect of such terms as FOB, FAS, CIF, C & F, Ex Ship and No Arrival, No Sale.

In the event that there is no evidence available of the current market price at the time and place of tender, proof of a substitute market may be made under the section on determination and proof of market price. Furthermore, the section on the admissibility of market quotations is intended to ease materially the problem of providing competent evidence.

2. The provision of this section permitting recovery of expected profit including reasonable

overhead where the standard measure of damages is inadequate, together with the new requirement that price actions may be sustained only where resale is impractical, are designed to eliminate the unfair and economically wasteful results arising under the older law when fixed price articles were involved. This section permits the recover of lost profits in all appropriate cases, which would include all standard priced goods. The normal measure there would be list price less cost to the dealer or list price less manufacturing cost to the manufacturer. It is not necessary to a recovery of "profit" to show a history of earnings, especially if a new venture is involved.

3. In all cases the seller may recover incidental damages.

Cross References:

Point 1: Sections 2-319 through 2-324, 2-503, 2-723 and 2-724.

Point 2: Section 2-709.

Point 3: Section 2-710.

Definitional Cross References:

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Seller". Section 2-103.

CASE NOTES

Damages.

In a situation where a buyer commits a breach of a contract of sale before completion of seller's performance under the contract, seller must establish at trial both the contract price and market price at time of buyer's breach in order to establish the measure of damages, and

seller is allowed to recover the difference between the contract price and the market price along with any incidental or consequential losses. D.C. Code 1981, § 28:2-708(1). *Fateh v. Rich*, 481 A.2d 464, 1984 D.C. App. LEXIS 458 (1984).

§ 28:2-709. Action for the price.

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price

(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (section

28:2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

(Dec. 30, 1963, 77 Stat. 666, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-703. 1973 Ed., § 28:2-709.

Prior Codifications. — 1981 Ed., § 28:2-709.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 63, Uniform Sales Act.

Changes: Rewritten, important commercially needed changes being incorporated.

Purposes of Changes: To make it clear that:

1. Neither the passing of title to the goods nor the appointment of a day certain for payment is now material to a price action.

2. The action for the price is now generally limited to those cases where resale of the goods is impracticable except where the buyer has accepted the goods or where they have been destroyed after risk of loss has passed to the buyer.

3. This section substitutes an objective test by action for the former "not readily resalable" standard. An action for the price under subsection (1)(b) can be sustained only after a "reasonable effort to resell" the goods "at reasonable price" has actually been made or where the circumstances "reasonably indicate" that such an effort will be unavailing.

4. If a buyer is in default not with respect to the price, but on an obligation to make an advance, the seller should recover not under this section for the price as such, but for the default in the collateral (though coincident) obligation to finance the seller. If the agreement between the parties contemplates that the buyer will acquire, on making the advance, a security interest in the goods, the buyer on making the advance has such an interest as

soon as the seller has rights in the agreed collateral. See Section 9-204.

5. "Goods accepted" by the buyer under subsection (1)(a) include only goods as to which there has been no justified revocation of acceptance, for such a revocation means that there has been a default by the seller which bars his rights under this section. "Goods lost or damaged" are covered by the section on risk of loss. "Goods identified to the contract" under subsection (1)(b) are covered by the section on identification and the section on identification notwithstanding breach.

6. This section is intended to be exhaustive in its enumeration of cases where an action for the price lies.

7. If the action for the price fails, the seller may nonetheless have proved a case entitling him to damages for non-acceptance. In such a situation, subsection (3) permits recovery of those damages in the same action.

Cross References:

Point 4: Section 1-106.

Point 5: Sections 2-501, 2-509, 2-510 and 2-704.

Point 7: Section 2-708.

Definitional Cross References:

"Action". Section 1-201.

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Seller". Section 2-103.

CASE NOTES

In general.

Where buyer, although indicating rejection of goods, refused to return goods because of fear of violence at his warehouse in area of city affected by rioting, fact that seller was at first willing to take back goods and, in effect, cancel contract rather than file an action for the price

did not bar subsequent action for price following buyer's inaction. D.C. Code §§ 28:1-204(3), 28:2-106(4), 28:2-602(1), 28:2-703(f), 28:2-709(1)(A), 28:2-720. *Robinson v. Jonathan Logan Financial*, 277 A.2d 115, 1971 D.C. App. LEXIS 314 (1971).

§ 28:2-710. Seller's incidental damages.

Incidental damages to an aggrieved seller include any commercially reason-

able charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

(Dec. 30, 1963, 77 Stat. 667, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-706, 28:2-707, 28:2-708, and 28:5-115.

Prior Codifications. — 1981 Ed., § 28:2-710.
1973 Ed., § 28:2-710.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: See Sections 64 and 70, Uniform Sales Act.

Purposes: To authorize reimbursement of the seller for expenses reasonably incurred by him as a result of the buyer's breach. The section sets forth the principal normal and necessary additional elements of damage flowing from the breach but intends to allow all

commercially reasonable expenditures made by the seller.

Definitional Cross References:

"Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

CASE NOTES

In general.

Since there was evidence that box seller had actually stored boxes sold to buyer against whom a judgment for purchase price was recovered and had been satisfied after issuance of an attachment against buyer's bank account, court

erred in denying seller's counterclaim for the fair and reasonable cost of storing boxes from the date of judgment for purchase price for such boxes. *Jacobson v. Thrifty Paper Boxes, Inc.*, 230 A.2d 710, 1967 D.C. App. LEXIS 166 (App. 1967).

§ 28:2-711. Buyer's remedies in general; buyer's security interest in rejected goods.

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole of the breach goes to the whole contract (section 28:2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this article (section 28:2-713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this article (section 28:2-502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this article (section 28:2-716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (section 28:2-706).

(Dec. 30, 1963, 77 Stat. 667, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-602, 28:2-603, 28:2-610, and 28:2-706.

Prior Codifications. — 1981 Ed., § 28:2-711.
1973 Ed., § 28:2-711.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: No comparable index section; Subsection (3)—Section 69(5), Uniform Sales Act.

Changes: The prior uniform statutory provision is generally continued and expanded in Subsection (3).

Purposes of Changes and New Matter:

1. To index in this section the buyer's remedies, subsection (1) covering those remedies permitting the recovery of money damages, and subsection (2) covering those which permit reaching the goods themselves. The remedies listed here are those available to a buyer who has not accepted the goods or who has justifiably revoked his acceptance. The remedies available to a buyer with regard to goods finally accepted appear in the section dealing with breach in regard to accepted goods. The buyer's right to proceed as to all goods when the breach is as to only some of the goods is determined by the section on breach in installment contracts and by the section on partial acceptance.

Despite the seller's breach, proper retender of delivery under the section on cure of improper tender or replacement can effectively preclude the buyer's remedies under this section, except for any delay involved.

2. To make it clear is subsection (3) that the buyer may hold and resell rejected goods if he has paid a part of the price or incurred expenses of the type specified. "Paid" as used here includes acceptance of a draft or other time negotiable instrument or the signing of a negotiable note. His freedom of resale is coextensive with that of a seller under this Article except

that the buyer may not keep any profit resulting from the resale and is limited to retaining only the amount of the price paid and the costs involved in the inspection and handling of the goods. The buyer's security interest in the goods is intended to be limited to the items listed in subsection (3), and the buyer is not permitted to retain such funds as he might believe adequate for his damages. The buyer's right to cover, or to have damages for non-delivery, is not impaired by his exercise of his right of resale.

3. It should also be noted that this Act requires its remedies to be liberally administered and provides that any right or obligation which it declares is enforceable by action unless a different effect is specifically prescribed (Section 1-106).

Cross References:

Point 1: Sections 2-508, 2-601(c), 2-608, 2-612 and 2-714.

Point 2: Section 2-706.

Point 3: Section 1-106.

Definitional Cross References:

"Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Cover". Section 2-712.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Receipt" of goods. Section 2-103.

"Remedy". Section 1-201.

"Security interest". Section 1-201.

"Seller". Section 2-103.

§ 28:2-712. "Cover"; buyer's procurement of substitute goods.

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (section 28:2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

(Dec. 30, 1963, 77 Stat. 667, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 28:2-103.

Prior Codifications. — 1981 Ed., § 28:2-712.

1973 Ed., § 28:2-712.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. This section provides the buyer with a remedy aimed at enabling him to obtain the goods he needs thus meeting his essential need. This remedy is the buyer's equivalent of the seller's right to resell.

2. The definition of "cover" under subsection (1) envisages a series of contracts or sales, as well as a single contract or sale;

goods not identical with those involved but commercially usable as reasonable substitutes under the circumstances of the particular case; and contracts on credit or delivery terms differing from the contract in breach, but again reasonable under the circumstances. The test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective.

The requirement that the buyer must cover "without unreasonable delay" is not intended to limit the time necessary for him to look around and decide as to how he may best effect cover. The test here is similar to that generally used in this Article as to reasonable time and seasonable action.

3. Subsection (3) expresses the policy that cover is not a mandatory remedy for the buyer. The buyer is always free to choose between cover and damages for non-delivery under the next section.

However, this subsection must be read in conjunction with the section which limits the recovery of consequential damages to such as could not have been obviated by cover. Moreover, the operation of the section on specific performance of contracts for "unique" goods must be considered in this connection for availability of the goods to the particular buyer for his particular needs is the test for that remedy and inability to cover is made an express condition to the right of the buyer to replevy the goods.

4. This section does not limit cover to merchants, in the first instance. It is the vital and important remedy for the consumer buyer as well. Both are free to use cover: the domestic or non-merchant consumer is required only to act in normal good faith while the merchant buyer must also observe all reasonable commercial standards of fair dealing in the trade, since this falls within the definition of good faith on his part.

Cross References:

Point 1: Section 2-706.

Point 2: Section 1-204.

Point 3: Sections 2-713, 2-715 and 2-716.

Point 4: Section 1-203.

Definitional Cross References:

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Purchase". Section 1-201.

"Remedy". Section 1-201.

"Seller". Section 2-103.

CASE NOTES

ANALYSIS

Consequential damages.

Cover.

Measure of damages.

Third-party beneficiaries.

Consequential damages.

Measure of consequential damages for breach of contract under Uniform Commercial Code does not differ from that developed in pre-UCC case law. D.C. Code §§ 16-3712, 28:2-711, 28:2-713, 28:2-715, 28:2-715(1, 2). Bay Gen. Indus. v. Johnson, 418 A.2d 1050, 1980 D.C. App. LEXIS 349 (1980).

The term "consequential" is generally used to describe what treaties denominate natural or general damages whereas "incidental" damages

refer to other special damages accompanying breach of contract; both "incidental" and "consequential" damages are intended to compensate party for loss incurred by the other's breach. Bay Gen. Indus. v. Johnson, 418 A.2d 1050, 1980 D.C. App. LEXIS 349 (1980).

Cover.

Where a dealer in eggs contracts with a baker to supply him for a year with eggs suitable for use in his business, and fails to do so the purchaser is entitled to go into the open market and purchase eggs at the most reasonable price for which he can obtain them, and charge his vendor with the difference between the price paid and the contract price; and, where the vendor is a nonresident, the purchaser is not required to go beyond the local market for the

purpose. *Armour & Co. v. Gundersheimer*, 23 App.D.C. 210, 1904 U.S. App. LEXIS 5245 (1904).

A party concerned about an apparent unwillingness or inability of another party to proceed with a contract should be able, even prior to a breach, to arrange for appropriate cover; thus, although the covering party, if it imprudently enters into a firm replacement contract, may end up being liable on both contracts if the original contract is not in fact breached, the cover contract is not itself a breach of the original contract. *Mashack v. Superior Mgmt. Servs.*, 806 A.2d 1239, 2002 D.C. App. LEXIS 541 (2002).

Measure of damages.

Under Uniform Commercial Code as adopted in District of Columbia, seller of goods who anticipatorily repudiates entirety of his obligations under requirements contract can be held liable for difference between cost to buyer of substitute goods and contract price. D.C. Code 1981, §§ 28:2-306(1), 28:2-610, 28:2-711, 28:2-712. *Gatolil (U.S.A.) v. Washington Metro. Area Transit Auth.*, 801 F.2d 451, 1986 U.S. App. LEXIS 30683 (C.A.D.C. 1986).

Where cabinet manufacturer breached purchase order agreement by providing government contractor with nonconforming cabinets, and subsequently refused to cure or replace the nonconforming cabinets, government contractor was entitled to damages equal to difference between contract price quoted by manufacturer and cover price of procuring substitute cabinets. Va.Code 1950, §§ 8.2-712, 8.2-714(1). *United States Use of Whitaker's, Inc. v. C.B.C. Enters.*, 820 F. Supp. 242, 1993 U.S. Dist. LEXIS 6207 (1993).

Court awarding damages for subcontractor's breach that required government contractor to enter cover contract inadequately explained effect of different labor costs between cover contract requiring drill and tap method to join carbon steel grates and original contract requiring a less expensive welding method to join stainless steel; the court adjusted the cover contract price to account for the fact that the

original contract called for the fabrication of thirty-eight grates and the cover contract called for the fabrication of fifty grates, awarded the difference between the adjusted cover contract price and the original contract price, but never quantified the added costs of drill and tap and never articulated a view regarding an offset based on the adjustment. *Mashack v. Superior Mgmt. Servs.*, 806 A.2d 1239, 2002 D.C. App. LEXIS 541 (2002).

Where punch press was not delivered to lessees or lessor-financier, where lessees succeeded in replacing punch press between six and eight months after sellers failed to deliver, and where specific performance for replevin was not realistic alternative, lessees were entitled to recover from sellers as damages, under third-party beneficiary theory, difference between cost of cover and contract price together with any incidental or consequential damages but less expenses saved in consequence of sellers' breach. D.C. Code §§ 16-3712, 28:2-711, 28:2-713, 28:2-715, 28:2-715(1, 2). *Bay Gen. Indus. v. Johnson*, 418 A.2d 1050, 1980 D.C. App. LEXIS 349 (1980).

Concrete subcontractor, which sued concrete supplier for breaches of contract and warranty arising from delivery and use of defective concrete, need not bear burden of unanticipated costs that were actually incurred in repairing in-place, defective concrete roof because selected method of repair among apparently equally viable alternatives proved more expensive. D.C. Code § 28:2-712 comment. *Bay Gen. Indus. v. Johnson*, 418 A.2d 1050, 1980 D.C. App. LEXIS 349 (1980).

Third-party beneficiaries.

Lessees, who did not receive punch press after sale from sellers to financier-lessor and who failed to obtain possession of punch press by means of their replevin attempts, were not barred from subsequently proceeding under third-party beneficiary contract theory for damages caused by its continued unlawful detention or, under tort theory, for harm arising from intentional tortious acts of the sellers. *Bay Gen. Indus. v. Johnson*, 418 A.2d 1050, 1980 D.C. App. LEXIS 349 (1980).

§ 28:2-713. Buyer's damages for non-delivery or repudiation.

(1) Subject to the provisions of this article with respect to proof of market price (section 28:2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this article (section 28:2-715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

(Dec. 30, 1963, 77 Stat. 668, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-711 and 28:2-723. 1973 Ed., § 28:2-713.

Prior Codifications. — 1981 Ed., § 28:2-713.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 67(3), Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To clarify the former rule so that:

1. The general baseline adopted in this section uses as a yardstick the market in which the buyer would have obtained cover had he sought that relief. So the place for measuring damages is the place of tender (or the place of arrival if the goods are rejected or their acceptance is revoked after reaching their destination) and the crucial time is the time at which the buyer learns of the breach.

2. The market or current price to be used in comparison with the contract price under this section is the price for goods of the same kind and in the same branch of trade.

3. When the current market price under this section is difficult to prove the section on determination and proof of market price is available to permit a showing of a comparable market price or, where no market price is available, evidence of spot sale prices is proper. Where the unavailability of a market price is caused by a

scarcity of goods of the type involved, a good case is normally made for specific performance under this Article. Such scarcity conditions, moreover, indicate that the price has risen and under the section providing for liberal administration of remedies, opinion evidence as to the value of the goods would be admissible in the absence of a market price and a liberal construction of allowable consequential damages should also result.

4. This section carries forward the standard rule that the buyer must deduct from his damages any expenses saved as a result of the breach.

5. The present section provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered.

Cross References:

Point 3: Sections 1-106, 2-716 and 2-723.

Point 5: Section 2-712.

Definitional Cross References:

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Seller". Section 2-103.

CASE NOTES

In general.

Where punch press was not delivered to lessees or lessor-financer, where lessees succeeded in replacing punch press between six and eight months after sellers failed to deliver, and where specific performance for replevin was not realistic alternative, lessees were entitled to recover from sellers as damages, under

third-party beneficiary theory, difference between cost of cover and contract price together with any incidental or consequential damages but less expenses saved in consequence of sellers' breach. D.C. Code §§ 16-3712, 28:2-711, 28:2-713, 28:2-715, 28:2-715(1, 2). Bay Gen. Indus. v. Johnson, 418 A.2d 1050, 1980 D.C. App. LEXIS 349 (1980).

§ 28:2-714. Buyer's damages for breach in regard to accepted goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of section 28:2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the

value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

(Dec. 30, 1963, 77 Stat. 668, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-714. 1973 Ed., § 28:2-714.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 69(6) and (7), Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes:

1. This section deals with the remedies available to the buyer after the goods have been accepted and the time for revocation of acceptance has gone by. In general this section adopts the rule of the prior uniform statutory provision for measuring damages where there has been a breach of warranty as to goods accepted, but goes further to lay down an explicit provision as to the time and place for determining the loss.

The section on deduction of damages from price provides an additional remedy for a buyer who still owes part of the purchase price, and frequently the two remedies will be available concurrently. The buyer's failure to notify of his claim under the section on effects of acceptance, however, operates to bar his remedies under either that section or the present section.

2. The "non-conformity" referred to in subsection (1) includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract. In the case of such non-conformity, the buyer is permitted to recover for his loss "in any manner which is reasonable."

3. Subsection (2) describes the usual, standard and reasonable method of ascertaining damages in the case of breach of warranty but it is not intended as an exclusive measure. It departs from the measure of damages for non-delivery in utilizing the place of acceptance rather than the place of tender. In some cases the two may coincide, as where the buyer signifies his acceptance upon the tender. If, however, the non-conformity is such as would justify revocation of acceptance, the time and place of acceptance under this section is determined as of the buyer's decision not to revoke.

4. The incidental and consequential damages referred to in subsection (3), which will usually accompany an action brought under this section, are discussed in detail in the comment on the next section.

Cross References:

Point 1: Compare Section 2-711; Sections 2-607 and 2-717.

Point 2: Section 2-106.

Point 3: Sections 2-608 and 2-713.

Point 4: Section 2-715.

Definitional Cross References:

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Goods". Section 1-201.

"Notification". Section 1-201.

"Seller". Section 2-103.

CASE NOTES

ANALYSIS

Contract restrictions on liability and damages.
Economic loss doctrine.

Election to rescind.

Evidence.

Fact questions.

Measure of damages, generally.

Natural and probable consequences of breaches of contract.

Practice and procedure.

Reasonably foreseeable damages.

Contract restrictions on liability and damages.

Under District of Columbia law, first test applied to clause in contract for sale of goods

excluding liability for consequential damages on part of seller is whether clause is unconscionable; if clause is not unconscionable, court's second inquiry in examining damage exclusion clause is whether party has broken its obligation of good faith in performance of contract. D.C. Code 1981, §§ 28:1-203, 28:2-719(3). Potomac Plaza Terraces v. QSC Prods., 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Under District of Columbia law, damage restriction clause in contract was not unconscionable where buyer made no contentions regarding contract's unconscionability. D.C. Code 1981, § 28:2-719(3). Potomac Plaza Terraces v. QSC Prods., 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Under District of Columbia law, clause in contract for sale of roofing materials which limited liability of seller for breach to repairs was agreed upon by commercial parties of relatively equal bargaining strength and was not unconscionable. D.C. Code 1981, § 28:2-719(3). *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Economic loss doctrine.

Under "economic loss doctrine," plaintiff in tort action may not recover damages for loss of value or use of product itself, cost to repair or replace product, or lost profits resulting from loss or use of product regardless of whether claim is based on negligence, strict liability, or both. *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Buyer of polyurethane coatings used for roofing was precluded under economic loss doctrine from recovering in action against seller damages relating specifically to loss of value or use of coatings themselves under either negligence or strict liability claim. *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Election to rescind.

Where a party to an executed contract discovers a material misrepresentation made in the execution of the contract, that party may elect one of two mutually exclusive remedies; he may either affirm the contract and sue for damages, or repudiate the contract and recover that with which he has parted. *Dean v. Garland*, 779 A.2d 911, 2001 D.C. App. LEXIS 189 (2001), writ of certiorari denied by 536 U.S. 924, 122 S. Ct. 2591, 153 L. Ed. 2d 780, 2002 U.S. LEXIS 4497, 70 U.S.L.W. 3774 (2002).

When a seller delivers damaged or defective merchandise or equipment under a contract of sale and upon notification fails or refuses to correct the deficiency, buyer may elect to affirm contract and sue for damages, or he may rescind contract and recover purchase price paid. *Talley v. Campbell Music Co.*, 219 A.2d 852, 1966 D.C. App. LEXIS 182 (App. 1966).

In case of breach of warranty, buyer need not proceed by way of rescission, but may keep merchandise and seek recoupment by way of diminution of the purchase price under the contract. D.C. Code 1961, §§ 28:2-711 to 28:2-725. *Talley v. Campbell Music Co.*, 219 A.2d 852, 1966 D.C. App. LEXIS 182 (App. 1966).

Evidence.

Even though there had been a loss in value of turkey products between time of their purchase by broker from producer and time of their ultimate sale, where broker, in action against producer, did not present evidence as to number of cartons of turkey that were mismarked or number of turkeys that were seasoned, both of

which acts were in breach of contract between broker and producer, and did not present evidence as to extent of decrease in value of turkeys because of rancidity which was not chargeable to producer, broker failed to carry burden of proof on damages. *Rubewa Products Co. v. Watson's Quality Turkey Products, Inc.*, 294 A.2d 378, 1972 D.C. App. LEXIS 244 (1972).

Fact questions.

Fact issue regarding good faith of seller of roofing products in including disclaimer of implied warranty of merchantability, precluding summary judgment for seller in action brought by buyer, was presented where buyer contended that seller issued its warranties without first conducting adequate weather and durability testing of product, without properly training and instructing employee who issued warranty, and without following its own policies for investigating installer's qualifications to install roofing system. D.C. Code 1981, § 28:2-316. *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Fact issue regarding strict liability claim for damages by buyer of polyurethane coating used for roofing against manufacturer of coating precluded summary judgment, notwithstanding fact that clause in contract attempted to hold manufacturer and applicator harmless for any damages resulting from or arising out of leaks or failures of roof. *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Measure of damages, generally.

Where concrete subcontractor's measure of damages against concrete supplier for breaches of contract and warranty arising from delivery and use of defective concrete was not limited to any particular remedy for repair of in-place, defective concrete roof, use of actual costs as measure of damages was proper under applicable statute. D.C. Code § 28:2-714. *District Concrete Co. v. Bernstein Concrete Corp.*, 418 A.2d 1030, 1980 D.C. App. LEXIS 345 (1980).

Standard for recovery for breach of warranty on sale of goods is difference between actual value of article sold and what it would have been worth had it been as warranted plus those damages which were natural consequence and proximate result of the conduct of the party who breached the warranty. D.C. Code § 28:2-714. *Giant Food, Inc. v. Jack I. Bender & Sons*, 399 A.2d 1293, 1979 D.C. App. LEXIS 315 (1979).

Proper basis for measuring damages for breach of warranty in connection with sale of carpeting by retail carpeting distributor to commercial building management companies was cost of replacement carpeting and not cost of original carpeting. D.C. Code § 28:2-714. *Giant*

Food, Inc. v. Jack I. Bender & Sons, 399 A.2d 1293, 1979 D.C. App. LEXIS 315 (1979).

If buyer affirms sale, his recovery is limited to difference in value of goods as delivered and value they would have had if they had met the warranty. D.C. Code 1961, §§ 28:2-711 to 28:2-725. Talley v. Campbell Music Co., 219 A.2d 852, 1966 D.C. App. LEXIS 182 (App. 1966).

Natural and probable consequences of breaches of contract.

Under breach of contract, whether a warranty or otherwise, defendant is liable for those damages which are a natural consequence and proximate result of his conduct. D.C. Code § 28:2-714. Rubewa Products Co. v. Watson's Quality Turkey Products, Inc., 242 A.2d 609, 1968 D.C. App. LEXIS 159 (App. 1968).

Under breach of contract, whether a warranty or otherwise, defendant is liable for those damages which are a natural consequence and proximate result of his conduct. D.C. Code 1961, § 28:2-714(2). Meyers v. Antone, 227 A.2d 56, 1967 D.C. App. LEXIS 134 (App. 1967).

Practice and procedure.

Although, if unauthorized, seller's delivery of air conditioners would constitute breach of con-

tract that would entitle buyers to resulting damages, where issues of notification of breach, breach of contract and damages and setoffs remained to be resolved, judgment on pleadings dismissing counterclaims for damages for alleged breach of contract was improper and recovery by seller would be subject to whatever rights buyers might have against seller for breach of contract. D.C. Code §§ 28:2-714, 28:2-714(1), 28:2-715. Bennings Associates v. Joseph M. Zamoiski Co., 379 A.2d 1171, 1977 D.C. App. LEXIS 276 (1977).

Reasonably foreseeable damages.

In action by concrete subcontractor against concrete supplier for breaches of contract and warranty arising from delivery and use of defective concrete, record supported trial court's finding that damages were reasonably foreseeable, and that subcontractor's actions in selection of composite slab method, rather than tear-out method, to repair in-place, defective concrete roof were reasonable in circumstances. D.C. Code § 28:2-714(1). District Concrete Co. v. Bernstein Concrete Corp., 418 A.2d 1030, 1980 D.C. App. LEXIS 345 (1980).

§ 28:2-715. Buyer's incidental and consequential damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting has reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

(Dec. 30, 1963, 77 Stat. 668, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-712 and 28:2-713.

Prior Codifications. — 1981 Ed., § 28:2-715.

1973 Ed., § 28:2-715.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provisions: Subsection (2)(b)—Sections 69(7) and 70, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes and New Matter:

1. Subsection (1) is intended to provide reimbursement for the buyer who incurs reasonable

expenses in connection with the handling of rightfully rejected goods or goods whose acceptance may be justifiably revoked, or in connection with effecting cover where the breach of the contract lies in non-conformity or non-delivery of the goods. The incidental damages listed are not intended to be exhaustive but are

merely illustrative of the typical kinds of incidental damage.

2. Subsection (2) operates to allow the buyer, in an appropriate case, any consequential damages which are the result of the seller's breach. The "tacit agreement" test for the recovery of consequential damages is rejected. Although the older rule at common law which made the seller liable for all consequential damages of which he had "reason to know" in advance is followed, the liberality of that rule is modified by refusing to permit recovery unless the buyer could not reasonably have prevented the loss by cover or otherwise. Subparagraph (2) carries forward the provisions of the prior uniform statutory provision as to consequential damages resulting from breach of warranty, but modifies the rule by requiring first that the buyer attempt to minimize his damages in good faith, either by cover or otherwise.

3. In the absence of excuse under the section on merchant's excuse by failure of presupposed conditions, the seller is liable for consequential damages in all cases where he had reason to know of the buyer's general or particular requirements at the time of contracting. It is not necessary that there be a conscious acceptance of an insurer's liability on the seller's part, nor is his obligation for consequential damages limited to cases in which he fails to use due effort in good faith.

Particular needs of the buyer must generally be made known to the seller while general needs must rarely be made known to charge the seller with knowledge.

Any seller who does not wish to take the risk

of consequential damages has available the section on contractual limitation of remedy.

4. The burden of proving the extent of loss incurred by way of consequential damage is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.

5. Subsection (2)(b) states the usual rule as to breach of warranty, allowing recovery for injuries "proximately" resulting from the breach. Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of "proximate" cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty.

6. In the case of sale of wares to one in the business of reselling them, resale is one of the requirements of which the seller has reason to know within the meaning of subsection (2)(a).

Cross References:

Point 1: Section 2-608.

Point 3: Sections 1-203, 2-615 and 2-719.

Point 4: Section 1-106.

Definitional Cross References:

"Cover". Section 2-712.

"Goods". Section 1-201.

"Person". Section 1-201.

"Receipt" of goods. Section 2-103.

"Seller". Section 2-103.

CASE NOTES

ANALYSIS

Actions precluding recovery.

Consequential damages.

Delay damages.

Measure of damages.

Actions precluding recovery.

In view of fact that true strength of concrete would not be revealed until after 28-day curing period had elapsed, buyer's use of concrete originating at seller's plant even though tests performed at jobsite indicated that concrete contained air in excess of normal bounds did not constitute negligent or malicious act on part of buyer so as to absolve seller from breach of warranty. D.C. Code §§ 28:2-313 to 28:2-315, 28:2-714, 28:2-715. *Bevard v. Howat Concrete Co.*, 433 F.2d 1202, 1970 U.S. App. LEXIS 8259 (C.A.D.C. 1970).

Consequential damages.

Where manufacturer seller had continuously exerted its best efforts to correct problem which

caused turbine generator to suffer from excessive heat rate, and where turbine generator was still operative and where increased fuel costs due to heat rate were not excessive, damages for increased heat costs were consequential and not recoverable from manufacturer seller where warranty provision of sales contract specifically limited liability to replacement of parts. D.C. Code §§ 28:2-715, 28:2-719(2). *Potomac Electric Power Co. v. Westinghouse Electric Corp.*, 385 F. Supp. 572, 1974 U.S. Dist. LEXIS 11937 (1974), reversed without opinion at 527 F.2d 853, 174 U.S. App. D.C. 70, 1975 U.S. App. LEXIS 16789 (1975).

Delay damages.

In action by concrete subcontractor against concrete supplier for breaches of contract and warranty arising from delivery and use of defective concrete, no error occurred in including "delay" damages, field overhead, even though project itself was completed on schedule, where there was no question that defect caused delay

and that expenses resulting from need to keep facilities and personnel on site for extended period of time were incurred as result, subcontractor's calculations of cost of this delay were sufficiently detailed to support award, and these expenses were within ambit of Uniform Commercial Code section governing incidental damages. D.C. Code § 28:2-715(1). *District Concrete Co. v. Bernstein Concrete Corp.*, 418 A.2d 1030, 1980 D.C. App. LEXIS 345 (1980).

Measure of damages.

Measure of consequential damages for breach of contract under Uniform Commercial Code does not differ from that developed in pre-UCC case law. D.C. Code §§ 16-3712, 28:2-711, 28:2-713, 28:2-715, 28:2-715(1, 2). *Bay*

Gen. Indus. v. Johnson, 418 A.2d 1050, 1980 D.C. App. LEXIS 349 (1980).

Where punch press was not delivered to lessees or lessor-financer, where lessees succeeded in replacing punch press between six and eight months after sellers failed to deliver, and where specific performance for replevin was not realistic alternative, lessees were entitled to recover from sellers as damages, under third-party beneficiary theory, difference between cost of cover and contract price together with any incidental or consequential damages but less expenses saved in consequence of sellers' breach. D.C. Code §§ 16-3712, 28:2-711, 28:2-713, 28:2-715, 28:2-715(1, 2). *Bay Gen. Indus. v. Johnson*, 418 A.2d 1050, 1980 D.C. App. LEXIS 349 (1980).

§ 28:2-716. Buyer's right to specific performance or replevin.

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered. In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

(Dec. 30, 1963, 77 Stat. 668, Pub. L. 88-243, § 1; Oct. 26, 2000, D.C. Law 13-201, § 201(c)(5), 47 DCR 7576.)

Section references. — This section is referred to in §§ 28:2-402 and 28:2-711.

Prior Codifications. — 1981 Ed., § 28:2-716.

1973 Ed., § 28:2-716.

Effect of amendments. — D.C. Law 13-

201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:2-103.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: Section 68, Uniform Sales Act.

Changes: Rephrased.

Purposes of Changes: To make it clear that:

1. The present section continues in general prior policy as to specific performance and injunction against breach. However, without intending to impair in any way the exercise of the

court's sound discretion in the matter, this Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.

2. In view of this Article's emphasis on the commercial feasibility of replacement, a new concept of what are "unique" goods is introduced under this section. Specific performance

is no longer limited to goods which are already specific or ascertained at the time of contracting. The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases. However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted "in other proper circumstances" and inability to cover is strong evidence of "other proper circumstances".

3. The legal remedy of replevin is given to the buyer in cases in which cover is reasonably unavailable and goods have been identified to the contract. This is in addition to the buyer's right to recover identified goods under Section 2-502. For consumer goods, the buyer's right to replevin vests upon the buyer's acquisition of a special property, which occurs upon identification of the goods to the contract. See Section 2-501. Inasmuch as a secured party normally acquires no greater rights in its collateral than

its debtor had or had power to convey, see Section 2-403(1) (first sentence), a buyer who acquires a right to replevin under subsection (3) will take free of a security interest created by the seller if it attaches to the goods after the goods have been identified to the contract. The buyer will take free, even if the buyer does not buy in ordinary course and even if the security interest is perfected. Of course, to the extent that the buyer pays the price after the security interest attaches, the payments will constitute proceeds of the security interest.

4. This section is intended to give the buyer rights to the goods comparable to the seller's rights to the price.

5. If a negotiable document of title is outstanding, the buyer's right of replevin relates of course to the document not directly to the goods. See Article 7, especially Section 7-602.

Cross References:

Point 3: Section 2-502.

Point 4: Section 2-709.

Point 5: Article 7.

Definitional Cross References:

"Buyer". Section 2-103.

"Goods". Section 1-201.

"Rights." Section 1-201.

§ 28:2-717. Deduction of damages from the price.

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

(Dec. 30, 1963, 77 Stat. 668, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-717. 1973 Ed., § 28:2-717.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: See Section 69(1)(a), Uniform Sales Act.

Purposes:

1. This section permits the buyer to deduct from the price damages resulting from any breach by the seller and does not limit the relief to cases of breach of warranty as did the prior uniform statutory provision. To bring this provision into application the breach involved must be of the same contract under which the price in question is claimed to have been earned.

2. The buyer, however, must give notice of his

intention to withhold all or part of the price if he wishes to avoid a default within the meaning of the section on insecurity and right to assurances. In conformity with the general policies of this Article, no formality of notice is required and any language which reasonably indicates the buyer's reason for holding up his payment is sufficient.

Cross Reference:

Point 2: Section 2-609.

Definitional Cross References:

"Buyer". Section 2-103.

"Notifies". Section 1-201.

CASE NOTES

Prejudgment interest.

In action by concrete subcontractor against concrete supplier for breaches of contract arising

from delivery and use of defective concrete, supplier was not entitled to prejudgment interest on its counterclaim of payment for concrete

delivered, where contract itself authorized subcontractor to deduct amount of any claim from payment to supplier, and even absent such clause, certain statute authorized subcontractor's actions, and implicit in trial judge's finding for subcontractor was conclusion that subcontractor was not in breach of contract for

withholding payment, so that value of supplied concrete was not liquidated debt "due and payable" until contract litigation was concluded. D.C. Code §§ 15-108, 28:2-717. *District Concrete Co. v. Bernstein Concrete Corp.*, 418 A.2d 1030, 1980 D.C. App. LEXIS 345 (1980).

§ 28:2-718. Liquidation or limitation of damages; deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty percent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this article on resale by an aggrieved seller (section 28:2-706).

(Dec. 30, 1963, 77 Stat. 669, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-316 and 28:2-601.

1973 Ed., § 28:2-718.

Prior Codifications. — 1981 Ed., § 28:2-718.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes:

1. Under subsection (1) liquidated damage clauses are allowed where the amount involved is reasonable in the light of the circumstances of the case. The subsection sets forth explicitly the elements to be considered in determining the reasonableness of a liquidated damage clause. A term fixing unreasonably large liqui-

dated damages is expressly made void as a penalty. An unreasonably small amount would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses.

2. Subsection (2) refuses to recognize a forfeiture unless the amount of the payment so forfeited represents a reasonable liquidation of damages as determined under subsection (1). A special exception is made in the case of small

amounts (20% of the price or \$500, whichever is smaller) deposited as security. No distinction is made between cases in which the payment is to be applied on the price and those in which it is intended as security for performance. Subsection (2) is applicable to any deposit or down or part payment. In the case of a deposit or turn in of goods resold before the breach, the amount actually received on the resale is to be viewed as the deposit rather than the amount allowed the buyer for the trade in. However, if the seller knows of the breach prior to the resale of the goods turned in, he must make reasonable efforts to realize their true value, and this is assured by requiring him to comply with the

conditions laid down in the section on resale by an aggrieved seller.

Cross References:

Point 1: Section 2-302.

Point 2: Section 2-706.

Definitional Cross References:

"Aggrieved party". Section 1-201.

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Notice". Section 1-201.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Seller". Section 2-103.

"Term". Section 1-201.

CASE NOTES

Consequential damages.

Where manufacturer seller had continuously exerted its best efforts to correct problem which caused turbine generator to suffer from excessive heat rate, and where turbine generator was still operative and where increased fuel costs due to heat rate were not excessive, damages for increased heat costs were consequential and not recoverable from manufacturer

seller where warranty provision of sales contract specifically limited liability to replacement of parts. D.C. Code §§ 28:2-715, 28:2-719(2). *Potomac Electric Power Co. v. Westinghouse Electric Corp.*, 385 F. Supp. 572, 1974 U.S. Dist. LEXIS 11937 (1974), reversed without opinion at 527 F.2d 853, 174 U.S. App. D.C. 70, 1975 U.S. App. LEXIS 16789 (1975).

§ 28:2-719. Contractual modification or limitation of remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this subtitle.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

(Dec. 30, 1963, 77 Stat. 669, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-316 and 28:2-601.

Prior Codifications. — 1981 Ed., § 28:2-719.

1973 Ed., § 28:2-719.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision:
None.

Purposes:

1. Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.

However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.

2. Subsection (1)(b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed.

3. Subsection (3) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316.

Cross References:

Point 1: Section 2-302.

Point 3: Section 2-316.

Definitional Cross References:

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Seller". Section 2-103.

CASE NOTES

ANALYSIS

Limitation of liability provisions.

Limitation of remedy provisions.

Limitation of liability provisions.

Fact issue was presented as to whether seller of roofing materials had broken its obligation of good faith and would be unable to claim benefit of clause in contract limiting its liability for damages which was not unconscionable, precluding summary judgment in action by buyer, where buyer contended that seller acted in bad faith in its proposals to repair roof coatings pursuant to exclusive remedy in contract by seeking to repair by applying another layer of coating in violation of its own product specifications and by never testing whether second application of coating would properly adhere to existing layer of same coating. D.C. Code 1981, §§ 28:1-203, 28:2-719(3). *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Under District of Columbia law, first test applied to clause in contract for sale of goods excluding liability for consequential damages on part of seller is whether clause is unconscionable; if clause is not unconscionable, court's second inquiry in examining damage exclusion clause is whether party has broken its obligation of good faith in performance of contract. D.C. Code 1981, §§ 28:1-203, 28:2-719(3). *Poto-*

mac Plaza Terraces v. QSC Prods., 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Warranty and limitation of liability clauses which restrict buyer's remedies to repair and replacement of nonconforming parts and limit manufacturer seller's liability regardless of its negligence in causing such nonconformities are valid and enforceable. D.C. Code §§ 28:2-316(4), 28:2-719(1)(a), (3). *Potomac Electric Power Co. v. Westinghouse Electric Corp.*, 385 F. Supp. 572, 1974 U.S. Dist. LEXIS 11937 (1974), reversed without opinion at 527 F.2d 853, 174 U.S. App. D.C. 70, 1975 U.S. App. LEXIS 16789 (1975).

Limitation of remedy provisions.

Fact issue regarding whether exclusive remedy provided in contract for sale of roofing materials failed its essential purpose, precluding summary judgment for seller, was presented by buyer's contention that seller's proposal under remedy provision to "power wash" failed foam roofing system and reapply additional layer of coating would not only fail to repair leaks in roof but would compound present damage. D.C. Code 1981, § 28:2-719. *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Seller who acted in bad faith may not claim benefit of limitation of remedy contained in contract for sale of goods that by itself would be

valid. D.C. Code 1981, §§ 28:1-203, 28:2-719(3). *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Under District of Columbia law, parties to contract for sale of goods may limit remedies available for breach of contract as long as prescribed remedy is exclusive and does not fail of its essential purpose. D.C. Code 1981, § 28:2-719. *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Under District of Columbia law, specification in contractual clause providing that buyer "agrees to accept repair referred to herein as [its] exclusive remedy and as the limit" of seller's liability fulfilled requirement that remedy provided for in contract by parties is intended to be exclusive. D.C. Code 1981, § 28:2-719. *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

In determining whether exclusive remedy provided for in contract fulfills its essential purpose, courts look to violating party's compliance with already limited contractual remedy. D.C. Code 1981, § 28:2-719. *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Under District of Columbia law, when exclusive remedy in contract for sale of goods is

found to fail its essential purpose, parties are then free to seek any other remedies available under sales subtitle of Uniform Commercial Code. D.C. Code 1981, § 28:2-719(2). *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Examination of exclusive remedy's ability to fulfill its essential purpose, as well as analysis of violating party's compliance with limited remedy, presents question of fact. D.C. Code 1981, § 28:2-719. *Potomac Plaza Terraces v. QSC Prods.*, 868 F. Supp. 346, 1994 U.S. Dist. LEXIS 16973 (1994).

Fact that specifications for project, which were incorporated by reference into concrete subcontractor's requirements contract with concrete supplier, provided for use of tear-out remedy to repair in-place, defective concrete roof did not mean that supplier was entitled to rely on tear-out remedy as only remedy contemplated by parties, where applicable statute provides that even if remedy is specified in contract, it is optional unless agreement expressly makes it exclusive, and nowhere in contract did there appear designation of tear-out as exclusive remedy. D.C. Code § 28:2-719(1). *District Concrete Co. v. Bernstein Concrete Corp.*, 418 A.2d 1030, 1980 D.C. App. LEXIS 345 (1980).

§ 28:2-720. Effect of "cancellation" or "rescission" on claims for antecedent breach.

Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

(Dec. 30, 1963, 77 Stat. 669, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-720. 1973 Ed., § 28:2-720.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None. Purpose:

This section is designed to safeguard a person holding a right of action from any unintentional loss of rights by the ill-advised use of such terms as "cancellation", "rescission", or the like. Once a party's rights have accrued they are not to be lightly impaired by concessions made in business decency and without intention to forego them. Therefore, unless the

cancellation of a contract expressly declares that it is "without reservation of rights", or the like, it cannot be considered to be a renunciation under this section.

Cross Reference:
Section 1-107.

Definitional Cross References:
"Cancellation". Section 2-106.
"Contract". Section 1-201.

CASE NOTES

In general.

Where buyer, although indicating rejection of

goods, refused to return goods because of fear of violence at his warehouse in area of city af-

fectured by rioting, fact that seller was at first willing to take back goods and, in effect, cancel contract rather than file an action for the price did not bar subsequent action for price following buyer's inaction. D.C. Code §§ 28:1-204(3),

28:2-106(4), 28:2-602(1), 28:2-703(f), 28:2-709(1)(A), 28:2-720. *Robinson v. Jonathan Logan Financial*, 277 A.2d 115, 1971 D.C. App. LEXIS 314 (1971).

§ 28:2-721. Remedies for fraud.

Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

(Dec. 30, 1963, 77 Stat. 670, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-721. 1973 Ed., § 28:2-721.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes: To correct the situation by which remedies for fraud have been more circumscribed than the more modern and mercantile remedies for breach of warranty. Thus the remedies for fraud are extended by this section to coincide in scope with those for non-fraudulent breach. This section thus makes it clear that

neither rescission of the contract for fraud nor rejection of the goods bars other remedies unless the circumstances of the case make the remedies incompatible.

Definitional Cross References:

"Contract for sale". Section 2-106.

"Goods". Section 1-201.

"Remedy", Section 1-201.

§ 28:2-722. Who can sue third parties for injury to goods.

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract

(a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

(b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;

(c) either party may with the consent of the other sue for the benefit of whom it may concern.

(Dec. 30, 1963, 77 Stat. 670, Pub. L. 88-243, § 1.)

Prior Codifications. — 1981 Ed., § 28:2-722. 1973 Ed., § 28:2-722.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes: To adopt and extend somewhat the principle of the statutes which provide for suit by the real party in interest. The provisions of this section apply only after identification of the goods. Prior to that time only the seller has a right of action.

During the period between identification and final acceptance (except in the case of revocation of acceptance) it is possible for both parties to have the right of action. Even after final

acceptance both parties may have the right of action if the seller retains possession or otherwise retains an interest.

Definitional Cross References:

"Action". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

CASE NOTES

Joint tortfeasors.

There is a right of equal contribution among joint tortfeasors. *M. Pierre Equip. Co. v. Griffith Consumers Co.*, 831 A.2d 1036, 2003 D.C. App. LEXIS 559 (2003).

A settling tortfeasor who brings a contribution action against a non-settling tortfeasor has the burden of establishing the liability of the non-settling tortfeasor and the reasonableness of settlement with injured persons. *M. Pierre Equip. Co. v. Griffith Consumers Co.*, 831 A.2d 1036, 2003 D.C. App. LEXIS 559 (2003).

Whether nonsettling contractor was negligent in process of converting home heating system from oil to natural gas, and whether any such negligence proximately caused basement oil spill that occurred when settling tortfeasor mistakenly delivered oil to that

home, were jury questions in settling tortfeasor's contribution action in view of evidence that contractor did not obtain required regulatory licenses, permits, and inspections, that it failed to cap, disable, or remove pipes through which oil had been pumped into home, and that homeowners were not contributorily negligent. *M. Pierre Equip. Co. v. Griffith Consumers Co.*, 831 A.2d 1036, 2003 D.C. App. LEXIS 559 (2003).

Where plaintiff originally sued 3 alleged tortfeasors but later entered into a consent judgment with one, the remaining defendants are entitled to have that settlement credited against their joint liability as a "Snowden credit." *Johnson v. Conrail-Amtrak Fed. Credit Union*, 111 WLR 2297 (Super. Ct. 1983).

§ 28:2-723. Proof of market price: time and place.

(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (section 28:2-708 or section 28:2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

(2) If evidence of a price prevailing at the times or places described in this article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at a time or place other than the one described in this article offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

(Dec. 30, 1963, 77 Stat. 670, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in §§ 28:2-708 and 28:2-713.

Prior Codifications. — 1981 Ed., § 28:2-723.

1973 Ed., § 28:2-723.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes: To eliminate the most obvious difficulties arising in connection with the determination of market price, when that is stipulated as a measure of damages by some provision of this Article. Where the appropriate market price is not readily available the court is here granted reasonable leeway in receiving evidence of prices current in other comparable markets or at other times comparable to the one in question. In accordance with the general principle of this Article against surprise, however, a party intending to offer evidence of such a substitute price must give suitable notice to the other party.

This section is not intended to exclude the use of any other reasonable method of determining market price or of measuring damages if the circumstances of the case make this necessary.

Definitional Cross References:

"Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Usage of trade". Section 1-205.

§ 28:2-724. Admissibility of market quotations.

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

(Dec. 30, 1963, 77 Stat. 670, Pub. L. 88-243, § 1; Apr. 9, 1997, D.C. Law 11-255, § 27(oo), 44 DCR 1271.)

Prior Codifications. — 1981 Ed., § 28:2-724.

1973 Ed., § 28:2-724.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to

the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision: None.

Purposes: To make market quotations admissible in evidence while providing for a challenge of the material by showing the circumstances of its preparation.

No explicit provision as to the weight to be given to market quotations is contained in this section, but such quotations, in the absence of compelling challenge, offer an adequate basis for a verdict.

Market quotations are made admissible when the price or value of goods traded "in any

established market" is in issue. The reason of the section does not require that the market be closely organized in the manner of a produce exchange. It is sufficient if transactions in the commodity are frequent and open enough to make a market established by usage in which one price can be expected to affect another and in which an informed report of the range and trend of prices can be assumed to be reasonably accurate.

This section does not in any way intend to limit or negate the application of similar rules of admissibility to other material, whether by

action of the courts or by statute. The purpose of the present section is to assure a minimum of mercantile administration in this important situation and not to limit any liberalizing trend in modern law.

Definitional Cross Reference:
"Goods". Section 2-105.

§ 28:2-725. Statute of limitations in contracts for sale.

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this subtitle becomes effective.

(Dec. 30, 1963, 77 Stat. 670, Pub. L. 88-243, § 1.)

Section references. — This section is referred to in § 12-301.

1973 Ed., § 28:2-725.

Prior Codifications. — 1981 Ed., § 28:2-725.

UNIFORM COMMERCIAL CODE COMMENT

Prior Uniform Statutory Provision:
None.

Purposes: To introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred. This Article takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern business practice. This is within the normal commercial record keeping period.

Subsection (1) permits the parties to reduce the period of limitation. The minimum period is set at one year. The parties may not, however, extend the statutory period.

Subsection (2), providing that the cause of action accrues when the breach occurs, states an exception where the warranty extends to future performance.

Subsection (3) states the saving provision included in many state statutes and permits an additional short period for bringing new actions, where suits begun within the four year period have been terminated so as to leave a remedy still available for the same breach.

Subsection (4) makes it clear that this Article does not purport to alter or modify in any

respect the law on tolling of the Statute-of Limitations as it now prevails in the various jurisdictions.

Definitional Cross References:

"Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Agreement". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Term". Section 1-201.

"Termination". Section 2-106.

CASE NOTES

ANALYSIS

Choice of law.

Commencement of limitations period, generally.

Counterclaims.

Date that breach occurs.

Discovery rule.

Fraudulent concealment.

In general.

Choice of law.

District court for the District of Columbia was required to apply District of Columbia statute of limitations, in diversity case in which plaintiffs asserted breach of warranty claim arising from allegedly defective forklift. U.C.C. § 2-725; D.C. Code 1981, § 28:2-725; Md.Code, Commercial Law § 2-725. *Hull v. Eaton Corp.*, 825 F.2d 448, 1987 U.S. App. LEXIS 10361 (C.A.D.C. 1987).

Commencement of limitations period, generally.

Cause of action for patient's implied warranty claims against manufacturer of prosthetic hip accrued, and statute of limitations began to run under District of Columbia law, when patient underwent hip surgery, rather than when patient learned of defect in prosthetic hip. *Hunt v. DePuy Orthopaedics, Inc.*, 636 F.Supp.2d 23, 2009 U.S. Dist. LEXIS 61644 (2009).

Parking garage patron's claims alleging manufacturer of vehicle that rolled down parking ramp breached express and implied warranties accrued, for purposes of four-year statute of limitations, when vehicle was purchased. *Lee v. Wolfson*, 265 F.Supp.2d 14, 2003 U.S. Dist. LEXIS 4013 (2003).

Statute of limitations in action for breach of contract, including breach of warranty, runs from time of breach or completion of contract. D.C. Code §§ 12-301, 28:2-725(1, 2, 4). *Sears, Roebuck & Co. v. Goudie*, 290 A.2d 826, 1972 D.C. App. LEXIS 382 (1972), writ of certiorari denied by 409 U.S. 1049, 93 S. Ct. 523, 34 L. Ed. 2d 501, 1972 U.S. LEXIS 514 (1972).

Counterclaims.

To extent that amended, reinstated counterclaim stated cause of action which was for first time being asserted, it could not relate back for

limitation purposes. D.C. Code §§ 12-301, 28:2-725(1, 2, 4); D.C. Code SCR, Civil Rule 15(c). *Sears, Roebuck & Co. v. Goudie*, 290 A.2d 826, 1972 D.C. App. LEXIS 382 (1972), writ of certiorari denied by 409 U.S. 1049, 93 S. Ct. 523, 34 L. Ed. 2d 501, 1972 U.S. LEXIS 514 (1972).

Where, in actions for amount due on contract, amended, reinstated counterclaim stated in part a cause of action which could not relate back and was barred by limitation, but claim was also asserted as matter of defense, trial court's findings in favor of counterclaimant were sustained and by operation of law were treated as defeating amount allegedly due and owing on account. D.C. Code §§ 12-301, 28:2-725(1, 2, 4); D.C. Code SCR, Civil Rule 15(c). *Sears, Roebuck & Co. v. Goudie*, 290 A.2d 826, 1972 D.C. App. LEXIS 382 (1972), writ of certiorari denied by 409 U.S. 1049, 93 S. Ct. 523, 34 L. Ed. 2d 501, 1972 U.S. LEXIS 514 (1972).

Where claim of breach of contract was asserted both as matter of defense, i.e., recoupment and as affirmative cause of action on counterclaim it was to be tested by statute of limitations to extent that it went beyond matters of defense. D.C. Code §§ 12-301, 28:2-725(1, 2, 4); D.C. Code SCR, Civil Rule 15(c). *Sears, Roebuck & Co. v. Goudie*, 290 A.2d 826, 1972 D.C. App. LEXIS 382 (1972), writ of certiorari denied by 409 U.S. 1049, 93 S. Ct. 523, 34 L. Ed. 2d 501, 1972 U.S. LEXIS 514 (1972).

Whether defendant whose counterclaim had been dismissed was reasserting same claim and whether she had been diligently pursuing her cause of action were matters which in trial court's discretion could be considered in allowing reinstatement of counterclaim. D.C. Code SCR, Civil Rule 15(c); D.C. Code §§ 12-301, 28:2-725(1, 2, 4). *Sears, Roebuck & Co. v. Goudie*, 290 A.2d 826, 1972 D.C. App. LEXIS 382 (1972), writ of certiorari denied by 409 U.S. 1049, 93 S. Ct. 523, 34 L. Ed. 2d 501, 1972 U.S. LEXIS 514 (1972).

Date that breach occurs.

Under District of Columbia code provision that cause of action for breach of contract accrues when breach occurs, regardless of aggrieved party's lack of knowledge, discovery

rule is not applicable to breach of warranty claim. D.C. Code 1981, § 28:2-725. *Hull v. Eaton Corp.*, 825 F.2d 448, 1987 U.S. App. LEXIS 10361 (C.A.D.C. 1987).

Provision of Uniform Commercial Code, providing that date of breach occurs when tender of delivery is made absent explicit warranties regarding future performance of the goods, applies only when warranty explicitly extends to future performance and does not apply to implied warranties. D.C. Code 1981, § 28:2-725(2). *Britt v. Schindler Elevator Corp.*, 637 F. Supp. 734, 1986 U.S. Dist. LEXIS 24307 (1986).

Discovery rule.

Discovery rule did not apply to District of Columbia statute of limitations governing breach of warranty products liability claims arising under Uniform Commercial Code. D.C. Code 1981, § 28:2-725(1, 2). *Long v. Sears Roebuck & Co.*, 877 F. Supp. 8, 1995 U.S. Dist. LEXIS 2197 (1995).

Fraudulent concealment.

Under doctrine of fraudulent concealment, time to bring action does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, basis of lawsuit. *Walsh v. Ford Motor Co.*, 616 F. Supp. 1170, 1985 U.S. Dist. LEXIS 17275 (1985).

Vehicle owners who did not experience any park-to-reverse incidents until after announcement of National Highway Traffic and Safety Administration investigation of vehicles were not guilty of lack of due diligence; thus, under doctrine of fraudulent concealment, claims against manufacturer brought by owners who bought vehicles more than four years before bringing of action but who did not experience any incidents until after announcement of investigation were not barred by limitations. U.C.C. § 2-725. *Walsh v. Ford Motor Co.*, 616 F. Supp. 1170, 1985 U.S. Dist. LEXIS 17275 (1985).

In general.

Manufacturer of a motor coach engine did not waive a limitations defense to a claim that it breached an implied warranty, even though the manufacturer withdrew the defense in an in-

terrogatory response; the withdrawal was submitted in error, the manufacturer filed an amended response once it recognized the error, and the plaintiff was not prejudiced by the erroneous response, which was submitted only four days before the close of discovery. *Capital Motor Lines v. Detroit Diesel Corp.*, 799 F.Supp.2d 11, 2011 U.S. Dist. LEXIS 83060 (2011).

Under District of Columbia law, contract between provider of components used in electronic train control system and Washington Metropolitan Area Transit Authority (WMATA) did not include express warranty of future performance under Uniform Commercial Code (UCC); none of relevant statements in agreement qualified as anything more than description of product's condition at time of delivery, and none of statements designated defined future period of time during which alleged warranty would apply. *Jenkins v. Wash. Metro. Area Transit Auth.* (In re Fort Totten Metrorail Cases), 793 F.Supp.2d 133, 2011 U.S. Dist. LEXIS 68913 (2009).

Elevator passenger's claims for breach of express and implied warranties, based on injuries she sustained in 1983 when elevator car allegedly dropped several inches as she was entering car with wheelchair, were barred by four-year limitations period of Uniform Commercial Code against contractor whose predecessor in interest "modernized" the car in 1959, in that contractor had no contact with car after its modernization in 1959, and there were no explicit or implied warranties made at time of modernization. D.C. Code 1981, § 28:2-725(2). *Britt v. Schindler Elevator Corp.*, 637 F. Supp. 734, 1986 U.S. Dist. LEXIS 24307 (1986).

Residual three-year statutory limitations period, for claims not otherwise specifically prescribed, rather than four-year limitations provision for breach of a sales contract under Uniform Commercial Code (UCC), applied to consumer's class action against cable company for unreasonably high late penalties, brought pursuant to Consumer Protection Procedures Act (CPPA). *Dist. Cablevision Ltd. P'shp v. Bassin*, 828 A.2d 714, 2003 D.C. App. LEXIS 471 (2003).

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*Part 1. General Provisions.***§ 28:2A-101. Short title.**

This article shall be known and may be cited as the Uniform Commercial Code—Leases.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-101.

Legislative history of Law 9-128. — Law 9-128, the "Uniform Commercial Code, Leases, Act of 1992," was introduced in Council and assigned Bill No. 9-19, which was referred to the Committee on Consumer and Regulatory

Affairs. The Bill was adopted on first and second readings on April 7, 1992, and May 6, 1992, respectively. Signed by the Mayor on May 28, 1992, it was assigned Act No. 9-212 and transmitted to both Houses of Congress for its review. D.C. Law 9-128 became effective on July 22, 1992.

UNIFORM COMMERCIAL CODE COMMENT**Rationale for Codification:**

There are several reasons for codifying the law with respect to leases of goods. An analysis of the case law as it applies to leases of goods suggests at least three significant issues to be resolved by codification. First, what is a lease? It is necessary to define lease to determine whether a transaction creates a lease or a security interest disguised as a lease. If the transaction creates a security interest disguised as a lease, the lessor will be required to file a financing statement or take other action to perfect its interest in the goods against third parties. There is no such requirement with respect to leases. Yet the distinction between a lease and a security interest disguised as a lease is not clear. Second, will the lessor be deemed to have made warranties to the lessee? If the transaction is a sale the express and implied warranties of Article 2 of the Uniform Commercial Code apply. However, the war-

ranty law with respect to leases is uncertain. Third, what remedies are available to the lessor upon the lessee's default? If the transaction is a security interest disguised as a lease, the answer is stated in Part 5 of the Article on Secured Transactions (Article 9). There is no clear answer with respect to leases.

There are reasons to codify the law with respect to leases of goods in addition to those suggested by a review of the reported cases. The answer to this important question should not be limited to the issues raised in these cases. Is it not also proper to determine the remedies available to the lessee upon the lessor's default? It is, but that issue is not reached through a review of the reported cases. This is only one of the many issues presented in structuring, negotiating and documenting a lease of goods.

Statutory Analogue:

After it was decided to proceed with the

codification project, the drafting committee of the National Conference of Commissioners on Uniform State Laws looked for a statutory analogue, gradually narrowing the focus to the Article on Sales (Article 2) and the Article on Secured Transactions (Article 9). A review of the literature with respect to the sale of goods reveals that Article 2 is predicated upon certain assumptions: Parties to the sales transaction frequently are without counsel; the agreement of the parties often is oral or evidenced by scant writings; obligations between the parties are bilateral; applicable law is influenced by the need to preserve freedom of contract. A review of the literature with respect to personal property security law reveals that Article 9 is predicated upon very different assumptions: Parties to a secured transaction regularly are represented by counsel; the agreement of the parties frequently is reduced to a writing, extensive in scope; the obligations between the parties are essentially unilateral; and applicable law seriously limits freedom of contract.

The lease is closer in spirit and form to the sale of goods than to the creation of a security interest. While parties to a lease are sometimes represented by counsel and their agreement is often reduced to a writing, the obligations of the parties are bilateral and the common law of leasing is dominated by the need to preserve freedom of contract. Thus the drafting committee concluded that Article 2 was the appropriate statutory analogue.

Issues:

The drafting committee then identified and resolved several issues critical to codification:

Scope: The scope of the Article was limited to leases (Section 2A-102). There was no need to include leases intended as security, i.e., security interests disguised as leases, as they are adequately treated in Article 9. Further, even if leases intended as security were included, the need to preserve the distinction would remain, as policy suggests treatment significantly different from that accorded leases.

Definition of Lease: Lease was defined to exclude leases intended as security (Section 2A-103(1)(j)). Given the litigation to date a revised definition of security interest was suggested for inclusion in the Act. (Section 1-201(37)). This revision sharpens the distinction between leases and security interests disguised as leases.

Filing: The lessor was not required to file a financing statement against the lessee or take any other action to protect the lessor's interest in the goods (Section 2A-301). The refined definition of security interest will more clearly signal the need to file to potential lessors of goods. Those lessors who are concerned will file a protective financing statement (Section 9-408).

Warranties: All of the express and implied warranties of the Article on Sales (Article 2) were included (Sections 2A-210 through 2A-216), revised to reflect differences in lease transactions. The lease of goods is sufficiently similar to the sale of goods to justify this decision. Further, many courts have reached the same decision.

Certificate of Title Laws: Many leasing transactions involve goods subject to certificate of title statutes. To avoid conflict with those statutes, this Article is subject to them (Section 2A-104(1)(a)).

Consumer Leases: Many leasing transactions involve parties subject to consumer protection statutes or decisions. To avoid conflict with those laws this Article is subject to them to the extent provided in (Section 2A-104(1)(c) and (2)). Further, certain consumer protections have been incorporated in the Article.

Finance Leases: Certain leasing transactions substitute the supplier of the goods for the lessor as the party responsible to the lessee with respect to warranties and the like. The definition of finance lease (Section 2A-103(1)(g)) was developed to describe these transactions. Various sections of the Article implement the substitution of the supplier for the lessor, including Sections 2A-209 and 2A-407. No attempt was made to fashion a special rule where the finance lessor is an affiliate of the supplier of goods; this is to be developed by the courts, case by case.

Sale and Leaseback: Sale and leaseback transactions are becoming increasingly common. A number of state statutes treat transactions where possession is retained by the seller as fraudulent per se or prima facie fraudulent. That position is not in accord with modern practice and thus is changed by the Article "if the buyer bought for value and in good faith" (Section 2A-308(3)).

Remedies: The Article has not only provided for lessor's remedies upon default by the lessee (Sections 2A-523 through 2A-531), but also for lessee's remedies upon default by the lessor (Sections 2A-508 through 2A-522). This is a significant departure from Article 9, which provides remedies only for the secured party upon default by the debtor. This difference is compelled by the bilateral nature of the obligations between the parties to a lease.

Damages: Many leasing transactions are predicated on the parties' ability to stipulate an appropriate measure of damages in the event of default. The rule with respect to sales of goods (Section 2-718) is not sufficiently flexible to accommodate this practice. Consistent with the common law emphasis upon freedom to contract, the Article has created a revised rule that allows greater flexibility with respect to leases of goods (Section 2A-504(1)).

History:

This Article is a revision of the Uniform Personal Property Leasing Act, which was approved by the National Conference of Commissioners on Uniform State Laws in August, 1985. However, it was believed that the subject matter of the Uniform Personal Property Leasing Act would be better treated as an article of this Act. Thus, although the Conference promulgated the Uniform Personal Property Leasing Act as a Uniform Law, activity was held in abeyance to allow time to restate the Uniform Personal Property Leasing Act as Article 2A.

In August, 1986 the Conference approved and recommended this Article (including conforming amendments to Article 1 and Article 9) for promulgation as an amendment to this Act. In December, 1986 the Council of the American Law Institute approved and recommended this Article (including conforming amendments to Article 1 and Article 9), with official comments, for promulgation as an amendment to this Act. In March, 1987 the Permanent Editorial Board for the Uniform Commercial Code approved and recommended this Article (including conforming amendments to Article 1 and Article 9), with official comments, for promulgation as an amendment to this Act.

In May, 1987 the American Law Institute approved and recommended this Article (including conforming amendments to Article 1 and Article 9), with official comments, for promulgation as an amendment to this Act. In August, 1987 the Conference confirmed its approval of the final text of this Article.

Upon its initial promulgation, Article 2A was rapidly enacted in several states, was introduced in a number of other states, and underwent bar association, law revision commission and legislative study in still further states. In that process debate emerged, principally sparked by the study of Article 2A by the California Bar Association, California's non-uniform amendments to Article 2A, and articles appearing in a symposium on Article 2A published after its promulgation in the *Alabama Law Review*. The debate chiefly centered on whether Article 2A had struck the proper balance or was clear enough concerning the ability of a lessor to grant a security interest in its leasehold interest and in the residual, priority between a secured party and the lessee, and the lessor's remedy structure under Article 2A.

This debate over issues on which reasonable minds could and did differ began to affect the enactment effort for Article 2A in a deleterious manner. Consequently, the Standby Committee for Article 2A, composed predominantly of the former members of the drafting committee, reviewed the legislative actions and studies in the various states, and opened a dialogue with the principal proponents of the non-uniform amendments. Negotiations were conducted in conjunction with, and were facilitated by, a

study of the uniform Article and the non-uniform Amendments by the New York Law Revision Commission. Ultimately, a consensus was reached, which has been approved by the membership of the Conference, the Permanent Editorial Board, and the Council of the Institute. Rapid and uniform enactment of Article 2A is expected as a result of the completed amendments. The Article 2A experience reaffirms the essential viability of the procedures of the Conference and the Institute for creating and updating uniform state law in the commercial law area.

Relationship of Article 2A to Other Articles:

The Article on Sales provided a useful point of reference for codifying the law of leases. Many of the provisions of that Article were carried over, changed to reflect differences in style, leasing terminology or leasing practices. Thus, the official comments to those sections of Article 2 whose provisions were carried over are incorporated by reference in Article 2A, as well; further, any case law interpreting those provisions should be viewed as persuasive but not binding on a court when deciding a similar issue with respect to leases. Any change in the sequence that has been made when carrying over a provision from Article 2 should be viewed as a matter of style, not substance. This is not to suggest that in other instances Article 2A did not also incorporate substantially revised provisions of Article 2, Article 9 or otherwise where the revision was driven by a concern over the substance; but for the lack of a mandate, the drafting committee might well have made the same or a similar change in the statutory analogue. Those sections in Article 2A include Sections 2A-104, 2A-105, 2A-106, 2A-108(2) and (4), 2A-109(2), 2A-208, 2A-214(2) and (3)(a), 2A-216, 2A-303, 2A-306, 2A-503, 2A-504(3)(b), 2A-506(2), and 2A-515. For lack of relevance or significance not all of the provisions of Article 2 were incorporated in Article 2A.

This codification was greatly influenced by the fundamental tenet of the common law as it has developed with respect to leases of goods: freedom of the parties to contract. Note that, like all other Articles of this Act, the principles of construction and interpretation contained in Article 1 are applicable throughout Article 2A (Section 2A-103(4)). These principles include the ability of the parties to vary the effect of the provisions of Article 2A, subject to certain limitations including those that relate to the obligations of good faith, diligence, reasonableness and care (Section 1-102(3)). Consistent with those principles no negative inference is to be drawn by the episodic use of the phrase "unless otherwise agreed" in certain provisions of Article 2A. Section 1-102(4). Indeed, the contrary is true, as the general rule in the Act, including this Article, is that the effect of the Act's provi-

sions may be varied by agreement. Section 1-102(3). This conclusion follows even where

the statutory analogue contains the phrase and the correlative provision in Article 2A does not.

§ 28:2A-102. Scope.

This article applies to any transaction, regardless of form, that creates a lease.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-102.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 9-102(1). Throughout this Article, unless otherwise stated, references to “Section” are to other sections of this Act.

Changes: Substantially revised.

Purposes: This Article governs transactions as diverse as the lease of a hand tool to an individual for a few hours and the leveraged lease of a complex line of industrial equipment to a multi-national organization for a number of years.

To achieve that end it was necessary to provide that this Article applies to any transaction, regardless of form, that creates a lease. Since lease is defined as a transfer of an interest in goods (Section 2A-103(1)(j)) and goods is defined to include fixtures (Section 2A-103(1)(h)), application is limited to the extent the transaction relates to goods, including fixtures. Further, since the definition of lease does not include a sale (Section 2-106(1)) or retention or creation of a security interest (Section 1-201(37)), application is further limited; sales and security interests are governed by other Articles of this Act.

Finally, in recognition of the diversity of the transactions to be governed, the sophistication of many of the parties to these transactions, and the common law tradition as it applies to the bailment for hire or lease, freedom of contract has been preserved.

DeKoven, *Proceedings After Default by the Lessee Under a True Lease of Equipment*, in 1C P. Coogan, W. Hogan, D. Vagts, *Secured Transactions Under the Uniform Commercial Code*, s 29B.02[2] (1986). Thus, despite the extensive regulatory scheme established by this Article, the parties to a lease will be able to create

private rules to govern their transaction. Sections 2A-103(4) and 1-102(3). However, there are special rules in this Article governing consumer leases, as well as other state and federal statutes, that may further limit freedom of contract with respect to consumer leases.

A court may apply this Article by analogy to any transaction, regardless of form, that creates a lease of personal property other than goods, taking into account the expressed intentions of the parties to the transaction and any differences between a lease of goods and a lease of other property. Such application has precedent as the provisions of the Article on Sales (Article 2) have been applied by analogy to leases of goods. E.g., *Hawkland, The Impact of the Uniform Commercial Code on Equipment Leasing*, 1972 Ill. L.F. 446; *Murray, Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 Fordham L.Rev. 447 (1971). Whether such application would be appropriate for other bailments of personal property, gratuitous or for hire, should be determined by the facts of each case. See *Mieske v. Bartell Drug Co.*, 92 Wash.2d 40, 46-48, 593 P.2d 1308, 1312 (1979).

Further, parties to a transaction creating a lease of personal property other than goods, or a bailment of personal property may provide by agreement that this Article applies. Upholding the parties’ choice is consistent with the spirit of this Article.

Cross References:

Sections 1-102(3), 1-201(37), Article 2, esp. Section 2-106(1), and Sections 2A-103(1)(h), 2A-103(1)(j) and 2A-103(4).

Definitional Cross Reference:

“Lease”. Section 2A-103(1)(j).

§ 28:2A-103. Definitions and index of definitions.

(a) In this article unless the context otherwise requires:

(1) “Buyer in ordinary course of business” means a person who in good faith and without knowledge that the sale to him or her is in violation of the

ownership rights or security interest or leasehold interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(2) "Cancellation" occurs when either party puts an end to the lease contract for default by the other party.

(3) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole.

(4) "Conforming" goods or performance under a lease contract means goods or performance that are in accordance with the obligations under the lease contract.

(5) "Consumer lease" means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose, if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed \$25,000.

(6) "Fault" means wrongful act, omission, breach, or default.

(7) "Finance lease" means a lease with respect to which:

(A) The lessor does not select, manufacture, or supply the goods;

(B) The lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and

(C) One of the following occurs:

(i) The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;

(ii) The lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;

(iii) The lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimer of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or

(iv) If the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person; that the lessee is entitled under this

article to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; and that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

(8) “Goods” means all things that are movable at the time of identification to the lease contract, or are fixtures (§ 28:2A-309), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.

(9) “Installment lease contract” means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause “each delivery is a separate lease” or its equivalent.

(10) “Lease” means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

(11) “Lease agreement” means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this article. Unless the context clearly indicates otherwise, the term includes a sublease agreement.

(12) “Lease contract” means the total legal obligation that results from the lease agreement as affected by this article and any other applicable rules of law. Unless the context clearly indicates otherwise, the term includes a sublease contract.

(13) “Leasehold interest” means the interest of the lessor or the lessee under a lease contract.

(14) “Lessee” means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessee.

(15) “Lessee in ordinary course of business” means a person who in good faith and without knowledge that the lease to him or her is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods leases in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. “Leasing” may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(16) “Lessor” means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor.

(17) “Lessor’s residual interest” means the lessor’s interest in the goods after expiration, termination, or cancellation of the lease contract.

(18) "Lien" means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest.

(19) "Lot" means a parcel or a single article that is the subject matter of a separate lease or delivery, whether or not it is sufficient to perform the lease contract.

(20) "Merchant lessee" means a lessee that is a merchant with respect to goods of the kind subject to the lease.

(21) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate was not manifestly unreasonable at the time the transaction was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(22) "Purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift, or any other voluntary transaction creating an interest in goods.

(23) "Sublease" means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.

(24) "Supplier" means a person from whom a lessor buys or leases goods to be leased under a finance lease.

(25) "Supply contract" means a contract under which a lessor buys or leases goods to be leased.

(26) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the lease contract otherwise than for default.

(b) Other definitions applying to this article and the sections in which they appear are:

"Accessions". § 28:2A-310(a).

"Construction mortgage". § 28:2A-309(a)(4).

"Encumbrance". § 28:2A-309(a)(5).

"Fixture filing". § 28:2A-309(a)(2).

"Fixtures". § 28:2A-309(a)(1).

"Purchase money lease". § 28:2A-309(a)(3).

(c) The following definitions in other articles apply to this article:

"Account". § 28:9-102(a)(2).

"Between merchants". § 28:2-104(3).

"Buyer". § 28:2-103(1)(a).

"Chattel paper". § 28:9-102(a)(11).

"Consumer goods". § 28:9-102(a)(23).

"Document." § 28:9-102(a)(30).

"Entrusting". § 28:2-403(3).

"General intangibles". § 28:9-102(a)(42).

"Good faith". § 28:2-103(1)(b).

"Instrument". § 28:9-102(a)(47).

"Merchant". § 28:2-104(1).

"Mortgage". § 28:9-102(a)(55).

"Pursuant to commitment". § 28:9-102(a)(68).

"Receipt". § 28:2-103(1)(c).

"Sale". § 28:2-106(1).

"Sale on approval". § 28:2-326.

"Sale or return". § 28:2-326.

"Seller". § 28:2-103(1)(d).

(d) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830; Oct. 26, 2000, D.C. Law 13-201, § 201(d)(1), 47 DCR 7576.)

Prior Codifications. — 1981 Ed., § 28:2A-103.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

Legislative history of Law 13-201. — Law

13-201, the "Uniform Commercial Code Secured Transactions Revision Act of 2000," was introduced in Council and assigned Bill No. 13-370, which was referred to the Committee on Finance and Revenue. The Bill was adopted on first and second readings on June 6, 2000, and July 11, 2000, respectively. Signed by the Mayor on August 11, 2000, it was assigned Act No. 13-434 and transmitted to both Houses of Congress for its review. D.C. Law 13-201 became effective on October 26, 2000.

UNIFORM COMMERCIAL CODE COMMENT

(a) "Buyer in ordinary course of business". Section 1-201(9).

(b) "Cancellation". Section 2-106(4). The effect of a cancellation is provided in Section 2A-505(1).

(c) "Commercial unit". Section 2-105(6).

(d) "Conforming". Section 2-106(2).

(e) "Consumer lease". New. This Article includes a subset of rules that applies only to consumer leases. Sections 2A-106, 2A-108(2), 2A-108(4), 2A-109(2), 2A-221, 2A-309, 2A-406, 2A-407, 2A-504(3)(b), and 2A-516(3)(b).

For a transaction to qualify as a consumer lease it must first qualify as a lease. Section 2A-103(1)(j). Note that this Article regulates the transactional elements of a lease, including a consumer lease; consumer protection statutes—present and future—, and existing consumer protection decisions are unaffected by this Article. Section 2A-104(1)(c) and (2). Of course, Article 2A as state law also is subject to federal consumer protection law.

This definition is modeled after the definition of consumer lease in the Consumer Leasing Act, 15 U.S.C. s 1667 (1982), and in the Unif. Consumer Credit Code s 1.301(14), 7A U.L.A. 43 (1974). However, this definition of consumer lease differs from its models in several respects: the lessor can be a person regularly engaged either in the business of leasing or of selling goods, the lease need not be for a term exceeding four months, a lease primarily for an agri-

cultural purpose is not covered and whether there should be a limitation by dollar amount and its amount is left up to the individual states.

This definition focuses on the parties as well as the transaction. If a lease is within this definition, the lessor must be regularly engaged in the business of leasing or selling, and the lessee must be an individual not an organization; note that a lease to two or more individuals having a common interest through marriage or the like is not excluded as a lease to an organization under Section 1-201(28). The lessee must take the interest primarily for a personal, family or household purpose. If required by the enacting state, total payments under the lease contract, excluding payments for options to renew or buy, cannot exceed the figure designated.

(f) "Fault". Section 1-201(16).

(g) "Finance Lease". New. This Article includes a subset of rules that applies only to finance leases. Sections 2A-209, 2A-211(2), 2A-212(1), 2A-213, 2A-219(1), 2A-220(1)(a), 2A-221, 2A-405(c), 2A-407, 2A-516(2) and 2A-517(1)(a) and (2).

For a transaction to qualify as a finance lease it must first qualify as a lease. Section 2A-103(1)(j). Unless the lessor is comfortable that the transaction will qualify as a finance lease, the lease agreement should include provisions giving the lessor the benefits created by the

subset of rules applicable to the transaction that qualifies as a finance lease under this Article.

A finance lease is the product of a three party transaction. The supplier manufactures or supplies the goods pursuant to the lessee's specification, perhaps even pursuant to a purchase order, sales agreement or lease agreement between the supplier and the lessee. After the prospective finance lease is negotiated, a purchase order, sales agreement, or lease agreement is entered into by the lessor (as buyer or prime lessee) or an existing order, agreement or lease is assigned by the lessee to the lessor, and the lessor and the lessee then enter into a lease or sublease of the goods. Due to the limited function usually performed by the lessor, the lessee looks almost entirely to the supplier for representations, covenants and warranties. If a manufacturer's warranty carries through, the lessee may also look to that. Yet, this definition does not restrict the lessor's function solely to the supply of funds; if the lessor undertakes or performs other functions, express warranties, covenants and the common law will protect the lessee.

This definition focuses on the transaction, not the status of the parties; to avoid confusion it is important to note that in other contexts, e.g., tax and accounting, the term finance lease has been used to connote different types of lease transactions, including leases that are disguised secured transactions. M. Rice, *Equipment Financing*, 62-71 (1981). A lessor who is a merchant with respect to goods of the kind subject to the lease may be a lessor under a finance lease. Many leases that are leases back to the seller of goods (Section 2A-308(3)) will be finance leases. This conclusion is easily demonstrated by a hypothetical. Assume that B has bought goods from C pursuant to a sales contract. After delivery to and acceptance of the goods by B, B negotiates to sell the goods to A and simultaneously to lease the goods back from A, on terms and conditions that, we assume, will qualify the transaction as a lease. Section 2A-103(1)(j). In documenting the sale and lease back, B assigns the original sales contract between B, as buyer, and C, as seller, to A. A review of these facts leads to the conclusion that the lease from A to B qualifies as a finance lease, as all three conditions of the definition are satisfied. Subparagraph (i) is satisfied as A, the lessor, had nothing to do with the selection, manufacture, or supply of the equipment. Subparagraph (ii) is satisfied as A, the lessor, bought the equipment at the same time that A leased the equipment to B, which certainly is in connection with the lease. Finally, subparagraph (iii) (A) is satisfied as A entered into the sales contract with B at the same time that A leased the equipment back to

B, the lessee, will have received a copy of the sales contract in a timely fashion.

Subsection (i) requires the lessor to remain outside the selection, manufacture and supply of the goods; that is the rationale for releasing the lessor from most of its traditional liability. The lessor is not prohibited from possession, maintenance or operation of the goods, as policy does not require such prohibition. To insure the lessee's reliance on the supplier, and not on the lessor, subsection (ii) requires that the goods (where the lessor is the buyer of the goods) or that the right to possession and use of the goods (where the lessor is the prime lessee and the sublessor of the goods) be acquired in connection with the lease (or sublease) to qualify as a finance lease. The scope of the phrase "in connection with" is to be developed by the courts, case by case. Finally, as the lessee generally relies almost entirely upon the supplier for representations and covenants, and upon the supplier or a manufacturer, or both, for warranties with respect to the goods, subsection (iii) requires that one of the following occur: (A) the lessee receive a copy of the supply contract before signing the lease contract; (B) the lessee's approval of the supply contract is a condition to the effectiveness of the lease contract; (C) the lessee receive a statement describing the promises and warranties and any limitations relevant to the lessee before signing the lease contract; or (D) before signing the lease contract and except in a consumer lease, the lessee receive a writing identifying the supplier (unless the supplier was selected and required by the lessee) and the rights of the lessee under Section 2A-209, and advising the lessee a statement of promises and warranties is available from the supplier. Thus, even where oral supply orders or computer placed supply orders are compelled by custom and usage the transaction may still qualify as a finance lease if the lessee approves the supply contract before the lease contract is effective and such approval was a condition to the effectiveness of the lease contract. Moreover, where the lessor does not want the lessee to see the entire supply contract, including price information, the lessee may be provided with a separate statement of the terms of the supply contract relevant to the lessee; promises between the supplier and the lessor that do not affect the lessee need not be included. The statement can be a restatement of those terms or a copy of portions of the supply contract with the relevant terms clearly designated. Any implied warranties need not be designated, but a disclaimer or modification of remedy must be designated. A copy of any manufacturer's warranty is sufficient if that is the warranty provided. However, a copy of any Regulation M disclosure given pursuant to 12 C.F.R. s 213.4(g) concerning warranties in itself is not sufficient since those disclosures need

only briefly identify express warranties and need not include any disclaimer of warranty.

If a transaction does not qualify as a finance lease, the parties may achieve the same result by agreement; no negative implications are to be drawn if the transaction does not qualify. Further, absent the application of special rules (fraud, duress, and the like), a lease that qualifies as a finance lease and is assigned by the lessor or the lessee to a third party does not lose its status as a finance lease under this Article. Finally, this Article creates no special rule where the lessor is an affiliate of the supplier; whether the transaction qualifies as a finance lease will be determined by the facts of each case.

(h) "Goods". Section 9-105(1)(h). See Section 2A-103(3) for reference to the definition of "Account", "Chattel paper", "Document", "General intangibles" and "Instrument". See Section 2A-217 for determination of the time and manner of identification.

(i) "Installment lease contract". Section 2-612(1).

(j) "Lease". New. There are several reasons to codify the law with respect to leases of goods. An analysis of the case law as it applies to leases of goods suggests at least several significant issues to be resolved by codification. First and foremost is the definition of a lease. It is necessary to define lease to determine whether a transaction creates a lease or a security interest disguised as a lease. If the transaction creates a security interest disguised as a lease, the transaction will be governed by the Article on Secured Transactions (Article 9) and the lessor will be required to file a financing statement or take other action to perfect its interest in the goods against third parties. There is no such requirement with respect to leases under the common law and, except with respect to leases of fixtures (Section 2A-309), this Article imposes no such requirement. Yet the distinction between a lease and a security interest disguised as a lease is not clear from the case law at the time of the promulgation of this Article. *DeKoven, Leases of Equipment: Puritan Leasing Company v. August, A Dangerous Decision*, 12 U.S.F. L.Rev. 257 (1978).

At common law a lease of personal property is a bailment for hire. While there are several definitions of bailment for hire, all require a thing to be let and a price for the letting. Thus, in modern terms and as provided in this definition, a lease is created when the lessee agrees to furnish consideration for the right to the possession and use of goods over a specified period of time. Mooney, *Personal Property Leasing: A Challenge*, 36 Bus.Law. 1605, 1607 (1981). Further, a lease is neither a sale (Section 2-106(1)) nor a retention or creation of a security interest (Section 1-201(37)). Due to extensive litigation to distinguish true leases

from security interests, an amendment to Section 1-201(37) has been promulgated with this Article to create a sharper distinction.

This section as well as Section 1-201(37) must be examined to determine whether the transaction in question creates a lease or a security interest. The following hypotheticals indicate the perimeters of the issue. Assume that A has purchased a number of copying machines, new, for \$1,000 each; the machines have an estimated useful economic life of three years. A advertises that the machines are available to rent for a minimum of one month and that the monthly rental is \$100.00. A intends to enter into leases where A provides all maintenance, without charge to the lessee. Further, the lessee will rent the machine, month to month, with no obligation to renew. At the end of the lease term the lessee will be obligated to return the machine to A's place of business. This transaction qualifies as a lease under the first half of the definition, for the transaction includes a transfer by A to a prospective lessee of possession and use of the machine for a stated term, month to month. The machines are goods (Section 2A-103(1)(h)). The lessee is obligated to pay consideration in return, \$100.00 for each month of the term.

However, the second half of the definition provides that a sale or a security interest is not a lease. Since there is no passing of title, there is no sale. Sections 2A-103(3) and 2-106(1). Under pre-Act security law this transaction would have created a bailment for hire or a true lease and not a conditional sale. *Da Rocha v. Macomber*, 330 Mass. 611, 614-15, 116 N.E.2d 139, 142 (1953). Under Section 1-201(37), as amended with the promulgation of this Article, the same result would follow. While the lessee is obligated to pay rent for the one month term of the lease, one of the other four conditions of the second paragraph of Section 1-201(37) must be met and none is. The term of the lease is one month and the economic life of the machine is 36 months; thus, subparagraph (a) of Section 1-201(37) is not now satisfied. Considering the amount of the monthly rent, absent economic duress or coercion, the lessee is not bound either to renew the lease for the remaining economic life of the goods or to become the owner. If the lessee did lease the machine for 36 months, the lessee would have paid the lessor \$3,600 for a machine that could have been purchased for \$1,000; thus, subparagraph (b) of Section 1-201(37) is not satisfied. Finally, there are no options; thus, subparagraphs (c) and (d) of Section 1-201(37) are not satisfied. This transaction creates a lease, not a security interest. However, with each renewal of the lease the facts and circumstances at the time of each renewal must be examined to determine if that conclusion remains accurate, as it is possible

that a transaction that first creates a lease, later creates a security interest.

Assume that the facts are changed and that A requires each lessee to lease the goods for 36 months, with no right to terminate. Under pre-Act security law this transaction would have created a conditional sale, and not a bailment for hire or true lease. *Hervey v. Rhode Island Locomotive Works*, 93 U.S. 664, 672-73 (1876). Under this subsection, and Section 1-201(37), as amended with the inclusion of this Article in the Act, the same result would follow. The lessee's obligation for the term is not subject to termination by the lessee and the term is equal to the economic life of the machine.

Between these extremes there are many transactions that can be created. Some of the transactions have not been properly categorized by the courts in applying the 1978 and earlier Official Texts of Section 1-201(37). This subsection, together with Section 1-201(37), as amended with the promulgation of this Article, draws a brighter line, which should create a clearer signal to the professional lessor and lessee.

(k) "Lease agreement". This definition is derived from the first sentence of Section 1-201(3). Because the definition of lease is broad enough to cover future transfers, lease agreement includes an agreement contemplating a current or subsequent transfer. Thus it was not necessary to make an express reference to an agreement for the future lease of goods (Section 2-106(1)). This concept is also incorporated in the definition of lease contract. Note that the definition of lease does not include transactions in ordinary building materials that are incorporated into an improvement on land. Section 2A-309(2).

The provisions of this Article, if applicable, determine whether a lease agreement has legal consequences; otherwise the law of bailments and other applicable law determine the same. Sections 2A-103(4) and 1-103.

(l) "Lease contract". This definition is derived from the definition of contract in Section 1-201(11). Note that a lease contract may be for the future lease of goods, since this notion is included in the definition of lease.

(m) "Leasehold interest". New.

(n) "Lessee". New.

(o) "Lessee in ordinary course of business". Section 1-201(9).

(p) "Lessor". New.

(q) "Lessor's residual interest". New.

(r) "Lien". New. This term is used in Section 2A-307 (Priority of Liens Arising by Attachment or Levy on, Security Interests in, and Other Claims to Goods).

(s) "Lot". Section 2-105(5).

(t) "Merchant lessee". New. This term is used in Section 2A-511 (Merchant Lessee's Duties as to Rightfully Rejected Goods). A person may satisfy the requirement of dealing in goods of the kind subject to the lease as lessor, lessee, seller, or buyer.

(u) "Present value". New. Authorities agree that present value should be used to determine fairly the damages payable by the lessor or the lessee on default. E.g., *Taylor v. Commercial Credit Equip. Corp.*, 170 Ga.App. 322, 316 S.E.2d 788 (Ct. App. 1984). Present value is defined to mean an amount that represents the discounted value as of a date certain of one or more sums payable in the future. This is a function of the economic principle that a dollar today is more valuable to the holder than a dollar payable in two years. While there is no question as to the principle, reasonable people would differ as to the rate of discount to apply in determining the value of that future dollar today. To minimize litigation, this Article allows the parties to specify the discount or interest rate, if the rate was not manifestly unreasonable at the time the transaction was entered into. In all other cases, the interest rate will be a commercially reasonable rate that takes into account the facts and circumstances of each case, as of the time the transaction was entered into.

(v) "Purchase". Section 1-201(32). This definition omits the reference to lien contained in the definition of purchase in Article 1 (Section 1-201(32)). This should not be construed to exclude consensual liens from the definition of purchase in this Article; the exclusion was mandated by the scope of the definition of lien in Section 2A-103(1)(r). Further, the definition of purchaser in this Article adds a reference to lease; as purchase is defined in Section 1-201(32) to include any other voluntary transaction creating an interest in property, this addition is not substantive.

(w) "Sublease". New.

(x) "Supplier". New.

(y) "Supply contract". New.

(z) "Termination". Section 2-106(3). The effect of a termination is provided in Section 2A-505(2).

§ 28:2A-104. Leases subject to other law.

(a) A lease, although subject to this article, is also subject to any applicable:

(1) Certificate of title statute of the District;

(2) Certificate of title statute of another jurisdiction (§ 28:2A-105); or

(3) Consumer protection statute of the District, or final consumer protection decision of a court of the District existing on the effective date of this article.

(b) In case of conflict between this article, other than §§ 28:2A-105, 28:2A-304(c), and 28:2A-305(c), and a statute or decision referred to in subsection (a) of this section, the statute controls.

(c) Failure to comply with an applicable law has only the effect specified therein.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-104.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 9-203(4) and 9-302(3)(b) and (c).

Changes: Substantially revised.

Purposes:

1. This Article creates a comprehensive scheme for the regulation of transactions that create leases. Section 2A-102. Thus, the Article supersedes all prior legislation dealing with leases, except to the extent set forth in this Section.

2. Subsection (1) states the general rule that a lease, although governed by the scheme of this Article, also may be governed by certain other applicable laws. This may occur in the case of a consumer lease. Section 2A-103(1)(e). Those laws may be state statutes existing prior to enactment of Article 2A or passed afterward. In this case, it is desirable for this Article to specify which statute controls. Or the law may be a pre-existing consumer protection decision. This Article preserves such decisions. Or the law may be a statute of the United States. Such a law controls without any statement in this Article under applicable principles of preemption.

An illustration of a statute of the United States that governs consumer leases is the Consumer Leasing Act, 15 U.S.C. ss 1667-1667(e) (1982) and its implementing regulation, Regulation M, 12 C.F.R. s 213 (1986); the statute mandates disclosures of certain lease terms, delimits the liability of a lessee in leasing personal property, and regulates the advertising of lease terms.

An illustration of a state statute that governs consumer leases and which if adopted in the enacting state prevails over this Article is the Unif. Consumer Credit Code, which includes many provisions similar to those of the Consumer Leasing Act, e.g. Unif.

Consumer Credit Code ss 3.202, 3.209, 3.401, 7A U.L.A. 108-09, 115, 125 (1974), as well as

provisions in addition to those of the Consumer Leasing Act, e.g., Unif. Consumer Credit Code ss 5.109-111, 7A U.L.A. 171-76 (1974) (the right to cure a default). Such statutes may define consumer lease so as to govern transactions within and without the definition of consumer lease under this Article.

3. Under subsection (2), subject to certain limited exclusions, in case of conflict a statute or a decision described in subsection (1) prevails over this Article. For example, a provision like Unif. Consumer Credit Code s 5.112, 7A U.L.A. 176 (1974), limiting self-help repossession, prevails over Section 2A-525(3). A consumer protection decision rendered after the effective date of this Article may supplement its provisions. For example, in relation to Article 9 a court might conclude that an acceleration clause may not be enforced against an individual debtor after late payments have been accepted unless a prior notice of default is given. To the extent the decision establishes a general principle applicable to transactions other than secured transactions, it may supplement Section 2A-502.

4. Consumer protection in lease transactions is primarily left to other law. However, several provisions of this Article do contain special rules that may not be varied by agreement in the case of a consumer lease. E.g., Sections 2A-106, 2A-108, and 2A-109(2). Were that not so, the ability of the parties to govern their relationship by agreement together with the position of the lessor in a consumer lease too often could result in a one-sided lease agreement.

5. In construing this provision the reference to statute should be deemed to include applicable regulations. A consumer protection decision is "final" on the effective date of this Article if it is not subject to appeal on that date or, if subject to appeal, is not later reversed on ap-

peal. Of course, such a decision can be overruled by a later decision or superseded by a later statute.

Cross References:

Sections 2A-103(1)(e), 2A-106, 2A-108, 2A-109(2) and 2A-525(3).

Definitional Cross Reference:

"Lease". Section 2A-103(1)(j).

§ 28:2A-105. Territorial application of article to goods covered by certificate of title.

Subject to the provisions of §§ 28:2A-304(c) and 28:2A-305(c), with respect to goods covered by a certificate of title issued under a statute of the District or of another jurisdiction, compliance and the effect of compliance or noncompliance with a certificate of title statute are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until the earlier of (i) surrender of the certificate, or (ii) 4 months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:1-105 and 28:2A-104.

Prior Codifications. — 1981 Ed., § 28:2A-105.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 9-103(2)(a) and (b).

Changes: Substantially revised. The provisions of the last sentence of Section 9-103(2)(b) have not been incorporated as it is superfluous in this context. The provisions of Section 9-103(2)(d) have not been incorporated because the problems dealt with are adequately addressed by this section and Sections 2A-304(3) and 305(3).

Purposes: The new certificate referred to in (b) must be permanent, not temporary. Generally, the lessor or creditor whose interest is indicated on the most recently issued certificate

of title will prevail over interests indicated on certificates issued previously by other jurisdictions. This provision reflects a policy that it is reasonable to require holders of interests in goods covered by a certificate of title to police the goods or risk losing their interests when a new certificate of title is issued by another jurisdiction.

Cross References:

Sections 2A-304(3), 2A-305(3), 9-103(2)(b) and 9-103(2)(d).

Definitional Cross Reference:

"Goods". Section 2A-103(1)(h).

§ 28:2A-106. Limitation on power of parties to consumer lease to choose applicable law and judicial forum.

(a) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter or in which the goods are to be used, the choice is not enforceable.

(b) If the judicial forum chosen by the parties to a consumer lease is a forum

that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:1-105.

Prior Codifications. — 1981 Ed., § 28:2A-106.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Unif. Consumer Credit Code s 1.201(8), 7A U.L.A. 36 (1974).

Changes: Substantially revised.

Purposes: There is a real danger that a lessor may induce a consumer lessee to agree that the applicable law will be a jurisdiction that has little effective consumer protection, or to agree that the applicable forum will be a forum that is inconvenient for the lessee in the event of litigation. As a result, this section invalidates these choice of law or forum clauses, except where the law chosen is that of the state of the consumer's residence or where the goods will be kept, or the forum chosen is one that otherwise would have jurisdiction over the lessee.

Subsection (1) limits potentially abusive choice of law clauses in consumer leases. The 30-day rule in subsection (1) was suggested by Section 9-103(1)(c). This section has no effect on choice of law clauses in leases that are not

consumer leases. Such clauses would be governed by other law.

Subsection (2) prevents enforcement of potentially abusive jurisdictional consent clauses in consumer leases. By using the term judicial forum, this section does not limit selection of a nonjudicial forum, such as arbitration. This section has no effect on choice of forum clauses in leases that are not consumer leases; such clauses are, as a matter of current law, "prima facie valid". The *Bremen v. Zapata Off-Shore, Co.*, 407 U.S. 1, 10 (1972). Such clauses would be governed by other law, including the Model Choice of Forum Act (1968).

Cross Reference:

Section 9-103(1)(c).

Definitional Cross Reference:

"Consumer lease". Section 2A-103(1)(e).

"Lease agreement". Section 2A-103(1)(k).

"Lessee". Section 2A-103(1)(n).

"Goods". Section 2A-103(1)(h).

"Party". Section 1-201(29).

§ 28:2A-107. Waiver or renunciation of claim or right after default.

Any claim or right arising out of an alleged default or breach of warranty may be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-107.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 1-107.

Changes: Revised to reflect leasing practices and terminology. This clause is used throughout the official comments to this Article to indicate the scope of change in the provisions of the Uniform Statutory Source included in the section; these changes range from one extreme, e.g., a significant difference in practice (a warranty as to merchantability is not implied in a

finance lease (Section 2A-212)) to the other extreme, e.g., a modest difference in style or terminology (the transaction governed is a lease not a sale (Section 2A-103)).

Cross References:

Sections 2A-103 and 2A-212.

Definitional Cross References:

"Aggrieved party". Section 1-201(2).

"Delivery". Section 1-201(14).

"Rights". Section 1-201(36).
 "Signed". Section 1-201(39).

"Written". Section 1-201(46).

§ 28:2A-108. Unconscionability.

(a) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

(c) Before making a finding of unconscionability under subsection (a) or (b) of this section, the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract or clause thereof, or of the conduct.

(d) In an action in which the lessee claims unconscionability with respect to a consumer lease:

(1) If the court finds unconscionability under subsection (a) or (b) of this section, the court shall award reasonable attorney's fees to the lessee.

(2) If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he or she knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.

(3) In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (a) and (b) of this section is not controlling.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-108.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-302 and Unif. Consumer Credit Code s 5.108, 7A U.L.A. 167-69 (1974).

Changes: Subsection (1) is taken almost verbatim from the provisions of Section 2-302(1). Subsection (2) is suggested by the provisions of Unif. Consumer Credit Code s 5.108(1), (2), 7A U.L.A. 167 (1974). Subsection (3), taken from the provisions of Section 2-302(2), has been expanded to cover unconscionable conduct. Unif. Consumer Credit Code s 5.108(3), 7A U.L.A. 167 (1974).

The provision for the award of attorney's fees to consumers, subsection (4), covers unconscionability under subsection (1) as well as (2). Subsection (4) is modeled on the provisions of

Unif. Consumer Credit Code s 5.108(6), 7A U.L.A. 169 (1974).

Purposes: Subsections (1) and (3) of this section apply the concept of unconscionability reflected in the provisions of Section 2-302 to leases. See *Dillman & Assocs. v. Capitol Leasing Co.*, 110 Ill.App.3d 335, 342, 442 N.E.2d 311, 316 (App.Ct.1982). Subsection (3) omits the adjective "commercial" found in subsection 2-302(2) because subsection (3) is concerned with all leases and the relevant standard of conduct is determined by the context.

The balance of the section is modeled on the provisions of Unif. Consumer Credit Code s 5.108, 7A U.L.A. 167-69 (1974). Thus subsection (2) recognizes that a consumer lease or a

clause in a consumer lease may not itself be unconscionable but that the agreement would never have been entered into if unconscionable means had not been employed to induce the consumer to agree. To make a statement to induce the consumer to lease the goods, in the expectation of invoking an integration clause in the lease to exclude the statement's admissibility in a subsequent dispute, may be unconscionable. Subsection (2) also provides a consumer remedy for unconscionable conduct, such as using or threatening to use force or violence, in the collection of a claim arising from a lease contract. These provisions are not exclusive. The remedies of this section are in addition to remedies otherwise available for the same conduct under other law, for example, an action in tort for abusive debt collection or under another statute of this State for such conduct. The reference to appropriate relief in subsection (2) is intended to foster liberal administration of this remedy. Sections 2A-103(4) and 1-106(1).

Subsection (4) authorizes an award of reasonable attorney's fees if the court finds unconscionability with respect to a consumer lease under subsections (1) or (2). Provision is also made for recovery by the party against whom the claim was made if the court does not find unconscionability and does find that the consumer knew the action to be groundless. Further, subsection (4)(b) is independent of, and thus will not override, a term in the lease agreement that provides for the payment of attorney's fees.

Cross References:

Sections 1-106(1), 2-302 and 2A-103(4).

Definitional Cross Reference:

"Action". Section 1-201(1).

"Consumer lease". Section 2A-103(1)(e).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Party". Section 1-201(29).

§ 28:2A-109. Option to accelerate at will.

(a) A term providing that one party or his or her successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he or she deems himself or herself insecure" or in words of similar import must be construed to mean that he or she has power to do so only if he or she in good faith believes that the prospect of payment or performance is impaired.

(b) With respect to a consumer lease, the burden of establishing good faith under subsection (a) of this section is on the party who exercised the power; otherwise the burden of establishing lack of good faith is on the party against whom the power has been exercised.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-109.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 1-208 and Unif. Consumer Credit Code s 5.109(2), 7A U.L.A. 171 (1974).

Purposes: Subsection (1) reflects modest changes in style to the provisions of the first sentence of Section 1-208.

Subsection (2), however, reflects a significant change in the provisions of the second sentence of Section 1-208 by creating a new rule with respect to a consumer lease. A lease provision allowing acceleration at the will of the lessor or when the lessor deems itself insecure is of critical importance to the lessee. In a consumer lease it is a provision that is not usually agreed to by the parties but is usually mandated by the

lessor. Therefore, where its invocation depends not on specific criteria but on the discretion of the lessor, its use should be regulated to prevent abuse. Subsection (1) imposes a duty of good faith upon its exercises. Subsection (2) shifts the burden of establishing good faith to the lessor in the case of a consumer lease, but not otherwise.

Cross Reference:

Section 1-208.

Definitional Cross Reference:

"Burden of establishing". Section 1-201(8).

"Consumer lease". Section 2A-103(1)(e).

"Good faith". Sections 1-201(19) and 2-103(1)(b).

“Party”. Section 1-201(29).

“Term”. Section 1-201(42).

Part 2. Formation and Construction of Lease Contract.

§ 28:2A-201. Statute of frauds.

(a) A lease contract is not enforceable by way of action or defense unless:

(1) The total payments to be made under the lease contract, excluding payments for options to renew or buy, are less than \$1,000; or

(2) There is a writing, signed by the party against whom enforcement is sought or by that party’s authorized agent, sufficient to indicate that a lease contract has been made between the parties and to describe the goods leased and the lease term.

(b) Any description of leased goods or of the lease term is sufficient and satisfies subsection (a)(2) of this section, whether or not it is specific, if it reasonably identifies what is described.

(c) A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the lease contract is not enforceable under subsection (a)(2) of this section beyond the lease term and the quantity of goods shown in the writing.

(d) A lease contract that does not satisfy the requirements of subsection (a) of this section, but which is valid in other respects, is enforceable:

(1) If the goods are to be specially manufactured or obtained for the lessee and are not suitable for lease or sale to others in the ordinary course of the lessor’s business, and the lessor, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the lessee, has made either a substantial beginning of their manufacture or commitments for their procurement;

(2) If the party against whom enforcement is sought admits in that party’s pleading, testimony, or otherwise in court that a lease contract was made, but the lease contract is not enforceable under this provision beyond the quantity of goods admitted; or

(3) With respect to goods that have been received and accepted by the lessee.

(e) The lease term under a lease contract referred to in subsection (d) of this section is:

(1) If there is a writing signed by the party against whom enforcement is sought or by that party’s authorized agent specifying the lease term, the term so specified;

(2) If the party against whom enforcement is sought admits in that party’s pleading, testimony, or otherwise in court a lease term, the term so admitted; or

(3) A reasonable lease term.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-201.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see His-

torical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 2-201, 9-203(1) and 9-110.

Changes: This section is modeled on Section 2-201, with changes to reflect the differences between a lease contract and a contract for the sale of goods. In particular, subsection (1)(b) adds a requirement that the writing "describe the goods leased and the lease term", borrowing that concept, with revisions, from the provisions of Section 9-203(1)(a). Subsection (2), relying on the statutory analogue in Section 9-110, sets forth the minimum criterion for satisfying that requirement.

Purposes: The changes in this section conform the provisions of Section 2-201 to custom and usage in lease transactions. Section 2-201(2), stating a special rule between merchants, was not included in this section as the number of such transactions involving leases, as opposed to sales, was thought to be modest. Subsection (4) creates no exception for transactions where payment has been made and accepted. This represents a departure from the analogue, Section 2-201(3)(c). The rationale for the departure is grounded in the distinction between sales and leases. Unlike a buyer in a

sales transaction, the lessee does not tender payment in full for goods delivered, but only payment of rent for one or more months. It was decided that, as a matter of policy, this act of payment is not a sufficient substitute for the required memorandum. Subsection (5) was needed to establish the criteria for supplying the lease term if it is omitted, as the lease contract may still be enforceable under subsection (4).

Cross References:

Sections 2-201, 9-110 and 9-203(1)(a).

Definitional Cross References:

"Action". Section 1-201(1).

"Agreed". Section 1-201(3).

"Buying". Section 2A-103(1)(a).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notice". Section 1-201(25).

"Party". Section 1-201(29).

"Sale". Section 2-106(1).

"Signed". Section 1-201(39).

"Term". Section 1-201(42).

"Writing". Section 1-201(46).

§ 28:2A-202. Final written expression: parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(1) By course of dealing or usage of trade or by course of performance; and

(2) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-214.

Prior Codifications. — 1981 Ed., § 28:2A-202.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-202.

Definitional Cross References:

"Agreement". Section 1-201(3).

"Course of dealing". Section 1-205.

"Party". Section 1-201(29).

"Term". Section 1-201(42).

“Usage of trade”. Section 1-205.
 “Writing”. Section 1-201(46).

§ 28:2A-203. Seals inoperative.

The affixing of a seal to a writing evidencing a lease contract or an offer to enter into a lease contract does not render the writing a sealed instrument and the law with respect to sealed instruments does not apply to the lease contract or offer.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-203. legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.
Legislative history of Law 9-128. — For

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-203.
Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:
 “Lease contract”. Section 2A-103(1)(l).
 “Writing”. Section 1-201(46).

§ 28:2A-204. Formation in general.

(a) A lease contract may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a lease contract.

(b) An agreement sufficient to constitute a lease contract may be found although the moment of its making is undetermined.

(c) Although one or more terms are left open, a lease contract does not fail for indefiniteness if the parties have intended to make a lease contract and there is a reasonably certain basis for giving an appropriate remedy.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-204. legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.
Legislative history of Law 9-128. — For

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-204.
Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:
 “Agreement”. Section 1-201(3).

“Lease contract”. Section 2A-103(1)(l).
 “Party”. Section 1-201(29).
 “Remedy”. Section 1-201(34).
 “Term”. Section 1-201(42).

CASE NOTES

In general.

Parol evidence rule did not apply to, and therefore did not bar extrinsic evidence regarding, the determination of which travel agency signed, as lessee, a lease of an automated computer airline reservation and ticketing system. *Affordable Elegance Travel, Inc. v.*

Worldspan, L.P., 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

Ambiguity regarding which travel agency had signed, as lessee, the lease of an automated computer airline reservation and ticketing system involved the identity of one of the parties to the lease rather than the “material terms” of

§ 28:2A-205 COMMERCIAL INSTRUMENTS AND TRANSACTIONS

the lease, and thus, the presumption that an ambiguity should be construed against the drafter was inapplicable. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

§ 28:2A-205. Firm offers.

An offer by a merchant to lease goods to or from another person in a signed writing that by its terms gives assurance it will be held open is not revocable, for lack of consideration, during the time stated or, if no time is stated, for a reasonable time, but in no event may the period of irrevocability exceed 3 months. Any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-205. legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.
Legislative history of Law 9-128. — For

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-205.
Changes: Revised to reflect leasing practices and terminology.
Definitional Cross References:
“Goods”. Section 2A-103(1)(h).
“Lease”. Section 2A-103(1)(j).
“Merchant”. Section 2-104(1).
“Person”. Section 1-201(30).
“Reasonable time”. Section 1-204(1) and (2).
“Signed”. Section 1-201(39).
“Term”. Section 1-201(42).
“Writing”. Section 1-201(46).

§ 28:2A-206. Offer and acceptance in formation of lease contract.

(a) Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a lease contract must be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.

(b) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-206. legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.
Legislative history of Law 9-128. — For

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-206(1)(a) and (2).
Changes: Revised to reflect leasing practices and terminology.
Definitional Cross References:
“Lease contract”. Section 2A-103(1)(l).
“Notifies”. Section 1-201(26).
“Reasonable time”. Section 1-204(1) and (2).

§ 28:2A-207. Course of performance or practical construction.

(a) If a lease contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the lease agreement.

(b) The express terms of a lease agreement and any course of performance, as well as any course of dealing and usage of trade, must be construed whenever reasonable as consistent with each other; but if that construction is unreasonable, express terms control course of performance, course of performance controls both course of dealing and usage of trade, and course of dealing controls usage of trade.

(c) Subject to the provisions of § 28:2A-208 on modification and waiver, course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-207.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 2-208 and 1-205(4).

Changes: Revised to reflect leasing practices and terminology, except that subsection (2) was further revised to make the subsection parallel the provisions of Section 1-205(4) by adding that course of dealing controls usage of trade.

Purposes: The section should be read in conjunction with Section 2A-208. In particular, although a specific term may control over course of performance as a matter of lease construction under subsection (2), subsection (3) allows the same course of dealing to show a

waiver or modification, if Section 2A-208 is satisfied.

Cross References:

Sections 1-205(4), 2-208 and 2A-208.

Definitional Cross References:

“Course of dealing”. Section 1-205.

“Knowledge”. Section 1-201(25).

“Lease agreement”. Section 2A-103(1)(k).

“Lease contract”. Section 2A-103(1)(l).

“Party”. Section 1-201(29).

“Term”. Section 1-201(42).

“Usage of trade”. Section 1-205.

§ 28:2A-208. Modification, rescission, and waiver.

(a) An agreement modifying a lease contract needs no consideration to be binding.

(b) A signed lease agreement that excludes modification or rescission except by a signed writing may not be otherwise modified or rescinded, but, except as between merchants, such a requirement on a form supplied by a merchant must be separately signed by the other party.

(c) Although an attempt at modification or rescission does not satisfy the requirements of subsection (b) of this section, it may operate as a waiver.

(d) A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless

the retraction would be unjust in view of a material change of position in reliance on the waiver.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-207.

Prior Codifications. — 1981 Ed., § 28:2A-208.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-209.

Changes: Revised to reflect leasing practices and terminology, except that the provisions of subsection 2-209(3) were omitted.

Purposes: Section 2-209(3) provides that “the requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.” This provision was not incorporated as it is unfair to allow an oral modification to make the entire lease contract unenforceable, e.g., if the modification takes it a few dollars over the dollar limit. At the same time, the problem could not be solved by providing that the lease contract would still be enforceable in its pre-modification state (if it then satisfied the statute of frauds) since in some

cases that might be worse than no enforcement at all. Resolution of the issue is left to the courts based on the facts of each case.

Cross References:

Sections 2-201 and 2-209.

Definitional Cross References:

“Agreement”. Section 1-201(3).

“Between merchants”. Section 2-104(3).

“Lease agreement”. Section 2A-103(1)(k).

“Lease contract”. Section 2A-103(1)(l).

“Merchant”. Section 2-104(1).

“Notification”. Section 1-201(26).

“Party”. Section 1-201(29).

“Signed”. Section 1-201(39).

“Term”. Section 1-201(42).

“Writing”. Section 1-201(46).

§ 28:2A-209. Lessee under finance lease as beneficiary of supply contract.

(a) The benefit of a supplier’s promises to the lessor under the supply contract and of all warranties, whether express or implied, including those of any third party provided in connection with or as part of the supply contract, extends to the lessee to the extent of the lessee’s leasehold interest under a finance lease related to the supply contract, but is subject to the terms of the warranty and of the supply contract and all defenses or claims arising therefrom.

(b) The extension of the benefit of a supplier’s promises and of warranties to the lessee (§ 28:2A-209(a)) does not:

(1) Modify the rights and obligations of the parties to the supply contract, whether arising therefrom or otherwise; or

(2) Impose any duty or liability under the supply contract on the lessee.

(c) Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract. If the modification or rescission is effective between the supplier and the lessee, the lessor is deemed to have assumed, in addition to the obligations of the lessor to the lessee under the lease contract, promises of the supplier to the lessor and warranties that were so modified or rescinded as they existed and were available to the lessee before modification or rescission.

(d) In addition to the extension of the benefit of the supplier's promises and of warranties to the lessee under subsection (a) of this section, the lessee retains all rights that the lessee may have against the supplier which arise from an agreement between the lessee and the supplier or under other law.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830; July 25, 1995, D.C. Law 11-30, § 7(a), 42 DCR 1547.)

Prior Codifications. — 1981 Ed., § 28:2A-209.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

Legislative history of Law 11-30. — Law 11-30, the "Technical Amendments Act of 1995," was introduced in Council and assigned Bill

No. 11-58, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on February 7, 1995, and March 7, 1995, respectively. Signed by the Mayor on March 22, 1995, it was assigned Act No. 11-32 and transmitted to both Houses of Congress for its review. D.C. Law 11-30 became effective on July 25, 1995.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: None.

Changes: This section is modeled on Section 9-318, the Restatement (Second) of Contracts ss 302-315 (1981), and leasing practices.

See *Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291, 1296-97 (5th Cir.1980).

Purposes:

1. The function performed by the lessor in a finance lease is extremely limited. Section 2A-103(1)(g). The lessee looks to the supplier of the goods for warranties and the like or, in some cases as to warranties, to the manufacturer if a warranty made by that person is passed on. That expectation is reflected in subsection (1), which is self-executing. As a matter of policy, the operation of this provision may not be excluded, modified or limited; however, an exclusion, modification, or limitation of any term of the supply contract or warranty, including any with respect to rights and remedies, and any defense or claim such as a statute of limitations, effective against the lessor as the acquiring party under the supply contract, is also effective against the lessee as the beneficiary designated under this provision. For example, the supplier is not precluded from excluding or modifying an express or implied warranty under a supply contract. Sections 2-312(2) and 2-316, or Section 2A-214. Further, the supplier is not precluded from limiting the rights and remedies of the lessor and from liquidating damages. Sections 2-718 and 2-719 or Sections 2A-503 and 2A-504. If the supply contract excludes or modifies warranties, limits remedies, or liquidates damages with respect to the lessor, such provisions are enforceable against the lessee as beneficiary. Thus, only selective discrimination against the beneficiaries designated under this section is precluded, i.e., exclusion of the supplier's liability to the

lessee with respect to warranties made to the lessor. This section does not affect the development of other law with respect to products liability.

2. Enforcement of this benefit is by action. Sections 2A-103(4) and 1-106(2).

3. The benefit extended by these provisions is not without a price, as this Article also provides in the case of a finance lease that is not a consumer lease that the lessee's promises to the lessor under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods. Section 2A-407.

4. Subsection (2) limits the effect of subsection (1) on the supplier and the lessor by preserving, notwithstanding the transfer of the benefits of the supply contract to the lessee, all of the supplier's and the lessor's rights and obligations with respect to each other and others; it further absolves the lessee of any duties with respect to the supply contract that might have been inferred from the extension of the benefits thereof.

5. Subsections (2) and (3) also deal with difficult issues related to modification or rescission of the supply contract. Subsection (2) states a rule that determines the impact of the statutory extension of benefit contained in subsection (1) upon the relationship of the parties to the supply contract and, in a limited respect, upon the lessee. This statutory extension of benefit, like that contained in Sections 2A-216 and 2-318, is not a modification of the supply contract by the parties. Thus, subsection (3) states the rules that apply to a modification or rescission of the supply contract by the parties. Subsection (3) provides that a modification or rescission is not effective between the supplier and the lessee if, before the modification or rescission occurs, the supplier received notice

that the lessee has entered into the finance lease. On the other hand, if the modification or rescission is effective, then to the extent of the modification or rescission of the benefit or warranty, the lessor by statutory dictate assumes an obligation to provide to the lessee that which the lessee would otherwise lose. For example, assume a reduction in an express warranty from four years to one year. No prejudice to the lessee may occur if the goods perform as agreed. If, however, there is a breach of the express warranty after one year and before four years pass, the lessor is liable. A remedy for any prejudice to the lessee because of the bifurcation of the lessee's recourse resulting from the action of the supplier and the lessor is left to resolution by the courts based on the facts of each case.

6. Subsection (4) makes it clear that the rights granted to the lessee by this section do not displace any rights the lessee otherwise may have against the supplier.

Cross References:

Sections 2A-103(1)(g), 2A-407 and 9-318.

Definitional Cross References:

"Action". Section 1-201(1).

"Finance lease". Section 2A-103(1)(g).

"Leasehold interest". Section 2A-103(1)(m).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notice". Section 1-201(25).

"Party". Section 1-201(29).

"Rights". Section 1-201(36).

"Supplier". Section 2A-103(1)(x).

"Supply contract". Section 2A-103(1)(y).

"Term". Section 1-201(42).

§ 28:2A-210. Express warranties.

(a) Express warranties by the lessor are created as follows:

(1) Any affirmation of fact or promise made by the lessor to the lessee which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise.

(2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods will conform to the description.

(3) Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model.

(b) It is not necessary to the creation of an express warranty that the lessor use formal words, such as "warrant" or "guarantee," or that the lessor have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the lessor's opinion or commendation of the goods does not create a warranty.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-210.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-313.

Changes: Revised to reflect leasing practices and terminology.

Purposes: All of the express and implied warranties of the Article on Sales (Article 2) are included in this Article, revised to reflect the differences between a sale of goods and a lease of goods. Sections 2A-210 through 2A-216. The lease of goods is sufficiently similar to the sale of goods to justify this decision. Hawkland, *The Impact of the Uniform Commercial Code on*

Equipment Leasing, 1972 Ill.L.F. 446, 459-60. Many state and federal courts have reached the same conclusion.

Value of the goods, as used in subsection (2), includes rental value.

Cross References:

Article 2, esp. Section 2-313, and Sections 2A-210 through 2A-216.

Definitional Cross References:

"Conforming". Section 2A-103(1)(d).

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Value". Section 1-201(44).

§ 28:2A-211. Warranties against interference and against infringement; lessee's obligation against infringement.

(a) There is in a lease contract a warranty that for the lease term no person holds a claim to or interest in the goods that arose from an act or omission of the lessor, other than a claim by way of infringement or the like, which will interfere with the lessee's enjoyment of its leasehold interest.

(b) Except in a finance lease there is in a lease contract by a lessor who is a merchant regularly dealing in goods of the kind a warranty that the goods are delivered free of the rightful claim of any person by way of infringement or the like.

(c) A lessee who furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim by way of infringement or the like that arises out of compliance with the specifications.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-214 and 28:2A-516.

Prior Codifications. — 1981 Ed., § 28:2A-211.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-312.

Changes: This section is modeled on the provisions of Section 2-312, with modifications to reflect the limited interest transferred by a lease contract and the total interest transferred by a sale. Section 2-312(2), which is omitted here, is incorporated in Section 2A-214. The warranty of quiet possession was abolished with respect to sales of goods. Section 2-312 official comment 1. Section 2A-211(1) reinstates the warranty of quiet possession with respect to leases. Inherent in the nature of the limited interest transferred by the lease—the right to possession and use of the goods—is the need of the lessee for protection greater than that afforded to the buyer. Since the scope of the protection is limited to claims or interests that arose from acts or omissions of the lessor, the lessor will be in position to evaluate the potential cost, certainly a far better position than that enjoyed by the lessee. Further, to the extent the market will allow, the lessor can attempt to pass on the anticipated additional cost to the lessee in the guise of higher rent.

Purposes: General language was chosen for subsection (1) that expresses the essence of the lessee's expectation: with an exception for infringement and the like, no person holding a

claim or interest that arose from an act or omission of the lessor will be able to interfere with the lessee's use and enjoyment of the goods for the lease term. Subsection (2), like other similar provisions in later sections, excludes the finance lessor from extending this warranty; with few exceptions (Sections 2A-210 and 2A-211(1)), the lessee under a finance lease is to look to the supplier for warranties and the like or, in some cases as to warranties, to the manufacturer if a warranty made by that person is passed on. Subsections (2) and (3) are derived from Section 2-312(3). These subsections, as well as the analogue, should be construed so that applicable principles of law and equity supplement their provisions. Sections 2A-103(4) and 1-103.

Cross References:

Sections 2-312, 2-312(1), 2-312(2), 2-312 official comment 1, 2A-210, 2A-211(1) and 2A-214.

Definitional Cross References:

"Delivery". Section 1-201(14).

"Finance lease". Section 2A-103(1)(g).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Leasehold interest". Section 2A-103(1)(m).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).
 "Merchant". Section 2-104(1).

"Person". Section 1-201(30).
 "Supplier". Section 2A-103(1)(x).

§ 28:2A-212. Implied warranty of merchantability.

(a) Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.

(b) Goods to be merchantable must:

(1) Pass without objection in the trade under the description in the lease agreement;

(2) In the case of fungible goods, be of fair average quality within the description;

(3) Be fit for the ordinary purposes for which goods of that type are used;

(4) Run, within the variation permitted by the lease agreement, of even kind, quality, and quantity within each unit and among all units involved;

(5) Be adequately contained, packaged, and labeled as the lease agreement may require; and

(6) Conform to any promises or affirmations of fact made on the container or label.

(c) Other implied warranties may arise from course of dealing or usage of trade.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-212.

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

Legislative history of Law 9-128. — For

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-314.
Changes: Revised to reflect leasing practices and terminology. E.g., *Glenn Dick Equip. Co. v. Galey Constr., Inc.*, 97 Idaho 216, 225, 541 P.2d 1184, 1193 (1975) (implied warranty of merchantability (Article 2) extends to lease transactions).

Definitional Cross References:

"Conforming". Section 2A-103(1)(d).

"Course of dealing". Section 1-205.

"Finance lease". Section 2A-103(1)(g).

"Fungible". Section 1-201(17).

"Goods". Section 2A-103(1)(h).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessor". Section 2A-103(1)(p).

"Merchant". Section 2-104(1).

"Usage of trade". Section 1-205.

§ 28:2A-213. Implied warranty of fitness for particular purpose.

Except in a finance lease, if the lessor at the time the lease contract is made has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor's skill or judgment to select or furnish suitable goods, there is in the lease contract an implied warranty that the goods will be fit for that purpose.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-213.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-315.

Changes: Revised to reflect leasing practices and terminology. E.g., *All-States Leasing Co. v. Bass*, 96 Idaho 873, 879, 538 P.2d 1177, 1183 (1975) (implied warranty of fitness for a particular purpose (Article 2) extends to lease transactions).

Definitional Cross References:

“Finance lease”. Section 2A-103(1)(g).

“Goods”. Section 2A-103(1)(h).

“Knows”. Section 1-201(25).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

§ 28:2A-214. Exclusion or modification of warranties.

(a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed wherever reasonable as consistent with each other; but, subject to the provisions of § 28:2A-202 on parol or extrinsic evidence, negation or limitation is inoperative to the extent that the construction is unreasonable.

(b) Subject to subsection (c) of this section, to exclude or modify the implied warranty of merchantability or any part of it the language must mention “merchantability”, be by a writing, and be conspicuous. Subject to subsection (c) of this section, to exclude or modify any implied warranty of fitness the exclusion must be by a writing and be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, “There is no warranty that the goods will be fit for a particular purpose”.

(c) Notwithstanding subsection (b) of this section, but subject to subsection (d) of this section:

(1) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is,” or “with all faults,” or by other language that in common understanding calls the lessee’s attention to the exclusion of warranties and makes plain that there is no implied warranty, if in writing and conspicuous;

(2) if the lessee before entering into the lease contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed; and

(3) an implied warranty may also be excluded or modified by course of dealing, course of performance, or usage of trade.

(d) To exclude or modify a warranty against interference or against infringement (§ 28:2A-211) or any part of it, the language must be specific, be by a writing, and be conspicuous, unless the circumstances, including course of performance, course of dealing, or usage of trade, give the lessee reason to know that the goods are being leased subject to a claim or interest of any person.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830; Apr. 9, 1997, D.C. Law 11-255, § 27(pp), 44 DCR 1271.)

Prior Codifications. — 1981 Ed., § 28:2A-214.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

Legislative history of Law 11-255. — Law 11-255, the “Second Technical Amendments Act of 1996,” was introduced in Council and as-

signed Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 2-316 and 2-312(2).

Changes: Subsection (2) requires that a disclaimer of the warranty of merchantability be conspicuous and in writing as is the case for a disclaimer of the warranty of fitness; this is contrary to the rule stated in Section 2-316(2) with respect to the disclaimer of the warranty of merchantability. This section also provides that to exclude or modify the implied warranty of merchantability, fitness or against interference or infringement the language must be in writing and conspicuous. There are, however, exceptions to the rule. E.g., course of dealing, course of performance, or usage of trade may exclude or modify an implied warranty. Section 2A-214(3)(c). The analogue of Section 2-312(2) has been moved to subsection (4) of this section for a more unified treatment of disclaimers; there is no policy with respect to leases of goods that would justify continuing certain distinctions found in the Article on Sales (Article 2) regarding the treatment of the disclaimer of various warranties. Compare Sections 2-312(2) and 2-316(2). Finally, the example of a disclaimer of the implied warranty of fitness

stated in subsection (2) differs from the analogue stated in Section 2-316(2); this example should promote a better understanding of the effect of the disclaimer.

Purposes: These changes were made to reflect leasing practices. E.g., *FMC Finance Corp. v. Murphree*, 632 F.2d 413, 418 (5th Cir.1980) (disclaimer of implied warranty under lease transactions must be conspicuous and in writing). The omission of the provisions of Section 2-316(4) was not substantive. Sections 2A-503 and 2A-504.

Cross References:

Article 2, esp. Sections 2-312(2) and 2-316, and Sections 2A-503 and 2A-504.

Definitional Cross References:

“Conspicuous”. Section 1-201(10).
 “Course of dealing”. Section 1-205.
 “Fault”. Section 2A-103(1)(f).
 “Goods”. Section 2A-103(1)(h).
 “Knows”. Section 1-201(25).
 “Lease”. Section 2A-103(1)(j).
 “Lease contract”. Section 2A-103(1)(l).
 “Lessee”. Section 2A-103(1)(n).
 “Person”. Section 1-201(30).
 “Usage of trade”. Section 1-205.
 “Writing”. Section 1-201(46).

§ 28:2A-215. Cumulation and conflict of warranties express or implied.

Warranties, whether express or implied, must be construed as consistent with each other and as cumulative, but if that construction is unreasonable, the intention of the parties determines which warranty is dominant. In ascertaining that intention the following rules apply:

- (1) Exact or technical specifications displace an inconsistent sample or model or general language of description.
- (2) A sample from an existing bulk displaces inconsistent general language of description.
- (3) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-215.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see His-

torical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-317. "Party". Section 1-201(29).
Definitional Cross Reference:

§ 28:2A-216. Third party beneficiaries of express and implied warranties.

A warranty to or for the benefit of a lessee under this article, whether express or implied, extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. The operation of this section may not be excluded, modified, or limited with respect to injury to the person of an individual to whom the warranty extends, but an exclusion, modification, or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against the beneficiary designated under this section.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-216.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-318.

Changes: The provisions of Section 2-318 have been included in this section, modified in two respects: first, to reflect leasing practice, including the special practices of the lessor under a finance lease; second, to reflect and thus codify elements of the official comment to Section 2-318 with respect to the effect of disclaimers and limitations of remedies against third parties.

Purposes: [Mississippi has adopted Alternative A.]. Alternative A is based on the 1962 version of Section 2-318 and is least favorable to the injured person as the doctrine of privity imposed by other law is abrogated to only a limited extent. Alternatives B and C are based on later additions to Section 2-318 and are more favorable to the injured person. In determining which alternative to select, the state legislature should consider making its choice parallel to the choice it made with respect to Section 2-318, as interpreted by the courts.

The last sentence of each of Alternatives A, B and C does not preclude the lessor from excluding or modifying an express or implied warranty under a lease. Section 2A-214. Further, that sentence does not preclude the lessor from limiting the rights and remedies of the lessee and from liquidating damages. Sections 2A-503

and 2A-504. If the lease excludes or modifies warranties, limits remedies for breach, or liquidates damages with respect to the lessee, such provisions are enforceable against the beneficiaries designated under this section. However, this last sentence forbids selective discrimination against the beneficiaries designated under this section, i.e., exclusion of the lessor's liability to the beneficiaries with respect to warranties made by the lessor to the lessee.

Other law, including the Article on Sales (Article 2), may apply in determining the extent to which a warranty to or for the benefit of the lessor extends to the lessee and third parties. This is in part a function of whether the lessor has bought or leased the goods.

This Article does not purport to change the development of the relationship of the common law, with respect to products liability, including strict liability in tort (as restated in Restatement (Second) of Torts, s 402A (1965)), to the provisions of this Act. Compare *Cline v. Prowler Indus. of Maryland*, 418 A.2d 968 (Del.1980) and *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973) with *Dippel v. Sciano*, 37 Wis.2d 443, 155 N.W.2d 55 (1967).

Cross References:

Article 2, esp. Section 2-318, and Sections 2A-214, 2A-503 and 2A-504.

Definitional Cross References:

“Goods”. Section 2A-103(1)(h).

“Lessee”. Section 2A-103(1)(n).

“Person”. Section 1-201(30).

“Remedy”. Section 1-201(34).

“Rights”. Section 1-201(36).

HISTORICAL NOTES

§ 28:2A-217. Identification.

Identification of goods as goods to which a lease contract refers may be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs:

(1) When the lease contract is made if the lease contract is for a lease of goods that are existing and identified;

(2) When the goods are shipped, marked, or otherwise designated by the lessor as goods to which the lease contract refers, if the lease contract is for a lease of goods that are not existing and identified; or

(3) When the young are conceived, if the lease contract is for a lease of unborn young of animals.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-522.

Prior Codifications. — 1981 Ed., § 28:2A-217.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-501.

Changes: This section, together with Section 2A-218, is derived from the provisions of Section 2-501, with changes to reflect lease terminology; however, this section omits as irrelevant to leasing practice the treatment of special property.

Purposes: With respect to subsection (b) there is a certain amount of ambiguity in the reference to when goods are designated, e.g., when the lessor is both selling and leasing goods to the same lessee/buyer and has marked goods for delivery but has not distinguished

between those related to the lease contract and those related to the sales contract. As in Section 2-501(1)(b), this issue has been left to be resolved by the courts, case by case.

Cross References:

Sections 2-501 and 2A-218.

Definitional Cross References:

“Agreement”. Section 1-201(3).

“Goods”. Section 2A-103(1)(h).

“Lease”. Section 2A-103(1)(j).

“Lease contract”. Section 2A-103(1)(l).

“Lessor”. Section 2A-103(1)(p).

“Party”. Section 1-201(29).

§ 28:2A-218. Insurance and proceeds.

(a) A lessee obtains an insurable interest when existing goods are identified to the lease contract even though the goods identified are nonconforming and the lessee has an option to reject them.

(b) If a lessee has an insurable interest only by reason of the lessor’s identification of the goods, the lessor, until default or insolvency or notification to the lessee that identification is final, may substitute other goods for those identified.

(c) Notwithstanding a lessee’s insurable interest under subsections (a) and (b) of this section, the lessor retains an insurable interest until an option to buy has been exercised by the lessee and risk of loss has passed to the lessee.

(d) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

(e) The parties by agreement may determine that one or more parties have an obligation to obtain and pay for insurance covering the goods and by agreement may determine the beneficiary of the proceeds of the insurance.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-218.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-501.

Changes: This section, together with Section 2A-217, is derived from the provisions of Section 2-501, with changes and additions to reflect leasing practices and terminology.

Purposes: Subsection (2) states a rule allowing substitution of goods by the lessor under certain circumstances, until default or insolvency of the lessor, or until notification to the lessee that identification is final. Subsection (3) states a rule regarding the lessor's insurable interest that, by virtue of the difference between a sale and a lease, necessarily is different from the rule stated in Section 2-501(2) regarding the seller's insurable interest. For this purpose the option to buy shall be deemed to have been exercised by the lessee when the resulting sale is closed, not when the lessee gives notice to the lessor. Further, subsection

(5) is new and reflects the common practice of shifting the responsibility and cost of insuring the goods between the parties to the lease transaction.

Cross References:

Sections 2-501, 2-501(2) and 2A-217.

Definitional Cross References:

"Agreement". Section 1-201(3).

"Buying". Section 2A-103(1)(a).

"Conforming". Section 2A-103(1)(d).

"Goods". Section 2A-103(1)(h).

"Insolvent". Section 1-201(23).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notification". Section 1-201(26).

"Party". Section 1-201(29).

HISTORICAL NOTES

§ 28:2A-219. Risk of loss.

(a) Except in the case of a finance lease, risk of loss is retained by the lessor and does not pass to the lessee. In the case of a finance lease, risk of loss passes to the lessee.

(b) Subject to the provisions of this article on the effect of default on risk of loss (§ 28:2A-220), if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:

(1) If the lease contract requires or authorizes the goods to be shipped by carrier

(A) And it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier; but

(B) If it does require delivery at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the lessee when the goods are there duly so tendered as to enable the lessee to take delivery.

(2) If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgment by the bailee of the lessee's right to possession of the goods.

(3) In any case not within paragraph (1) or (2) of this subsection, the risk

of loss passes to the lessee on the lessee's receipt of the goods if the lessor, or, in the case of a finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on tender of delivery.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-529.

Prior Codifications. — 1981 Ed., § 28:2A-219.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-509(1) through (3).

Changes: Subsection (1) is new. The introduction to subsection (2) is new, but subparagraph (a) incorporates the provisions of Section 2-509(1); subparagraph (b) incorporates the provisions of Section 2-509(2) only in part, reflecting current practice in lease transactions.

Purposes: Subsection (1) states rules related to retention or passage of risk of loss consistent with current practice in lease transactions. The provisions of subsection (4) of Section 2-509 are not incorporated as they are not necessary. This section does not deal with

responsibility for loss caused by the wrongful act of either the lesser or the lessee.

Cross References:

Sections 2-509(1), 2-509(2) and 2-509(4).

Definitional Cross References:

"Delivery". Section 1-201(14).

"Finance lease". Section 2A-103(1)(g).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Merchant". Section 2-104(1).

"Receipt". Section 2-103(1)(c).

"Rights". Section 1-201(36).

"Supplier". Section 2A-103(1)(x).

§ 28:2A-220. Effect of default on risk of loss.

(a) Where risk of loss is to pass to the lessee and the time of passage is not stated:

(1) If a tender or delivery of goods so fails to conform to the lease contract as to give a right of rejection, the risk of their loss remains with the lessor, or, in the case of a finance lease, the supplier, until cure or acceptance.

(2) If the lessee rightfully revokes acceptance, he or she, to the extent of any deficiency in his or her effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning.

(b) Whether or not risk of loss is to pass to the lessee, if the lessee as to conforming goods already identified to a lease contract repudiates or is otherwise in default under the lease contract, the lessor, or, in the case of a finance lease, the supplier, to the extent of any deficiency in his or her effective insurance coverage may treat the risk of loss as resting on the lessee for a commercially reasonable time.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-219.

Prior Codifications. — 1981 Ed., § 28:2A-220.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-510.

Changes: Revised to reflect leasing practices and terminology. The rule in Section (1)(b) does not allow the lessee under a finance lease to treat the risk of loss as having remained with the supplier from the beginning. This is appropriate given the limited circumstances under which the lessee under a finance lease is allowed to revoke acceptance. Section 2A-517 and Section 2A-516 official comment.

Definitional Cross References:

“Conforming”. Section 2A-103(1)(d).

“Delivery”. Section 1-201(14).

“Finance lease”. Section 2A-103(1)(g).

“Goods”. Section 2A-103(1)(h).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Reasonable time”. Section 1-204(1) and (2).

“Rights”. Section 1-201(36).

“Supplier”. Section 2A-103(1)(x).

§ 28:2A-221. Casualty to identified goods.

If a lease contract requires goods identified when the lease contract is made, and the goods suffer casualty without fault of the lessee, the lessor, or the supplier before delivery, or the goods suffer casualty before risk of loss passes to the lessee pursuant to the lease agreement or § 28:2A-219, then:

(1) If the loss is total, the lease contract is avoided; and

(2) If the loss is partial or the goods have so deteriorated as to no longer conform to the lease contract, the lessee may nevertheless demand inspection and at his or her option either treat the lease contract as avoided or, except in a finance lease that is not a consumer lease, accept the goods with due allowance from the rent payable for the balance of the lease term for the deterioration or the deficiency in quantity but without further right against the lessor.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-221.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-613.

Changes: Revised to reflect leasing practices and terminology. Purpose: Due to the vagaries of determining the amount of due allowance (Section 2-613(b), no attempt was made in subsection (b) to treat a problem unique to lease contracts and installment sales contracts: determining how to recapture the allowance, e.g., application to the first or last rent payments or allocation, pro rata, to all rent payments.

Cross References:

Section 2-613.

Definitional Cross References:

“Conforming”. Section 2A-103(1)(d).

“Consumer lease”. Section 2A-103(1)(e).

“Delivery”. Section 1-201(14).

“Fault”. Section 2A-103(1)(f).

“Finance lease”. Section 2A-103(1)(g).

“Goods”. Section 2A-103(1)(h).

“Lease”. Section 2A-103(1)(j).

“Lease agreement”. Section 2A-103(1)(k).

“Lease contract”. Section 2A-193(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Rights”. Section 1-201(36).

“Supplier”. Section 2A-103(1)(x).

*Part 3. Effect of Lease Contract.***§ 28:2A-301. Enforceability of lease contract.**

Except as otherwise provided in this article, a lease contract is effective and enforceable according to its terms between the parties, against purchasers of the goods and against creditors of the parties.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-301.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 9-201.

Changes: The first sentence of Section 9-201 was incorporated, modified to reflect leasing terminology. The second sentence of Section 9-201 was eliminated as not relevant to leasing practices.

Purposes:

1. This section establishes a general rule regarding the validity and enforceability of a lease contract. The lease contract is effective and enforceable between the parties and against third parties. Exceptions to this general rule arise where there is a specific rule to the contrary in this Article. Enforceability is, thus, dependent upon the lease contract meeting the requirements of the Statute of Frauds provisions of Section 2A-201. Enforceability is also a function of the lease contract conforming to the principles of construction and interpretation contained in the Article on General Provisions (Article 1). Section 2A-103(4).

2. The effectiveness or enforceability of the lease contract is not dependent upon the lease contract or any financing statement or the like being filed or recorded; however, the priority of the interest of a lessor of fixtures with respect to the interests of certain third parties in such fixtures is subject to the provisions of the Article on Secured Transactions (Article 9). Section 2A-309. Prior to the adoption of this Article filing or recording was not required with respect to leases, only leases intended as security. The definition of security interest, as amended concurrently with the adoption of this Article, more clearly delineates leases and leases intended as security and thus signals the need to file. Section 1-201(37). Those lessors who are concerned about whether the transaction creates a lease or a security interest will continue to file a protective financing statement. Section 9-408. Coogan, *Leasing and the Uniform Commercial Code*, in *Equipment Leasing-Leveraged Leasing* 681, 744-46 (2d ed. 1980).

3. Hypothetical:

(a) In construing this section it is important to recognize its relationship to other sections in this Article. This is best demonstrated by reference to a hypothetical. Assume that on February 1 A, a manufacturer of combines and other farm equipment, leased a fleet of six combines to B, a corporation engaged in the business of farming, for a 12 month term. Under the lease agreement between A and B, A agreed to defer B's payment of the first two months' rent to April 1. On March 1 B recognized that it would need only four combines and thus subleased two combines to C for an 11 month term.

(b) This hypothetical raises a number of issues that are answered by the sections contained in this part. Since lease is defined to include sublease (Section 2A-103(1)(j) and (w)), this section provides that the prime lease between A and B and the sublease between B and C are enforceable in accordance with their terms, except as otherwise provided in this Article; that exception, in this case, is one of considerable scope.

(c) The separation of ownership, which is in A, and possession, which is in B with respect to four combines and which is in C with respect to two combines, is not relevant. Section 2A-302. A's interest in the six combines cannot be challenged simply because A parted with possession to B, who in turn parted with possession of some of the combines to C. Yet it is important to note that by the terms of Section 2A-302 this conclusion is subject to change if otherwise provided in this Article.

(d) B's entering the sublease with C raises an issue that is treated by this part. In a dispute over the leased combines A may challenge B's right to sublease. The rule is permissive as to transfers of interests under a lease contract, including subleases. Section 2A-303(2). However, the rule has two significant qualifications. If the prime lease contract between A and B prohibits B from subleasing the combines, or

makes such a sublease an event of default, Section 2A-303(2) applies; thus, while B's interest under the prime lease may not be transferred under the sublease to C, A may have a remedy pursuant to Section 2A-303(5). Absent a prohibition or default provision in the prime lease contract A might be able to argue that the sublease to C materially increases A's risk; thus, while B's interest under the prime lease may be transferred under the sublease to C, A may have a remedy pursuant to Section 2A-303(5). Section 2A-303(5)(b)(ii).

(e) Resolution of this issue is also a function of the section dealing with the sublease of goods by a prime lessee (Section 2A-305). Subsection (1) of Section 2A-305, which is subject to the rules of Section 2A-303 stated above, provides that C takes subject to the interest of A under the prime lease between A and B. However, there are two exceptions. First, if B is a merchant (Sections 2A-103(3) and 2-104(1)) dealing in goods of that kind and C is a sublessee in the ordinary course of business (Sections 2A-103(1)(o) and 2A-103(1)(n)), C takes free of the prime lease between A and B. Second, if B has rejected the six combines under the prime lease with A, and B disposes of the goods by sublease to C, C takes free of the prime lease if C can establish good faith. Section 2A-511(4).

(f) If the facts of this hypothetical are expanded and we assume that the prime lease obligated B to maintain the combines, an additional issue may be presented. Prior to entering the sublease, B, in satisfaction of its maintenance covenant, brought the two combines that it desired to sublease to a local independent dealer of A's. The dealer did the requested work for B. C inspected the combines on the dealer's lot after the work was completed. C signed the sublease with B two days later. C, however, was prevented from taking delivery of the two combines as B refused to pay the dealer's invoice for the repairs. The dealer furnished the repair service to B in the ordinary course of the dealer's business. If under applicable law the dealer has a lien on repaired goods in the dealer's possession, the dealer's lien will take priority over B's and C's interests, and also should take priority over A's interest, depending upon the terms of the lease contract and the applicable law. Section 2A-306.

(g) Now assume that C is in financial straits and one of C's creditors obtains a judgment against C. If the creditor levies on C's subleasehold interest in the two combines, who will prevail? Unless the levying creditor also holds a lien covered by Section 2A-306, discussed above, the judgment creditor will take its interest subject to B's rights under the sublease and A's rights under the prime lease. Section 2A-307(1). The hypothetical becomes more complicated if we assume that B is in financial straits and B's creditor holds the judg-

ment. Here the judgment creditor takes subject to the sublease unless the lien attached to the two combines before the sublease contract became enforceable. Section 2A-307(2)(a). However, B's judgment creditor cannot prime A's interest in the goods because, with respect to A, the judgment creditor is a creditor of B in its capacity as lessee under the prime lease between A and B. Thus, here the judgment creditor's interest is subject to the lease between A and B. Section 2A-307(1).

(h) Finally, assume that on April 1 B is unable to pay A the deferred rent then due under the prime lease, but that C is current in its payments under the sublease from B. What effect will B's default under the prime lease between A and B have on C's rights under the sublease between B and C? Section 2A-301 provides that a lease contract is effective against the creditors of either party. Since a lease contract includes a sublease contract (Section 2A-103(1)(l)), the sublease contract between B and C arguably could be enforceable against A, a prime lessor who has extended unsecured credit to B the prime lessee/sublessor, if the sublease contract meets the requirements of Section 2A-201. However, the rule stated in Section 2A-301 is subject to other provisions in this Article. Under Section 2A-305, C, as sublessee, would take subject to the prime lease contract in most cases. Thus, B's default under the prime lease will in most cases lead to A's recovery of the goods from C. Section 2A-523. A and C could provide otherwise by agreement. Section 2A-311. C's recourse will be to assert a claim for damages against B. Sections 2A-211(1) and 2A-508.

4. Relationship Between Sections: (a) As the analysis of the hypothetical demonstrates, Part 3 of the Article focuses on issues that relate to the enforceability of the lease contract (Sections 2A-301, 2A-302 and 2A-303) and to the priority of various claims to the goods subject to the lease contract (Sections 2A-304, 2A-305, 2A-306, 2A-307, 2A-308, 2A-309, 2A-310, and 2A-311).

(b) This section states a general rule of enforceability, which is subject to specific rules to the contrary stated elsewhere in the Article. Section 2A-302 negates any notion that the separation of title and possession is fraudulent as a rule of law. Finally, Section 2A-303 states rules with respect to the transfer of the lessor's interest (as well as the residual interest in the goods) or the lessee's interest under the lease contract. Qualifications are imposed as a function of various issues, including whether the transfer is the creation or enforcement of a security interest or one that is material to the other party to the lease contract. In addition, a system of rules is created to deal with the rights and duties among assignor, assignee and the other party to the lease contract.

(c) Sections 2A-304 and 2A-305 are twins that deal with good faith transferees of goods subject to the lease contract. Section 2A-304 creates a set of rules with respect to transfers by the lessor of goods subject to a lease contract; the transferee considered is a subsequent lessee of the goods. The priority dispute covered here is between the subsequent lessee and the original lessee of the goods (or persons claiming through the original lessee). Section 2A-305 creates a set of rules with respect to transfers by the lessee of goods subject to a lease contract; the transferees considered are buyers of the goods or sublessees of the goods. The priority dispute covered here is between the transferee and the lessor of the goods (or persons claiming through the lessor).

(d) Section 2A-306 creates a rule with respect to priority disputes between holders of liens for services or materials furnished with respect to goods subject to a lease contract and the lessor or the lessee under that contract. Section 2A-307 creates a rule with respect to priority disputes between the lessee and creditors of the lessor and priority disputes between the lessor and creditors of the lessee.

(e) Section 2A-308 creates a series of rules relating to allegedly fraudulent transfers and

preferences. The most significant rule is that set forth in subsection (3) which validates sale-leaseback transactions if the buyer-lessor can establish that he or she bought for value and in good faith.

(f) Sections 2A-309 and 2A-310 create a series of rules with respect to priority disputes between various third parties and a lessor of fixtures or accessions, respectively, with respect thereto.

(g) Finally, Section 2A-311 allows parties to alter the statutory priorities by agreement.

Cross References:

Article 1, especially Section 1-201(37), and Sections 2-104(1), 2A-103(1)(j), 2A-103(1)(l), 2A-103(1)(n), 2A-103(1)(o) and 2A-103(1)(w), 2A-103(3), 2A-103(4), 2A-201, 2A-301 through 2A-303, 2A-303(2), 2A-303(5), 2A-304 through 2A-307, 2A-307(1), 2A-307(2)(a), 2A-308 through 2A-311, 2A-508, 2A-511(4), 2A-523, Article 9, especially Sections 9-201 and 9-408.

Definitional Cross References:

"Creditor". Section 1-201(12).
 "Goods". Section 2A-103(1)(h).
 "Lease contract". Section 2A-103(1)(l).
 "Party". Section 1-201(29).
 "Purchaser". Section 1-201(33).
 "Term". Section 1-201(42).

§ 28:2A-302. Title to and possession of goods.

Except as otherwise provided in this article, each provision of this article applies whether the lessor or a third party has title to the goods, and whether the lessor, the lessee, or a third party has possession of the goods, notwithstanding any statute or rule of law that possession or the absence of possession is fraudulent.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-302.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 9-202.

Changes: Section 9-202 was modified to reflect leasing terminology and to clarify the law of leases with respect to fraudulent conveyances or transfers.

Purposes: The separation of ownership and possession of goods between the lessor and the lessee (or a third party) has created problems under certain fraudulent conveyance statutes. See, e.g., *In re Ludlum Enters.*, 510 F.2d 996 (5th Cir.1975); *Suburbia Fed. Sav. & Loan Ass'n v. Bel-Air Conditioning Co.*, 385 So.2d 1151

(Fla. Dist. Ct. App. 1980). This section provides, among other things, that separation of ownership and possession per se does not affect the enforceability of the lease contract. Sections 2A-301 and 2A-308.

Cross References:

Sections 2A-301, 2A-308 and 9-202.

Definitional Cross References:

"Goods". Section 2A-103(1)(h).
 "Lessee". Section 2A-103(1)(n).
 "Lessor". Section 2A-103(1)(p).

§ 28:2A-303. Alienability of party's interest under lease contract or of lessor's residual interest in goods; delegation of performance; transfer of rights.

(a) As used in this section, the term "creation of a security interest" includes the sale of a lease contract that is subject to § 28:9-109(a)(3).

(b) Except as provided in subsection (c) of this section and § 28:9-407, a provision in a lease agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (d), but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

(c) A provision in a lease agreement which (i) prohibits a transfer of a right to damages for default with respect to the whole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, or (ii) makes such a transfer an event of default, is not enforceable, and such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract within the purview of subsection (d).

(d) Subject to subsection (c) and § 28:9-407:

(1) If a transfer is made which is made an event of default under a lease agreement, the party to the lease contract not making the transfer, unless that party waives the default or otherwise agrees, has the rights and remedies described in § 28:2A-501(2);

(2) If paragraph (1) is not applicable and if a transfer is made that (i) is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, unless the party not making the transfer agrees at any time to the transfer in the lease contract or otherwise, then, except as limited by contract, (i) the transferor is liable to the party not making the transfer for damages caused by the transfer to the extent that the damages could not reasonably be prevented by the party not making the transfer, and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract or an injunction against the transfer.

(e) A transfer of "the lease" or of "all my rights under the lease", or a transfer in similar general terms, is a transfer of rights and, unless the language or the circumstances, as in a transfer for security, indicate the contrary, the transfer is a delegation of duties by the transferor to the transferee. Acceptance by the transferee constitutes a promise by the transferee to perform those duties. The promise is enforceable by either the transferor or the other party to the lease contract.

(f) Unless otherwise agreed by the lessor and the lessee, a delegation of

performance does not relieve the transferor as against the other party of any duty to perform or of any liability for default.

(g) In a consumer lease, to prohibit the transfer of an interest of a party under the lease contract or to make a transfer an event of default, the language must be specific, by a writing, and conspicuous.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830; May 16, 1995, D.C. Law 10-255, § 21, 41 DCR 5193; July 25, 1995, D.C. Law 11-30, § 7(b), 42 DCR 1547; Oct. 26, 2000, D.C. Law 13-201, § 201(d)(2), 47 DCR 7576.)

Section references. — This section is referred to in §§ 28:2A-304 and 28:2A-305.

Prior Codifications. — 1981 Ed., § 28:2A-303.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

Legislative history of Law 10-255. — Law 10-255, the “Technical Amendments Act of

1994,” was introduced in Council and assigned Bill No. 10-673, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 21, 1994, and July 5, 1994, respectively. Signed by the Mayor on July 25, 1994, it was assigned Act No. 10-302 and transmitted to both Houses of Congress for its review. D.C. Law 10-255 became effective on May 16, 1995.

Legislative history of Law 11-30. — For legislative history of D.C. Law 11-30, see Historical and Statutory Notes following § 28:2A-209.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:2A-103.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 2-210 and 9-311.

Changes: The provisions of Sections 2-210 and 9-311 were incorporated in this section, with substantial modifications to reflect leasing terminology and practice and to harmonize the principles of the respective provisions, i.e., limitations on delegation of performance on the one hand and alienability of rights on the other. In addition, unlike Section 2-210 which deals only with voluntary transfers, this section deals with involuntary as well as voluntary transfers. Moreover, the principle of Section 9-318(4) denying effectiveness to contractual terms prohibiting assignments of receivables due and to become due also is implemented.

Purposes:

1. Subsection (2) states a rule, consistent with Section 9-401(b), that voluntary and involuntary transfers of an interest of a party under the lease contract or of the lessor’s residual interest, including by way of the creation or enforcement of a security interest, are effective, notwithstanding a provision in the lease agreement prohibiting the transfer or making the transfer an event of default. Although the transfers are effective, the provision in the lease agreement is nevertheless enforceable, but only as provided in subsection (4). Under subsection (4) the prejudiced party is limited to the remedies on “default under the lease contract” in this Article and, except as limited by

this Article, as provided in the lease agreement, if the transfer has been made an event of default. Section 2A-501(2). Usually, there will be a specific provision to this effect or a general provision making a breach of a covenant an event of default. In those cases where the transfer is prohibited, but not made an event of default, the prejudiced party may recover damages; or, if the damage remedy would be ineffective adequately to protect that party, the court can order cancellation of the lease contract or enjoin the transfer. This rule that such provisions generally are enforceable is subject to subsection (3) and Section 9-407, which make such provisions unenforceable in certain instances.

2. Under Section 9-407, a provision in a lease agreement which prohibits the creation or enforcement of a security interest, including sales of lease contracts subject to Article 9 (Section 9-109(a)(3)), or makes it an event of default is generally not enforceable, reflecting the policy of Section 9-406 and former Section 9-318(4).

3. Subsection (3) is based upon Section 2-210(2) and Section 9-406. It makes unenforceable a prohibition against transfers of certain rights to payment or a provision making the transfer an event of default. It also provides that such transfers do not materially impair the prospect of obtaining return performance by, materially change the duty of, or materially increase the burden or risk imposed on, the

other party to the lease contract so as to give rise to the rights and remedies stated in subsection (4). Accordingly, a transfer of a right to payment cannot be prohibited or made an event of default, or be one that materially impairs performance, changes duties or increases risk, if the right is already due or will become due without further performance being required by the party to receive payment. Thus, a lessor can transfer the right to future payments under the lease contract, including by way of a grant of a security interest, and the transfer will not give rise to the rights and remedies stated in subsection (4) if the lessor has no remaining performance under the lease contract. The mere fact that the lessor is obligated to allow the lessee to remain in possession and to use the goods as long as the lessee is not in default does not mean that there is "remaining performance" on the part of the lessor. Likewise, the fact that the lessor has potential liability under a "non-operating" lease contract for breaches of warranty does not mean that there is "remaining performance." In contrast, the lessor would have "remaining performance" under a lease contract requiring the lessor to regularly maintain and service the goods or to provide "upgrades" of the equipment on a periodic basis in order to avoid obsolescence. The basic distinction is between a mere potential duty to respond which is not "remaining performance," and an affirmative duty to render stipulated performance. Although the distinction may be difficult to draw in some cases, it is instructive to focus on the difference between "operating" and "non-operating" leases as generally understood in the marketplace. Even if there is "remaining performance" under a lease contract, a transfer for security of a right to payment that is made an event of default or that is in violation of a prohibition against transfer does not give rise to the rights and remedies under subsection (4) if it does not constitute an actual delegation of a material performance under Section 9-407.

4. The application of either the rule of Section 9-407 or the rule of subsection (3) to the grant by the lessor of a security interest in the lessor's right to future payment under the lease contract may produce the same result. Both provisions generally protect security transfers by the lessor in particular because the creation by the lessor of a security interest or the enforcement of that interest generally will not prejudice the lessee's rights if it does not result in a delegation of the lessor's duties. To the contrary, the receipt of loan proceeds or relief from the enforcement of an antecedent debt normally should enhance the lessor's ability to perform its duties under the lease contract. Nevertheless, there are circumstances where relief might be justified. For example, if ownership of the goods is transferred pursuant to enforce-

ment of a security interest to a party whose ownership would prevent the lessee from continuing to possess the goods, relief might be warranted. See 49 U.S.C. s 1401(a) and (b) which places limitations on the operation of aircraft in the United States based on the citizenship or corporate qualification of the registrant.

5. Relief on the ground of material prejudice when the lease agreement does not prohibit the transfer or make it an event of default should be afforded only in extreme circumstances, considering the fact that the party asserting material prejudice did not insist upon a provision in the lease agreement that would protect against such a transfer.

6. Subsection (4) implements the rule of subsection (2). Subsection (2) provides that, even though a transfer is effective, a provision in the lease agreement prohibiting it or making it an event of default may be enforceable as provided in subsection (4). See *Brummond v. First National Bank of Clovis*, 656 P.2d 884, 35 U.C.C. Rep. Serv. (Callaghan) 1311 (N. Mex. 1983), stating the analogous rule for Section 9-311. If the transfer prohibited by the lease agreement is made an event of default, then, under subsection (4)(a), unless the default is waived or there is an agreement otherwise, the aggrieved party has the rights and remedies referred to in Section 2A-501(2), viz. those in this Article and, except as limited in the Article, those provided in the lease agreement. In the unlikely circumstance that the lease agreement prohibits the transfer without making a violation of the prohibition an event of default or, even if there is no prohibition against the transfer, and the transfer is one that materially impairs performance, changes duties, or increases risk (for example, a sublease or assignment to a party using the goods improperly or for an illegal purpose), then subsection (4)(b) is applicable. In that circumstance, unless the party aggrieved by the transfer has otherwise agreed in the lease contract, such as by assenting to a particular transfer or to transfers in general, or agrees in some other manner, the aggrieved party has the right to recover damages from the transferor and a court may, in appropriate circumstances, grant other relief, such as cancellation of the lease contract or an injunction against the transfer.

7. If a transfer gives rise to the rights and remedies provided in subsection (4), the transferee as an alternative may propose, and the other party may accept, adequate cure or compensation for past defaults and adequate assurance of future due performance under the lease contract. Subsection (4) does not preclude any other relief that may be available to a party to the lease contract aggrieved by a transfer subject to an enforceable prohibition, such as an

action for interference with contractual relations.

8. Subsection (7) requires that a provision in a consumer lease prohibiting a transfer, or making it an event of default, must be specific, written and conspicuous. See Section 1-201(10). This assists in protecting a consumer lessee against surprise assertions of default.

9. Subsection (5) is taken almost verbatim from the provisions of Section 2-210(5). The subsection states a rule of construction that distinguishes a commercial assignment, which substitutes the assignee for the assignor as to rights and duties, and an assignment for security or financing assignment, which substitutes the assignee for the assignor only as to rights. Note that the assignment for security or financing assignment is a subset of all security interests. Security interest is defined to include "any interest of a buyer of . . . chattel paper". Section 1-201(37). Chattel paper is defined to include a lease. Section 9-102. Thus, a buyer of leases is the holder of a security interest in the leases. That conclusion should not influence this issue, as the policy is quite different. Whether a buyer of leases is the holder of a commercial assign-

ment, or an assignment for security or financing assignment should be determined by the language of the assignment or the circumstances of the assignment.

Cross References:

Sections 1-201(11), 1-201(37), 2-210, 2A-401, 9-102(1)(b), 9-104(f), 9-105(1)(a), 9-206, and 9-318.

Definitional Cross References:

"Agreed" and "Agreement". Section 1-201(3).
 "Conspicuous". Section 1-201(10).
 "Goods". Section 2A-103(1)(h).
 "Lease". Section 2A-103(1)(j).
 "Lease contract". Section 2A-103(1)(l).
 "Lessee". Section 2A-103(1)(n).
 "Lessor". Section 2A-103(1)(p).
 "Lessor's residual interest". Section 2A-103(1)(q).
 "Notice". Section 1-201(25).
 "Party". Section 1-201(29).
 "Person". Section 1-201(30).
 "Reasonable time". Section 1-204(1) and (2).
 "Rights". Section 1-201(36).
 "Term". Section 1-201(42).
 "Writing". Section 1-201(46).

§ 28:2A-304. Subsequent lease of goods by lessor.

(a) Subject to § 28:2A-303, a subsequent lessee from a lessor of goods under an existing lease contract obtains, to the extent of the leasehold interest transferred, the leasehold interest in the goods that the lessor had or had power to transfer, and, except as provided in subsection (b) of this section and § 28:2A-527(d), takes subject to the existing lease contract. A lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value, but only to the extent set forth in the preceding sentence. If goods have been delivered under a transaction of purchase, the lessor has that power even though:

- (1) The lessor's transferor was deceived as to the identity of the lessor;
- (2) The delivery was in exchange for a check which is later dishonored;
- (3) It was agreed that the transaction was to be a "cash sale"; or
- (4) The delivery was procured through fraud punishable as larcenous under the criminal law.

(b) A subsequent lessee in the ordinary course of business from a lessor who is a merchant dealing in goods of that kind to whom the goods were entrusted by the existing lessee of that lessor before the interest of the subsequent lessee became enforceable against that lessor obtains, to the extent of the leasehold interest transferred, all of that lessor's and the existing lessee's rights to the goods, and takes free of the existing lease contract.

(c) A subsequent lessee from the lessor of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of the District or of another jurisdiction takes no greater rights than those provided both by this and by the certificate of title statute.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-104 and 28:2A-105.

Prior Codifications. — 1981 Ed., § 28:2A-304.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-403.

Changes: While Section 2-403 was used as a model for this section, the provisions of Section 2-403 were significantly revised to reflect leasing practices and to integrate this Article with certificate of title statutes.

Purposes:

1. This section must be read in conjunction with, as it is subject to, the provisions of Section 2A-303, which govern voluntary and involuntary transfers of rights and duties under a lease contract, including the lessor's residual interest in the goods.

2. This section must also be read in conjunction with Section 2-403. This section and Section 2A-305 are derived from Section 2-403, which states a unified policy on good faith purchases of goods. Given the scope of the definition of purchaser (Section 1-201(33)), a person who bought goods to lease as well as a person who bought goods subject to an existing lease from a lessor will take pursuant to Section 2-403. Further, a person who leases such goods from the person who bought them should also be protected under Section 2-403, first because the lessee's rights are derivative and second because the definition of purchaser should be interpreted to include one who takes by lease; no negative implication should be drawn from the inclusion of lease in the definition of purchase in this Article. Section 2A-103(1)(v).

3. There are hypotheticals that relate to an entrustee's unauthorized lease of entrusted goods to a third party that are outside the provisions of Sections 2-403, 2A-304 and 2A-305. Consider a sale of goods by M, a merchant, to B, a buyer. After paying for the goods B allows M to retain possession of the goods as B is short of storage. Before B calls for the goods M leases the goods to L, a lessee. This transaction is not governed by Section 2-403(2) as L is not a buyer in the ordinary course of business. Section 1-201(9). Further, this transaction is not governed by Section 2A-304(2) as B is not an existing lessee. Finally, this transaction is not governed by Section 2A-305(2) as B is not M's lessor. Section 2A-307(2) resolves the potential dispute between B, M and L. By virtue of B's entrustment of the goods to M and M's lease of the goods to L, B has a cause of action against M under the common law. Sections 2A-103(4) and 1-103. See, e.g., Restatement (Second) of Torts ss 222A-243. Thus, B is a creditor of M. Sections 2A-103(4) and 1-201(12).

Section 2A-307(2) provides that B, as M's creditor, takes subject to M's lease to L. Thus, if L does not default under the lease, L's enjoyment and possession of the goods should be undisturbed. However, B is not without recourse. B's action should result in a judgment against M providing, among other things, a turnover of all proceeds arising from M's lease to L, as well as a transfer of all of M's right, title and interest as lessor under M's lease to L, including M's residual interest in the goods. Section 2A-103(1)(q).

4. Subsection (1) states a rule with respect to the leasehold interest obtained by a subsequent lessee from a lessor of goods under an existing lease contract. The interest will include such leasehold interest as the lessor has in the goods as well as the leasehold interest that the lessor had the power to transfer. Thus, the subsequent lessee obtains unimpaired all rights acquired under the law of agency, apparent agency, ownership or other estoppel, whether based upon statutory provisions or upon case law principles. Sections 2A-103(4) and 1-103. In general, the subsequent lessee takes subject to the existing lease contract, including the existing lessee's rights thereunder. Furthermore, the subsequent lease contract is, of course, limited by its own terms, and the subsequent lessee takes only to the extent of the leasehold interest transferred thereunder.

5. Subsection (1) further provides that a lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value. In addition, subsections (1)(a) through (d) provide specifically for the protection of the good faith subsequent lessee for value in a number of specific situations which have been troublesome under prior law.

6. The position of an existing lessee who entrusts leased goods to its lessor is not distinguishable from the position of other entrusters. Thus, subsection (2) provides that the subsequent lessee in the ordinary course of business takes free of the existing lease contract between the lessor entrustee and the lessee entruster, if the lessor is a merchant dealing in goods of that kind. Further, the subsequent lessee obtains all of the lessor entrustee's and the lessee entruster's rights to the goods, but only to the extent of the leasehold interest transferred by the lessor entrustee. Thus, the lessor entrustee retains the residual interest in the goods. Section 2A-103(1)(q). However, entrustment by the existing lessee must have

occurred before the interest of the subsequent lessee became enforceable against the lessor. Entrusting is defined in Section 2-403(3) and that definition applies here. Section 2A-103(3).

7. Subsection (3) states a rule with respect to a transfer of goods from a lessor to a subsequent lessee where the goods are subject to an existing lease and covered by a certificate of title. The subsequent lessee's rights are no greater than those provided by this section and the applicable certificate of title statute, including any applicable case law construing such statute. Where the relationship between the certificate of title statute and Section 2-403, the statutory analogue to this section, has been construed by a court, that construction is incorporated here. Sections 2A-103(4) and 1-102(1) and (2). The better rule is that the certificate of title statutes are in harmony with Section 2-403 and thus would be in harmony with this section. E.g., *Atwood Chevrolet-Olds v. Aberdeen Mun. School Dist.*, 431 So.2d 926, 928, (Miss.1983); *Godfrey v. Gilsdorf*, 476 P.2d 3, 6, 86 Nev. 714, 718 (1970); *Martin v. Nager*, 192 N.J.Super. 189, 197-98, 469 A.2d 519, 523 (Su-

per. Ct. Ch. Div. 1983). Where the certificate of title statute is silent on this issue of transfer, this section will control.

Cross References:

Sections 1-102, 1-103, 1-201(33), 2-403, 2A-103(1)(v), 2A-103(3), 2A-103(4), 2A-303 and 2A-305.

Definitional Cross References:

"Agreed". Section 1-201(3).
 "Delivery". Section 1-201(14).
 "Entrusting". Section 2-403(3).
 "Good faith". Sections 1-201(19) and 2-103(1)(b).
 "Goods". Section 2A-103(1)(h).
 "Lease". Section 2A-103(1)(j).
 "Lease contract". Section 2A-103(1)(l).
 "Leasehold interest". Section 2A-103(1)(m).
 "Lessee". Section 2A-103(1)(n).
 "Lessee in the ordinary course of business". Section 2A-103(1)(o).
 "Lessor". Section 2A-103(1)(p).
 "Merchant". Section 2-104(1).
 "Purchase". Section 2A-103(1)(v).
 "Rights". Section 1-201(36).
 "Value". Section 1-201(44).

§ 28:2A-305. Sale or sublease of goods by lessee.

(a) Subject to the provisions of § 28:2A-303, a buyer or sublessee from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer, and except as provided in subsection (b) of this section and § 28:2A-511(d), takes subject to the existing lease contract. A lessee with a voidable leasehold interest has power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in the preceding sentence. When goods have been delivered under a transaction of lease the lessee has that power even though:

- (1) The lessor was deceived as to the identity of the lessee;
- (2) The delivery was in exchange for a check which is later dishonored; or
- (3) The delivery was procured through fraud punishable as larcenous under the criminal law.

(b) A buyer in the ordinary course of business or a sublessee in the ordinary course of business from a lessee who is a merchant dealing in goods of that kind to whom the goods were entrusted by the lessor obtains, to the extent of the interest transferred, all of the lessor's and lessee's rights to the goods, and takes free of the existing lease contract.

(c) A buyer or sublessee from the lessee of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of the District of Columbia or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

(July 22, 1992, D.C. Law 9-128, § 2(b), 38 DCR 3830; July 25, 1995, D.C. Law 11-30, § 7(c), 42 DCR 1547.)

Section references. — This section is referred to in §§ 28:2A-104 and 28:2A-105.

Prior Codifications. — 1981 Ed., § 28:2A-305.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see His-

torical and Statutory Notes following § 28:2A-101.

Legislative history of Law 11-30. — For legislative history of D.C. Law 11-30, see Historical and Statutory Notes following § 28:2A-209.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-403.

Changes: While Section 2-403 was used as a model for this section, the provisions of Section 2-403 were significantly revised to reflect leasing practice and to integrate this Article with certificate of title statutes.

Purposes: This section, a companion to Section 2A-304, states the rule with respect to the leasehold interest obtained by a buyer or sublessee from a lessee of goods under an existing lease contract. Cf. Section 2A-304 official comment. Note that this provision is consistent with existing case law, which prohibits the bailee's transfer of title to a good faith purchaser for value under Section 2-403(1). *Rohweder v. Aberdeen Product. Credit Ass'n*, 765 F.2d 109 (8th Cir.1985).

Subsection (2) is also consistent with existing case law. *American Standard Credit, Inc. v. National Cement Co.*, 643 F.2d 248, 269-70 (5th Cir.1981); but cf. *Exxon Co., U.S.A. v. TLW Computer Indus.*, 37 U.C.C. Rep. Serv. (Callaghan) 1052, 1057-58 (D.Mass.1983). Unlike Section 2A-304(2), this subsection does not contain any requirement with respect to the time that the goods were entrusted to the merchant. In Section 2A-304(2) the competition is between two customers of the merchant lessor; the time of entrusting was added as a criterion to create additional protection to the customer who was first in time: the existing lessee. In subsection (2) the equities between the competing interests were viewed as balanced.

There appears to be some overlap between Section 2-403(2) and Section 2A-305(2) with

respect to a buyer in the ordinary course of business. However, an examination of this Article's definition of buyer in the ordinary course of business (Section 2A-103(1)(a)) makes clear that this reference was necessary to treat entrusting in the context of a lease.

Subsection (3) states a rule of construction with respect to a transfer of goods from a lessee to a buyer or sublessee, where the goods are subject to an existing lease and covered by a certificate of title. Cf. Section 2A-304 official comment.

Cross References:

Sections 2-403, 2A-103(1)(a), 2A-304 and 2A-305(2).

Definitional Cross References:

"Buyer". Section 2-103(1)(a).

"Buyer in the ordinary course of business".

Section 2A-103(1)(a).

"Delivery". Section 1-201(14).

"Entrusting". Section 2-403(3).

"Good faith". Sections 1-201(19) and 2-103(1)(b).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Leasehold interest". Section 2A-103(1)(m).

"Lessee". Section 2A-103(1)(n).

"Lessee in the ordinary course of business".

Section 2A-103(1)(o).

"Lessor". Section 2A-103(1)(p).

"Merchant". Section 2-104(1).

"Rights". Section 1-201(36).

"Sale". Section 2-106(1).

"Sublease". Section 2A-103(1)(w).

"Value". Section 1-201(44).

§ 28:2A-306. Priority of certain liens arising by operation of law.

If a person in the ordinary course of his or her business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or this article unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-307.

Prior Codifications. — 1981 Ed., § 28:2A-306.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 9-310.

Changes: The approach reflected in the provisions of Section 9-310 was included, but revised to conform to leasing terminology and to expand the exception to the special priority granted to protected liens to cover liens created by rule of law as well as those created by statute.

Purposes: This section should be interpreted to allow a qualified lessor or a qualified lessee to be the competing lienholder if the statute or rule of law so provides. The reference

to statute includes applicable regulations and cases; these sources must be reviewed in resolving a priority dispute under this section.

Cross Reference:

Section 9-310.

Definitional Cross References:

“Goods”. Section 2A-103(1)(h).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Lien”. Section 2A-103(1)(r).

“Person”. Section 1-201(30).

§ 28:2A-307. Priority of liens arising by attachment or levy on, security interests in, and other claims to goods.

(a) Except as otherwise provided in § 28:2A-306, a creditor of a lessee takes subject to the lease contract.

(b) Except as otherwise provided in subsection (c) of this section and in §§ 28:2A-306 and 28:2A-308, a creditor of a lessor takes subject to the lease contract unless the creditor holds a lien that attached to the goods before the lease contract became enforceable.

(c) Except as otherwise provided in §§ 28:9-317, 28:9-321, and 28:9-323, a lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830; Oct. 26, D.C. Law 13-201, § 201(d)(3), 47 DCR 7576.)

Prior Codifications. — 1981 Ed., § 28:2A-307.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:2A-103.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: None for subsection (1). Subsection (2) is derived from Section 9-301, and subsections (3) and (4) are derived from Section 9-307(1) and (3), respectively.

Changes: The provisions of Sections 9-301 and 9-307(1) and (3) were incorporated, and modified to reflect leasing terminology and the basic concepts reflected in this Article.

Purposes:

1. Subsection (1) states a general rule of priority that a creditor of the lessee takes subject to the lease contract. The term lessee (Section 2A-103(1)(n)) includes sublessee. Therefore, this subsection not only covers disputes between the prime lessor and a creditor of the prime lessee but also disputes between the prime lessor, or the sublessor, and a creditor

of the sublessee. Section 2A-301 official comment 3(g). Further, by using the term creditor (Section 1-201(12)), this subsection will cover disputes with a general creditor, a secured creditor, a lien creditor and any representative of creditors. Section 2A-103(4).

2. Subsection (2) states a general rule of priority that a creditor of a lessor takes subject to the lease contract. Note the discussion above with regard to the scope of these rules. Section 2A-301 official comment 3(g). Thus, the section will not only cover disputes between the prime lessee and a creditor of the prime lessor but also disputes between the prime lessee, or the sublessee, and a creditor of the sublessor.

3. To take priority over the lease contract, and the interests derived therefrom, the creditor must come within the exception stated in subsection (2) or within one of the provisions of Article 9 mentioned in subsection (3). Subsection (2) provides that where the creditor holds a lien (Section 2A-103(1)(r)) that attached before the lease contract became enforceable (Section 2A-301), the creditor does not take subject to the lease. Subsection (3) provides that a lessee takes its leasehold interest subject to a security interest except as otherwise provided in Sections 9-317, 9-321, or 9-323.

4. The rules of this section operate in favor of whichever party to the lease contract may enforce it, even if one party perhaps may not, e.g., under Section 2A-201(1)(b).

Cross References:

Sections 1-201(12), 1-201(25), 1-201(37), 1-201(44), 2A-103(1)(n), 2A-103(1)(o), 2A-103(1)(r), 2A-103(4), 2A-201(1)(b), 2A-301 official comment 3(g), Article 9, especially Sections 9-301, 9-307(1) and 9-307(3).

Definitional Cross References:

"Creditor". Section 1-201(12).
 "Goods". Section 2A-103(1)(h).
 "Knowledge" and "Knows". Section 1-201(25).
 "Lease". Section 2A-103(1)(j).
 "Lease contract". Section 2A-103(1)(l).
 "Leasehold interest". Section 2A-103(1)(m).
 "Lessee". Section 2A-103(1)(n).
 "Lessee in the ordinary course of business". Section 2A-103(1)(o).
 "Lessor". Section 2A-103(1)(p).
 "Lien". Section 2A-103(1)(r).
 "Party". Section 1-201(29).
 "Pursuant to commitment". Section 2A-103(3).
 "Security interest". Section 1-201(37).

§ 28:2A-308. Special rights of creditors.

(a) A creditor of a lessor in possession of goods subject to a lease contract may treat the lease contract as void if as against the creditor retention of possession by the lessor is fraudulent under any statute or rule of law, but retention of possession in good faith and current course of trade by the lessor for a commercially reasonable time after the lease contract becomes enforceable is not fraudulent.

(b) Nothing in this article impairs the rights of creditors of a lessor if the lease contract (i) becomes enforceable, not in current course of trade but in satisfaction of or as security for a preexisting claim for money, security, or the like, and (ii) is made under circumstances which under any statute or rule of law apart from this article would constitute the transaction a fraudulent transfer or voidable preference.

(c) A creditor of a seller may treat a sale or an identification of goods to a contract for sale as void if as against the creditor retention of possession by the seller is fraudulent under any statute or rule of law, but retention of possession of the goods pursuant to a lease contract entered into by the seller as lessee and the buyer as lessor in connection with the sale or identification of the goods is not fraudulent if the buyer bought for value and in good faith.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-307.

Prior Codifications. — 1981 Ed., § 28:2A-308.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-402(2) and (3)(b).

Changes: Rephrased and new material added to conform to leasing terminology and practice.

Purposes: Subsection (1) states a general rule of avoidance where the lessor has retained possession of goods if such retention is fraudulent under any statute or rule of law. However, the subsection creates an exception under certain circumstances for retention of possession of goods for a commercially reasonable time after the lease contract becomes enforceable.

Subsection (2) also preserves the possibility of an attack on the lease by creditors of the lessor if the lease was made in satisfaction of or as security for a pre-existing claim, and would constitute a fraudulent transfer or voidable preference under other law.

Finally, subsection (3) states a new rule with respect to sale-leaseback transactions, i.e., transactions where the seller sells goods to a buyer but possession of the goods is retained by the seller pursuant to a lease contract between the buyer as lessor and the seller as lessee. Notwithstanding any statute or rule of law that

would treat such retention as fraud, whether per se, prima facie, or otherwise, the retention is not fraudulent if the buyer bought for value (Section 1-201(44)) and in good faith (Sections 1-201(19) and 2-103(1)(b)). Section 2A-103(3) and (4). This provision overrides Section 2-402(2) to the extent it would otherwise apply to a sale-leaseback transaction.

Cross References:

Sections 1-201(19), 1-201(44), 2-402(2) and 2A-103(4).

Definitional Cross References:

“Buyer”. Section 2-103(1)(a).
 “Contract”. Section 1-201(11).
 “Creditor”. Section 1-201(12).
 “Good faith”. Sections 1-201(19) and 2-103(1)(b).
 “Goods”. Section 2A-103(1)(h).
 “Lease contract”. Section 2A-103(1)(l).
 “Lessee”. Section 2A-103(1)(n).
 “Lessor”. Section 2A-103(1)(p).
 “Money”. Section 1-201(24).
 “Reasonable time”. Section 1-204(1) and (2).
 “Rights”. Section 1-201(36).
 “Sale”. Section 2-106(1).
 “Seller”. Section 2-103(1)(d).
 “Value”. Section 1-201(44).

§ 28:2A-309. Lessor’s and lessee’s rights when goods become fixtures.

(a) In this section:

(1) Goods are “fixtures” when they become so related to particular real estate that an interest in them arises under real estate law.

(2) A “fixture filing” is the filing, in the office where a record of a mortgage on the real estate would be filed or recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of § 28:9-502(a) and (b).

(3) A lease is a “purchase money lease” unless the lessee has possession or use of the goods or the right to possession or use of the goods before the lease agreement is enforceable.

(4) A mortgage is a “construction mortgage” to the extent it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.

(5) “Encumbrance” includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests.

(b) Under this article a lease may be of goods that are fixtures or may continue in goods that become fixtures, but no lease exists under this article of ordinary building materials incorporated into an improvement on land.

(c) This article does not prevent creation of a lease of fixtures pursuant to real estate law.

(d) The perfected interest of a lessor of fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate if:

(1) The lease is a purchase money lease, the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, the interest of the lessor is perfected by a fixture filing before the goods become fixtures or within 10 days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate; or

(2) The interest of the lessor is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the lessee has an interest of record in the real estate or is in possession of the real estate.

(e) The interest of a lessor of fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate if:

(1) The fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for use in the operation of the real estate, or readily removable replacements of domestic appliances that are goods subject to a consumer lease, and before the goods become fixtures the lease contract is enforceable;

(2) The conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the lease contract is enforceable;

(3) The encumbrancer or owner has consented in writing to the lease or has disclaimed an interest in the goods as fixtures; or

(4) The lessee has a right to remove the goods as against the encumbrancer or owner. If the lessee's right to remove terminates, the priority of the interest of the lessor continues for a reasonable time.

(f) Notwithstanding subsection (d)(1) of this section but otherwise subject to subsections (d) and (e) of this section, the interest of a lessor of fixtures, including the lessor's residual interest, is subordinate to the conflicting interest of an encumbrancer of the real estate under a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent given to refinance a construction mortgage, the conflicting interest of an encumbrancer of the real estate under a mortgage has this priority to the same extent as the encumbrancer of the real estate under the construction mortgage.

(g) In cases not within the preceding subsections, priority between the interest of a lessor of fixtures, including the lessor's residual interest, and the conflicting interest of a encumbrancer or owner of the real estate who is not the lessee is determined by the priority rules governing conflicting interests in real estate.

(h) If the interest of a lessor of fixtures, including the lessor's residual interest, has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee may (i) on default, expiration, termination, or cancellation of the lease agreement but subject to the lease agreement and this article, or (ii) if necessary to enforce other rights and remedies of the lessor or lessee under this article, remove the goods from the real estate, free and clear of all conflicting interests of all owners and encumbrancers of the real estate, but the lessor or lessee must reimburse any encumbrancer or owner of the real estate who is not the lessee and who has not

otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

(i) Even though the lease agreement does not create a security interest, the interest of a lessor of fixtures, including the lessor's residual interest, is perfected by filing a financing statement as a fixture filing for leased goods that are or are to become fixtures in accordance with the relevant provisions of the Article on Secured Transactions (Article 9).

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830; Oct. 26, 2000, D.C. Law 13-201, § 201(d)(4), 47 DCR 7576.)

Section references. — This section is referred to in § 28:2A-103.

Prior Codifications. — 1981 Ed., § 28:2A-309.

Effect of amendments. — D.C. Law 13-201, enacting a new Article 9 of the Uniform Commercial Code applicable July 1, 2001, made conforming amendments to this section applicable upon the same date.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

Legislative history of Law 13-201. — For Law 13-201, see notes following § 28:2A-103.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 9-313.

Changes: Revised to reflect leasing terminology and to add new material.

Purposes:

1. While Section 9-313 provided a model for this section, certain provisions were substantially revised.

2. Section 2A-309(1)(c), which is new, defines purchase money lease to exclude leases where the lessee had possession or use of the goods or the right thereof before the lease agreement became enforceable. This term is used in subsection (4)(a) as one of the conditions that must be satisfied to obtain priority over the conflicting interest of an encumbrancer or owner of the real estate.

3. Section 2A-309(4), which states one of several priority rules found in this section, deletes reference to office machines and the like (Section 9-313(4)(c)) as well as certain liens (Section 9-313(4)(d)). However, these items are included in subsection (5), another priority rule that is more permissive than the rule found in subsection (4) as it applies whether or not the interest of the lessor is perfected. In addition, subsection (5)(a) expands the scope of the provisions of Section 9-313(4)(c) to include readily removable equipment not primarily used or leased for use in the operation of real estate; the qualifier is intended to exclude from the expanded rule equipment integral to the operation of real estate, e.g., heating and air conditioning equipment.

4. The rule stated in subsection (7) is more liberal than the rule stated in Section 9-313(7) in that issues of priority not otherwise resolved in this subsection are left for resolution by the priority rules governing conflicting interests in real estate, as opposed to the Section 9-313(7) automatic subordination of the security interest in fixtures. Note that, for the purpose of this section, where the interest of an encumbrancer or owner of the real estate is paramount to the intent of the lessor, the latter term includes the residual interest of the lessor.

5. The rule stated in subsection (8) is more liberal than the rule stated in Section 9-313(8) in that the right of removal is extended to both the lessor and the lessee and the occasion for removal includes expiration, termination or cancellation of the lease agreement, and enforcement of rights and remedies under this Article, as well as default. The new language also provides that upon removal the goods are free and clear of conflicting interests of owners and encumbrancers of the real estate.

6. Finally, subsection (9) provides a mechanism for the lessor of fixtures to perfect its interest by filing a financing statement under the provisions of the Article on Secured Transactions (Article 9), even though the lease agreement does not create a security interest. Section 1-201(37). The relevant provisions of Article 9 must be interpreted permissively to give effect to this mechanism as it implicitly

expands the scope of Article 9 so that its filing provisions apply to transactions that create a lease of fixtures, even though the lease agreement does not create a security interest. This mechanism is similar to that provided in Section 2-326(3)(c) for the seller of goods on consignment, even though the consignment is not "intended as security". Section 1-201(37). Given the lack of litigation with respect to the mechanism created for consignment sales, this new mechanism should prove effective.

Cross References:

Sections 1-201(37), 2A-309(1)(c), 2A-309(4), Article 9, especially Sections 9-313, 9-313(4)(c), 9-313(4)(d), 9-313(7), 9-313(8) and 9-408.

Definitional Cross References:

"Agreed". Section 1-201(3).

"Cancellation". Section 2A-103(1)(b).

"Conforming". Section 2A-103(1)(d).

"Consumer lease". Section 2A-103(1)(e).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Lien". Section 2A-103(1)(r).

"Mortgage". Section 9-105(1)(j).

"Party". Section 1-201(29).

"Person". Section 1-201(30).

"Reasonable time". Section 1-204(1) and (2).

"Remedy". Section 1-201(34).

"Rights". Section 1-201(36).

"Security interest". Section 1-201(37).

"Termination". Section 2A-103(1)(z).

"Value". Section 1-201(44).

"Writing". Section 1-201(46).

§ 28:2A-310. Lessor's and lessee's rights when goods become accessions.

(a) Goods are "accessions" when they are installed in or affixed to other goods.

(b) The interest of a lessor or a lessee under a lease contract entered into before the goods became accessions is superior to all interests in the whole except as stated in subsection (d) of this section.

(c) The interest of a lessor or a lessee under a lease contract entered into at the time or after the goods became accessions is superior to all subsequently acquired interests in the whole except as stated in subsection (d) of this section, but is subordinate to interests in the whole existing at the time the lease contract was made unless the holders of such interests in the whole have in writing consented to the lease or disclaimed an interest in the goods as part of the whole.

(d) The interest of a lessor or a lessee under a lease contract described in subsection (b) or (c) of this section is subordinate to the interest of:

(1) A buyer in the ordinary course of business or a lessee in the ordinary course of business of any interest in the whole acquired after the goods became accessions; or

(2) A creditor with a security interest in the whole perfected before the lease contract was made to the extent that the creditor makes subsequent advances without knowledge of the lease contract.

(e) When under subsections (b) or (c) and (d) of this section, a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole, the lessor or the lessee may (i) on default, expiration, termination, or cancellation of the lease contract by the other party but subject to the provisions of the lease contract and this article, or (ii) if necessary to enforce his or her other rights and remedies under this article, remove the goods from the whole, free and clear of all interests in the whole, but he or she must reimburse any holder of an interest in the whole who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury but not for

any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-103.

Prior Codifications. — 1981 Ed., § 28:2A-310.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 9-314.

Changes: Revised to reflect leasing terminology and to add new material.

Purposes: Subsections (1) and (2) restate the provisions of subsection (1) of Section 9-314 to clarify the definition of accession and to add leasing terminology to the priority rule that applies when the lease is entered into before the goods become accessions.

Subsection (3) restates the provisions of subsection (2) of Section 9-314 to add leasing terminology to the priority rule that applies when the lease is entered into on or after the goods become accessions. Unlike the rule with respect to security interests, the lease is merely subordinate, not invalid.

Subsection (4) creates two exceptions to the priority rules stated in subsections (2) and (3). Subsection (4) deletes the special priority rule found in the provisions of Section 9-314(3)(b) as the interests of the lessor and lessee are entitled to greater protection.

Finally, subsection (5) is modeled on the provisions of Section 9-314(4) with respect to removal of accessions, restated to reflect the parallel changes in Section 2A-309(8).

Neither this section nor Section 9-314 governs where the accession to the goods is not subject to the interest of a lessor or a lessee

under a lease contract and is not subject to the interest of a secured party under a security agreement. This issue is to be resolved by the courts, case by case.

Cross References:

Sections 2A-309(8), 9-314(1), 9-314(2), 9-314(3)(b), 9-314(4).

Definitional Cross References:

"Agreed". Section 1-201(3).

"Buyer in the ordinary course of business". Section 2A-103(1)(a).

"Cancellation". Section 2A-103(1)(b).

"Creditor". Section 1-201(12).

"Goods". Section 2A-103(1)(h).

"Holder". Section 1-201(20).

"Knowledge". Section 1-201(25).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessee in the ordinary course of business". Section 2A-103(1)(o).

"Lessor". Section 2A-103(1)(p).

"Party". Section 1-201(29).

"Person". Section 1-201(30).

"Remedy". Section 1-201(34).

"Rights". Section 1-201(36).

"Security interest". Section 1-201(37).

"Termination". Section 2A-103(1)(z).

"Value". Section 1-201(44).

"Writing". Section 1-201(46).

§ 28:2A-311. Priority subject to subordination.

Nothing in this article prevents subordination by agreement by any person entitled to priority.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-311.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 9-316.

Purposes: The several preceding sections deal with questions of priority. This section is inserted to make it entirely clear that a person entitled to priority may effectively agree to subordinate the claim. Only the person entitled to priority may make such an agreement; the rights of such a person cannot be adversely

affected by an agreement to which that person is not a party.

Cross References:

Sections 1-102 and 2A-304 through 2A-310.

Definitional Cross References:

"Agreement". Section 1-201(3).

"Person". Section 1-201(30).

Part 4. Performance of Lease Contract: Repudiated, Substituted, and Excused.

§ 28:2A-401. Insecurity: adequate assurance of performance.

(a) A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.

(b) If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may demand in writing adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable the insecure party may suspend any performance for which he or she has not already received the agreed return.

(c) A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed 30 days after receipt of a demand by the other party.

(d) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards.

(e) Acceptance of any nonconforming delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-402 and 28:2A-403.

Prior Codifications. — 1981 Ed., § 28:2A-401.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-609.

Changes: Revised to reflect leasing practices and terminology. Note that in the analogue to subsection (3) (Section 2-609(4)), the adjective "justified" modifies demand. The adjective was deleted here as unnecessary, implying no substantive change.

Definitional Cross References:

"Aggrieved party". Section 1-201(2).

"Agreed". Section 1-201(3).

"Between merchants". Section 2-104(3).

"Conforming". Section 2A-103(1)(d).

"Delivery". Section 1-201(14).

"Lease contract". Section 2A-103(1)(l).

"Party". Section 1-201(29).

"Reasonable time". Section 1-204(1) and (2).

"Receipt". Section 2-103(1)(c).

"Rights". Section 1-201(36).

"Writing". Section 1-201(46).

§ 28:2A-402. Anticipatory repudiation.

If either party repudiates a lease contract with respect to a performance not yet due under the lease contract, the loss of which performance will substantially impair the value of the lease contract to the other, the aggrieved party may:

(1) For a commercially reasonable time, await retraction of repudiation and performance by the repudiating party;

(2) Make demand pursuant to § 28:2A-401 and await assurance of future performance adequate under the circumstances of the particular case; or

(3) Resort to any right or remedy upon default under the lease contract or this article, even though the aggrieved party has notified the repudiating party that the aggrieved party would await the repudiating party's performance and assurance and has urged retraction. In addition, whether or not the aggrieved party is pursuing one of the foregoing remedies, the aggrieved party may suspend performance or, if the aggrieved party is the lessor, proceed in accordance with the provisions of this article on the lessor's right to identify goods to the lease contract notwithstanding default or to salvage unfinished goods (§ 28:2A-524).

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-508 and 28:2A-529.

Prior Codifications. — 1981 Ed., § 28:2A-402.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-610.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

"Aggrieved party". Section 1-201(2).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Lessor". Section 2A-103(1)(p).

"Notifies". Section 1-201(26).

"Party". Section 1-201(29).

"Reasonable time". Section 1-204(1) and (2).

"Remedy". Section 1-201(34).

"Rights." Section 1-201(36).

"Value". Section 1-201(44).

§ 28:2A-403. Retraction of anticipatory repudiation.

(a) Until the repudiating party's next performance is due, the repudiating party can retract the repudiation unless, since the repudiation, the aggrieved party has cancelled the lease contract or materially changed the aggrieved party's position or otherwise indicated that the aggrieved party considers the repudiation final.

(b) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform under the lease contract and includes any assurance demanded under § 28:2A-401.

(c) Retraction reinstates a repudiating party's rights under a lease contract

with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-403.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-611.

Changes: Revised to reflect leasing practices and terminology. Note that in the analogue to subsection (2) (Section 2-611(2)) the adjective “justifiably” modifies demanded. The adjective was deleted here (as it was in Section 2A-401) as unnecessary, implying no substantive change.

Definitional Cross References:

“Aggrieved party”. Section 1-201(2).

“Cancellation”. Section 2A-103(1)(b).

“Lease contract”. Section 2A-103(1)(l).

“Party”. Section 1-201(29).

“Rights”. Section 1-201(36).

§ 28:2A-404. Substituted performance.

(a) If without fault of the lessee, the lessor and the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted.

(b) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation:

(1) The lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery unless the lessee provides a means or manner of payment that is commercially a substantial equivalent; and

(2) If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the lessee’s obligation unless the regulation is discriminatory, oppressive, or predatory.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-405.

Prior Codifications. — 1981 Ed., § 28:2A-404.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-614.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

“Agreed”. Section 1-201(3).

“Delivery”. Section 1-201(14).

“Fault”. Section 2A-103(1)(f).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Supplier”. Section 2A-103(1)(x).

§ 28:2A-405. Excused performance.

Subject to § 28:2A-404 on substituted performance, the following rules apply:

(1) Delay in delivery or nondelivery in whole or in part by a lessor or a supplier who complies with paragraphs (2) and (3) of this section is not a default under the lease contract if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not the regulation or order later proves to be invalid.

(2) If the causes mentioned in paragraph (1) of this section affect only part of the lessor's or the supplier's capacity to perform, he or she shall allocate production and deliveries among his or her customers but at his or her option may include regular customers, not then under contract for sale or lease as well as his or her own requirements for further manufacture. He or she may so allocate in any manner that is fair and reasonable.

(3) The lessor seasonably shall notify the lessee and in the case of a finance lease the supplier seasonably shall notify the lessor and the lessee, if known, that there will be delay or nondelivery and, if allocation is required under paragraph (2) of this section, of the estimated quota thus made available for the lessee.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830; Apr. 9, 1997, D.C. Law 11-255, § 27(qq), 44 DCR 1271.)

Section references. — This section is referred to in § 28:2A-406.

Prior Codifications. — 1981 Ed., § 28:2A-405.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act

of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-615.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

"Agreed". Section 1-201(3).

"Contract". Section 1-201(11).

"Delivery". Section 1-201(14).

"Finance lease". Section 2A-103(1)(g).

"Good faith". Sections 1-201(19) and 2-103(1)(b).

"Knows". Section 1-201(25).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notifies". Section 1-201(26).

"Sale". Section 2-106(1).

"Seasonably". Section 1-204(3).

"Supplier". Section 2A-103(1)(x).

§ 28:2A-406. Procedure on excused performance.

(a) If the lessee receives notification of a material or indefinite delay or an allocation justified under § 28:2A-405, the lessee may by written notification to the lessor as to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (§ 28:2A-510):

(1) Terminate the lease contract (§ 28:2A-505(b)); or

(2) Except in a finance lease that is not a consumer lease, modify the lease contract by accepting the available quota in substitution, with due allowance from the rent payable for the balance of the lease term for the deficiency but without further right against the lessor.

(b) If, after receipt of a notification from the lessor under § 28:2A-405, the lessee fails so to modify the lease agreement within a reasonable time not exceeding 30 days, the lease contract lapses with respect to any deliveries affected.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-406.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-616(1) and (2).

Changes: Revised to reflect leasing practices and terminology. Note that subsection 1(a) allows the lessee under a lease, including a finance lease, the right to terminate the lease for excused performance (Sections 2A-404 and 2A-405). However, subsection 1(b), which allows the lessee the right to modify the lease for excused performance, excludes a finance lease that is not a consumer lease. This exclusion is compelled by the same policy that led to codification of provisions with respect to irrevocable promises. Section 2A-407.

Definitional Cross References:

“Consumer lease”. Section 2A-103(1)(e).

“Delivery”. Section 1-201(14).

“Finance lease”. Section 2A-103(1)(g).

“Goods”. Section 2A-103(1)(h).

“Installment lease contract”. Section 2A-103(1)(i).

“Lease agreement”. Section 2A-103(1)(k).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Notice”. Section 1-201(25).

“Reasonable time”. Section 1-204(1) and (2).

“Receipt”. Section 2-103(1)(c).

“Rights”. Section 1-201(36).

“Termination”. Section 2A-103(1)(z).

“Value”. Section 1-201(44).

“Written”. Section 1-201(46).

§ 28:2A-407. Irrevocable promises: finance leases.

(a) In the case of a finance lease that is not a consumer lease, the lessee’s promises under the lease contract become irrevocable and independent upon the lessee’s acceptance of the goods.

(b) A promise that has become irrevocable and independent under subsection (a) of this section:

(1) Is effective and enforceable between the parties, and by or against third parties including assignees of the parties, and

(2) Is not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom the promise runs.

(c) This section does not affect the validity under any other law of a covenant in any lease contract making the lessee’s promises irrevocable and independent upon the lessee’s acceptance of the goods.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-508.

Prior Codifications. — 1981 Ed., § 28:2A-407.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see His-

torical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: None.

Purposes:

1. This section extends the benefits of the classic "hell or high water" clause to a finance lease that is not a consumer lease. This section is self-executing; no special provision need be added to the contract. This section makes covenants in a finance lease irrevocable and independent due to the function of the finance lessor in a three party relationship: the lessee is looking to the supplier to perform the essential covenants and warranties. Section 2A-209. Thus, upon the lessee's acceptance of the goods the lessee's promises to the lessor under the lease contract become irrevocable and independent. The provisions of this section remain subject to the obligation of good faith (Sections 2A-103(4) and 1-203), and the lessee's revocation of acceptance (Section 2A-517).

2. The section requires the lessee to perform even if the lessor's performance after the lessee's acceptance is not in accordance with the lease contract; the lessee may, however, have and pursue a cause of action against the lessor, e.g., breach of certain limited warranties (Sections 2A-210 and 2A-211(1)). This is appropriate because the benefit of the supplier's promises and warranties to the lessor under the supply contract and, in some cases, the warranty of a manufacturer who is not the supplier, is extended to the lessee under the finance lease. Section 2A-209. Despite this balance, this section excludes a finance lease that is a consumer lease. That a consumer be obligated to pay notwithstanding defective goods or the like is a principle that is not tenable under case law (*Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967)), state statute (Unif. Consumer Credit Code ss 3.403-405, 7A U.L.A. 126-31 (1974), or federal statute (15 U.S.C. s 1666i (1982))).

3. The relationship of the three parties to a transaction that qualifies as a finance lease is best demonstrated by a hypothetical. A, the potential lessor, has been contracted by B, the potential lessee, to discuss the lease of an expensive line of equipment that B has recently placed an order for with C, the manufacturer of such goods. The negotiation is completed and A, as lessor, and B, as lessee, sign a lease of the line of equipment for a 60-month term. B, as buyer, assigns the purchase order with C to A. If this transaction creates a lease (Section 2A-103(1)(j)), this transaction should qualify as a finance lease. Section 2A-103(1)(g).

4. The line of equipment is delivered by C to B's place of business. After installation by C

and testing by B, B accepts the goods by signing a certificate of delivery and acceptance, a copy of which is sent by B to A and C. One year later the line of equipment malfunctions and B falls behind in its manufacturing schedule.

5. Under this Article, because the lease is a finance lease, no warranty of fitness or merchantability is extended by A to B. Sections 2A-212(1) and 2A-213. Absent an express provision in the lease agreement, application of Section 2A-210 or Section 2A-211(1), or application of the principles of law and equity, including the law with respect to fraud, duress, or the like (Sections 2A-103(4) and 1-103), B has no claim against A. B's obligation to pay rent to A continues as the obligation became irrevocable and independent when B accepted the line of equipment (Section 2A-407(1)). B has no right of set-off with respect to any part of the rent still due under the lease. Section 2A-508(6). However, B may have another remedy. Despite the lack of privity between B and C (the purchase order with C having been assigned by B to A), B may have a claim against C. Section 2A-209(1).

6. This section does not address whether a "hell or high water" clause, i.e., a clause that is to the effect of this section, is enforceable if included in a finance lease that is a consumer lease or a lease that is not a finance lease. That issue will continue to be determined by the facts of each case and other law which this section does not affect. Sections 2A-104, 2A-103(4), 9-206 and 9-318. However, with respect to finance leases that are not consumer leases courts have enforced "hell or high water" clauses. In re O.P.M. Leasing Servs., 21 Bankr. 993, 1006 (Bankr. S.D.N.Y. 1982).

7. Subsection (2) further provides that a promise that has become irrevocable and independent under subsection (1) is enforceable not only between the parties but also against third parties. Thus, the finance lease can be transferred or assigned without disturbing enforceability. Further, subsection (2) also provides that the promise cannot, among other things, be cancelled or terminated without the consent of the lessor.

Cross References:

Sections 1-103, 1-203, 2A-103(1)(g), 2A-103(1)(j), 2A-103(4), 2A-104, 2A-209, 2A-209(1), 2A-210, 2A-211(1), 2A-212(1), 2A-213, 2A-517(1)(b), 9-206 and 9-318.

Definitional Cross References:

"Cancellation". Section 2A-103(1)(b).

"Consumer lease". Section 2A-103(1)(e).

"Finance lease". Section 2A-103(1)(g).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Party". Section 1-201(29).

"Termination". Section 2A-103(1)(z).

Part 5. Default.

Subpart A. In General.

§ 28:2A-501. Default: procedure.

(a) Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and this article.

(b) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this article and, except as limited by this Article, as provided in the lease agreement.

(c) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party's claim to judgment, or otherwise enforce the lease contract by self help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, in accordance with this article.

(d) Except as otherwise provided in § 28:1-106 or this article or the lease agreement, the rights and remedies referred to in subsections (b) and (c) of this section are cumulative.

(e) If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this part as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party's rights and remedies in respect of the real property, in which case this part does not apply.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830; May 16, 1995, D.C. Law 10-255, § 22, 41 DCR 5193; July 25, 1995, D.C. Law 11-30, § 7(d), 42 DCR 1547; Apr. 9, 1997, D.C. Law 11-255, § 27(rr), 44 DCR 1271.)

Section references. — This section is referred to in § 28:2A-303.

Prior Codifications. — 1981 Ed., § 28:2A-501.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

Legislative history of Law 10-255. — For legislative history of D.C. Law 10-255, see Historical and Statutory Notes following § 28:2A-303.

Legislative history of Law 11-30. — For legislative history of D.C. Law 11-30, see His-

torical and Statutory Notes following § 28:2A-209.

Legislative history of Law 11-255. — Law 11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 9-501.

Changes: Substantially revised.

Purposes:

1. Subsection (1) is new and represents a

departure from the Article on Secured Transactions (Article 9) as the subsection makes clear that whether a party to the lease agreement is in default is determined by this Article as well as the agreement. Sections 2A-508 and 2A-523. It further departs from Article 9 in recognizing the potential default of either party, a function of the bilateral nature of the obligations between the parties to the lease contract.

2. Subsection (2) is a version of the first sentence of Section 9-501(1), revised to reflect leasing terminology.

3. Subsection (3), an expansive version of the second sentence of Section 9-501(1), lists the procedures that may be followed by the party seeking enforcement; in effect, the scope of the procedures listed in subsection (3) is consistent with the scope of the procedures available to the foreclosing secured party.

4. Subsection (4) establishes that the parties' rights and remedies are cumulative. *DeKoven, Leases of Equipment: Puritan Leasing Company v. August*, A Dangerous Decision, 12 U.S.F.L.Rev. 257, 276-80 (1978). Cumulation, and largely unrestricted selection, of remedies is allowed in furtherance of the general policy of the Commercial Code, stated in Section 1-106, that remedies be liberally administered to put the aggrieved party in as good a position as if the other party had fully performed. Therefore, cumulation of, or selection among, remedies is

available to the extent necessary to put the aggrieved party in as good a position as it would have been in had there been full performance. However, cumulation of, or selection among, remedies is not available to the extent that the cumulation or selection would put the aggrieved party in a better position than it would have been in had there been full performance by the other party.

5. Section 9-501(3), which, among other things, states that certain rules, to the extent they give rights to the debtor and impose duties on the secured party, may not be waived or varied, was not incorporated in this Article. Given the significance of freedom of contract in the development of the common law as it applies to bailments for hire and the lessee's lack of an equity of redemption, there was no reason to impose that restraint.

Cross References:

Sections 1-106, 2A-508, 2A-523, Article 9, especially Sections 9-501(1) and 9-501(3).

Definitional Cross References:

"Goods". Section 2A-103(1)(h).

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Party". Section 1-201(29).

"Remedy". Section 1-201(34).

"Rights". Section 1-201(36).

§ 28:2A-502. Notice after default.

Except as otherwise provided in this article or the lease agreement, the lessor or lessee in default under the lease contract is not entitled to notice of default or notice of enforcement from the other party to the lease agreement.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-502.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: None.

Purposes: This section makes clear that absent agreement to the contrary or provision in this Article to the contrary, e.g., Section 2A-516(3)(a), the party in default is not entitled to notice of default or enforcement. While a review of Part 5 of Article 9 leads to the same conclusion with respect to giving notice of default to the debtor, it is never stated. Although Article 9 requires notice of disposition and strict foreclosure, the different scheme of lessors' and lessees' rights and remedies developed under the common law, and codified by this Article, generally does not require notice of

enforcement; furthermore, such notice is not mandated by due process requirements. However, certain sections of this Article do require notice. E.g., Section 2A-517(4).

Cross References:

Sections 2A-516(3)(a), 2A-517(4), and Article 9, esp. Part 5.

Definitional Cross References:

"Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notice". Section 1-201(25).

"Party". Section 1-201(29).

§ 28:2A-503. Modification or impairment of rights and remedies.

(a) Except as otherwise provided in this article, the lease agreement may include rights and remedies for default in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article.

(b) Resort to a remedy provided under this article or in the lease agreement is optional unless the remedy is expressly agreed to be exclusive. If circumstances cause an exclusive or limited remedy to fail of its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided in this article.

(c) Consequential damages may be liquidated under § 28:2A-504, or may otherwise be limited, altered, or excluded unless the limitation, alteration, or exclusion is unconscionable. Limitation, alteration, or exclusion of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable, but limitation, alteration, or exclusion of damages where the loss is commercial is not *prima facie* unconscionable.

(d) Rights and remedies on default by the lessor or the lessee with respect to any obligation or promise collateral or ancillary to the lease contract are not impaired by this article.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-518, 28:2A-519, 28:2A-527, and 28:2A-528.

Prior Codifications. — 1981 Ed., § 28:2A-503.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 2-719 and 2-701.

Changes: Rewritten to reflect lease terminology and to clarify the relationship between this section and Section 2A-504.

Purposes:

1. A significant purpose of this Part is to provide rights and remedies for those parties to a lease who fail to provide them by agreement or whose rights and remedies fail of their essential purpose or are unenforceable. However, it is important to note that this implies no restriction on freedom to contract. Sections 2A-103(4) and 1-102(3). Thus, subsection (1), a revised version of the provisions of Section 2-719(1), allows the parties to the lease agreement freedom to provide for rights and remedies in addition to or in substitution for those provided in this Article and to alter or limit the measure of damages recoverable under this Article. Except to the extent otherwise provided in this Article (e.g., Sections 2A-105, 106 and 108(1) and (2)), this Part shall be construed

neither to restrict the parties' ability to provide for rights and remedies or to limit or alter the measure of damages by agreement, nor to imply disapproval of rights and remedy schemes other than those set forth in this Part.

2. Subsection (2) makes explicit with respect to this Article what is implicit in Section 2-719 with respect to the Article on Sales (Article 2): if an exclusive remedy is held to be unconscionable, remedies under this Article are available. Section 2-719 official comment 1.

3. Subsection (3), a revision of Section 2-719(3), makes clear that consequential damages may also be liquidated. Section 2A-504(1).

4. Subsection (4) is a revision of the provisions of Section 2-701. This subsection leaves the treatment of default with respect to obligations or promises collateral or ancillary to the lease contract to other law. Sections 2A-103(4) and 1-103. An example of such an obligation would be that of the lessor to the secured creditor which has provided the funds to leverage the lessor's lease transaction; an example

of such a promise would be that of the lessee, as seller, to the lessor, as buyer, in a sale-lease-back transaction.

Cross References:

Sections 1-102(3), 1-103, Article 2, especially Sections 2-701, 2-719, 2-719(1), 2-719(3), 2-719 official comment 1, and Sections 2A-103(4), 2A-105, 2A-106, 2A-108(1), 2A-108(2), and 2A-504.

Definitional Cross References:

"Agreed". Section 1-201(3).
 "Consumer goods". Section 9-109(1).
 "Lease agreement". Section 2A-103(1)(k).
 "Lease contract". Section 2A-103(1)(l).
 "Lessee". Section 2A-103(1)(n).
 "Lessor". Section 2A-103(1)(p).
 "Person". Section 1-201(30).
 "Remedy". Section 1-201(34).
 "Rights". Section 1-201(36).

§ 28:2A-504. Liquidation of damages.

(a) Damages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be liquidated in the lease agreement, but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission.

(b) If the lease agreement provides for liquidation of damages and the provision does not comply with subsection (a) of this section, or the provision is an exclusive or limited remedy that circumstances cause to fail of its essential purpose, remedy may be had as provided in this article.

(c) If the lessor justifiably withholds or stops delivery of goods because of the lessee's default or insolvency (§ 28:2A-525 or § 28:2A-526), the lessee is entitled to restitution of any amount by which the sum of his or her payments exceeds:

(1) The amount to which the lessor is entitled by virtue of terms liquidating the lessor's damages in accordance with subsection (a) of this section; or

(2) In the absence of those terms, 20 percent of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of the amount or \$500.

(d) A lessee's right to restitution under subsection (c) of this section is subject to offset to the extent the lessor establishes:

(1) A right to recover damages under the provisions of this article other than subsection (a) of this section; and

(2) The amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-503, 28:2A-518, 28:2A-519, 28:2A-527, and 28:2A-528.

Prior Codifications. — 1981 Ed., § 28:2A-504.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 2-718(1), (2), (3) and 2-719(2).

Changes: Substantially rewritten.

Purposes: Many leasing transactions are

predicated on the parties' ability to agree to an appropriate amount of damages or formula for damages in the event of default or other act or omission. The rule with respect to sales of goods

(Section 2-718) may not be sufficiently flexible to accommodate this practice. Thus, consistent with the common law emphasis upon freedom to contract with respect to bailments for hire, this section has created a revised rule that allows greater flexibility with respect to leases of goods.

Subsection (1), a significantly modified version of the provisions of Section 2-718(1), provides for liquidation of damages in the lease agreement at an amount or by a formula. Section 2-718(1) does not by its express terms include liquidation by a formula;

this change was compelled by modern leasing practice. Subsection (1), in a further expansion of Section 2-718(1), provides for liquidation of damages for default as well as any other act or omission.

A liquidated damages formula that is common in leasing practice provides that the sum of lease payments past due, accelerated future lease payments, and the lessor's estimated residual interest, less the net proceeds of disposition (whether by sale or re-lease) of the leased goods is the lessor's damages. Tax indemnities, costs, interest and attorney's fees are also added to determine the lessor's damages. Another common liquidated damages formula utilizes a periodic depreciation allocation as a credit to the aforesaid amount in mitigation of a lessor's damages. A third formula provides for a fixed number of periodic payments as a means of liquidating damages. Stipulated loss or stipulated damage schedules are also common. Whether these formulae are enforceable will be determined in the context of each case by applying a standard of reasonableness in light of the harm anticipated when the formula was agreed to. Whether the inclusion of these formulae will affect the classification of the transaction as a lease or a security interest is to be determined by the facts of each case. Section 1-201(37). E.g., In re Noack, 44 Bankr. 172, 174-75 (Bankr. E.D.Wis.1984).

This section does not incorporate two other tests that under sales law determine enforceability of liquidated damages, i.e., difficulties of proof of loss and inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. The ability to liquidate damages is critical to modern leasing practice; given the parties' freedom to contract at common law, the policy behind retaining these two additional requirements here was thought to be outweighed. Further, given the expansion of subsection (1)

to enable the parties to liquidate the amount payable with respect to an indemnity for loss or diminution of anticipated tax benefits resulted in another change: the last sentence of Section 2-718(1), providing that a term fixing unreasonably large liquidated damages is void as a penalty, was also not incorporated. The impact of local, state and federal tax laws on a leasing transaction can result in an amount payable with respect to the tax indemnity many times greater than the original purchase price of the goods.

By deleting the reference to unreasonably large liquidated damages the parties are free to negotiate a formula, restrained by the rule of reasonableness in this section. These changes should invite the parties to liquidate damages. Peters, Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two, 73 Yale L.J. 199, 278 (1963).

Subsection (2), a revised version of Section 2-719(2), provides that if the liquidated damages provision is not enforceable or fails of its essential purpose, remedy may be had as provided in this Article.

Subsection (3)(b) of this section differs from subsection (2)(b) of Section 2-718; in the absence of a valid liquidated damages amount or formula the lessor is permitted to retain 20 percent of the present value of the total rent payable under the lease. The alternative limitation of \$500 contained in Section 2-718 is deleted as unrealistically low with respect to a lease other than a consumer lease.

Cross References:

Sections 1-201(37), 2-718, 2-718(1), 2-718(2)(b) and 2-719(2).

Definitional Cross References:

"Consumer lease". Section 2A-103(1)(e).
 "Delivery". Section 1-201(14).
 "Goods". Section 2A-103(1)(h).
 "Insolvent". Section 1-201(23).
 "Lease agreement". Section 2A-103(1)(k).
 "Lease contract". Section 2A-103(1)(l).
 "Lessee". Section 2A-103(1)(n).
 "Lessor". Section 2A-103(1)(p).
 "Lessor's residual interest". Section 2A-103(1)(q).
 "Party". Section 1-201(29).
 "Present value". Section 2A-103(1)(u).
 "Remedy". Section 1-201(34).
 "Rights". Section 1-201(36).
 "Term". Section 1-201(42).
 "Value". Section 1-201(44).

§ 28:2A-505. Cancellation and termination and effect of cancellation, termination, rescission, or fraud on rights and remedies.

(a) On cancellation of the lease contract, all obligations that are still

executory on both sides are discharged, but any right based on prior default or performance survives, and the cancelling party also retains any remedy for default of the whole lease contract or any unperformed balance.

(b) On termination of the lease contract, all obligations that are still executory on both sides are discharged but any right based on prior default or performance survives.

(c) Unless the contrary intention clearly appears, expressions of "cancellation," "rescission," or the like of the lease contract may not be construed as a renunciation or discharge of any claim in damages for an antecedent default.

(d) Rights and remedies for material misrepresentation or fraud include all rights and remedies available under this article for default.

(e) Neither rescission nor a claim for rescission of the lease contract nor rejection or return of the goods may bar or be deemed inconsistent with a claim for damages or other right or remedy.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-406, 28:2A-508, and 28:2A-523.

Prior Codifications. — 1981 Ed., § 28:2A-505.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 2-106(3) and (4), 2-720 and 2-721.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

"Cancellation". Section 2A-103(1)(b).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Party". Section 1-201(29).

"Remedy". Section 1-201(34).

"Rights". Section 1-201(36).

"Termination". Section 2A-103(1)(z).

§ 28:2A-506. Statute of limitations.

(a) An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within 4 years after the cause of action accrued. By the original lease contract the parties may reduce the period of limitation to not less than 1 year.

(b) A cause of action for default accrues when the act or omission on which the default or breach of warranty is based is or should have been discovered by the aggrieved party, or when the default occurs, whichever is later. A cause of action for indemnity accrues when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party, whichever is later.

(c) If an action commenced within the time limited by subsection (a) of this section is so terminated as to leave available a remedy by another action for the same default or breach of warranty or indemnity, the other action may be commenced after the expiration of the time limited and within 6 months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(d) This section does not alter the law on tolling of the statute of limitations

nor does it apply to causes of action that have accrued before this article becomes effective.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-506.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-725.

Changes: Substantially rewritten.

Purposes: Subsection (1) does not incorporate the limitation found in Section 2-725(1) prohibiting the parties from extending the period of limitation. Breach of warranty and indemnity claims often arise in a lease transaction; with the passage of time such claims often diminish or are eliminated. To encourage the parties to commence litigation under these circumstances makes little sense.

Subsection (2) states two rules for determining when a cause of action accrues. With respect to default, the rule of Section 2-725(2) is not incorporated in favor of a more liberal rule

of the later of the date when the default occurs or when the act or omission on which it is based is or should have been discovered. With respect to indemnity, a similarly liberal rule is adopted.

Cross References:

Sections 2-725(1) and 2-725(2).

Definitional Cross References:

"Action". Section 1-201(1).

"Aggrieved party". Section 1-201(2).

"Lease contract". Section 2A-103(1)(l).

"Party". Section 1-201(29).

"Remedy". Section 1-201(34).

"Termination". Section 2A-103(1)(z).

HISTORICAL NOTES

§ 28:2A-507. Proof of market rent: time and place.

(a) Damages based on market rent (§ 28:2A-519 or § 28:2A-528) are determined according to the rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the time of the default.

(b) If evidence of rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times or places described in this article is not readily available, the rent prevailing within any reasonable time before or after the time described or at any other place or for a different lease term which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the difference, including the cost of transporting the goods to or from the other place.

(c) Evidence of a relevant rent prevailing at a time or place or for a lease term other than the one described in this article offered by one party is not admissible unless and until he or she has given the other party notice the court finds sufficient to prevent unfair surprise.

(d) If the prevailing rent or value of any goods regularly leased in any established market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of that market are admissible in evidence. The circumstances of the preparation of the report may be shown to affect its weight but not its admissibility.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-507.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 2-723 and 2-724.

Changes: Revised to reflect leasing practices and terminology. Sections 2A-519 and 2A-528 specify the times as of which market rent is to be determined.

Definitional Cross References:

“Goods”. Section 2A-103(1)(h).

“Lease”. Section 2A-103(1)(j).

“Lease agreement”. Section 2A-103(1)(k).

“Notice”. Section 1-201(25).

“Party”. Section 1-201(29).

“Reasonable time”. Section 1-204(1) and (2).

“Usage of trade”. Section 1-205.

“Value”. Section 1-201(44).

Subpart B. Default by Lessor.

§ 28:2A-508. Lessee’s remedies.

(a) If a lessor fails to deliver the goods in conformity to the lease contract (§ 28:2A-509) or repudiates the lease contract (§ 28:2A-402), or a lessee rightfully rejects the goods (§ 28:2A-509) or justifiably revokes acceptance of the goods (§ 28:2A-517), then with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (§ 28:2A-510), the lessor is in default under the lease contract and the lessee may:

(1) Cancel the lease contract (§ 28:2A-505(a));

(2) Recover so much of the rent and security as has been paid and is just under the circumstances; or

(3) Cover and recover damages as to all goods affected whether or not they have been identified to the lease contract (§§ 28:2A-518 and 28:2A-520), or recover damages for nondelivery (§§ 28:2A-519 and 28:2A-520).

(b) If a lessor fails to deliver the goods in conformity to the lease contract or repudiates the lease contract, the lessee may also:

(1) If the goods have been identified, recover them (§ 28:2A-522); or

(2) In a proper case, obtain specific performance or replevy the goods (§ 28:2A-521).

(c) If a lessor is otherwise in default under a lease contract, the lessee may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease, and in § 28:2A-519(c).

(d) If a lessor has breached a warranty, whether express or implied, the lessee may recover damages (§ 28:2A-519(d)).

(e) On rightful rejection or justifiable revocation of acceptance, a lessee has a security interest in goods in the lessee’s possession or control for any rent and security that has been paid and any expenses reasonably incurred in their inspection, receipt, transportation, and care and custody and may hold those goods and dispose of them in good faith and in a commercially reasonable manner, subject to § 28:2A-527(e).

(f) Subject to the provisions of § 28:2A-407, a lessee, on notifying the lessor of the lessee’s intention to do so, may deduct all or any part of the damages

resulting from any default under the lease contract from any part of the rent still due under the same lease contract.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-511, 28:2A-512, 28:2A-518, and 28:2A-527.

Prior Codifications. — 1981 Ed., § 28:2A-508.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 2-711 and 2-717.

Changes: Substantially rewritten.

Purposes:

1. This section is an index to Sections 2A-509 through 522 which set out the lessee's rights and remedies after the lessor's default. The lessor and the lessee can agree to modify the rights and remedies available under this Article; they can, among other things, provide that for defaults other than those specified in subsection (1) the lessee can exercise the rights and remedies referred to in subsection (1); and they can create a new scheme of rights and remedies triggered by the occurrence of the default. Sections 2A-103(4) and 1-102(3).

2. Subsection (1), a substantially rewritten version of the provisions of Section 2-711(1), lists three cumulative remedies of the lessee where the lessor has failed to deliver conforming goods or has repudiated the contract, or the lessee has rightfully rejected or justifiably revoked. Sections 2A-501(2) and (4). Subsection (1) also allows the lessee to exercise any contractual remedy. This Article rejects any general doctrine of election of remedy. To determine if one remedy bars another in a particular case is a function of whether the lessee has been put in as good a position as if the lessor had fully performed the lease agreement. Use of multiple remedies is barred only if the effect is to put the lessee in a better position than it would have been in had the lessor fully performed under the lease. Sections 2A-103(4), 2A-501(4), and 1-106(1). Subsection (1)(b), in recognition that no bright line can be created that would operate fairly in all installment lease cases and in recognition of the fact that a lessee may be able to cancel the lease (revoke acceptance of the goods) after the goods have been in use for some period of time, does not require that all lease payments made by the lessee under the lease be returned upon cancellation. Rather, only such portion as is just of the rent and security payments made may be recovered. If a defect in the goods is discovered immediately upon tender to the lessee and the goods are rejected immediately, then the lessee

should recover all payments made. If, however, for example, a 36-month equipment lease is terminated in the 12th month because the lessor has materially breached the contract by failing to perform its maintenance obligations, it may be just to return only a small part or none of the rental payments already made.

3. Subsection (2), a version of the provisions of Section 2-711(2) revised to reflect leasing terminology, lists two alternative remedies for the recovery of the goods by the lessee; however, each of these remedies is cumulative with respect to those listed in subsection (1).

4. Subsection (3) is new. It covers defaults which do not deprive the lessee of the goods and which are not so serious as to justify rejection or revocation of acceptance under subsection (1). It also covers defaults for which the lessee could have rejected or revoked acceptance of the goods but elects not to do so and retains the goods. In either case, a lessee which retains the goods is entitled to recover damages as stated in Section 2A-519(3). That measure of damages is "the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's breach."

5. Subsection (1)(d) and subsection (3) recognize that the lease agreement may provide rights and remedies in addition to or different from those which Article 2A provides. In particular, subsection (3) provides that the lease agreement may give the remedy of cancellation of the lease for defaults by the lessor that would not otherwise be material defaults which would justify cancellation under subsection (1). If there is a right to cancel, there is, of course, a right to reject or revoke acceptance of the goods.

6. Subsection (4) is new and merely adds to the completeness of the index by including a reference to the lessee's recovery of damages upon the lessor's breach of warranty; such breach may not rise to the level of a default by the lessor justifying revocation of acceptance. If the lessee properly rejects or revokes acceptance of the goods because of a breach of war-

ranty, the rights and remedies are those provided in subsection (1) rather than those in Section 2A-519(4).

7. Subsection (5), a revised version of the provisions of Section 2-711(3), recognizes, on rightful rejection or justifiable revocation, the lessee's security interest in goods in its possession and control. Section 9-113, which recognized security interests arising under the Article on Sales (Article 2), was amended with the adoption of this Article to reflect the security interests arising under this Article. Pursuant to Section 2A-511(4), a purchaser who purchases goods from the lessee in good faith takes free of any rights of the lessor, or in the case of a finance lease the supplier. Such goods, however, must have been rightfully rejected and disposed of pursuant to Section 2A-511 or 2A-512. However, Section 2A-517(5) provides that the lessee will have the same rights and duties with respect to goods where acceptance has been revoked as with respect to goods rejected. Thus, Section 2A-511(4) will apply to the lessee's disposition of such goods.

8. Pursuant to Section 2A-527(5), the lessee must account to the lessor for the excess proceeds of such disposition, after satisfaction of the claim secured by the lessee's security interest.

9. Subsection (6), a slightly revised version of the provisions of Section 2-717, sanctions a right of set-off by the lessee, subject to the rule of Section 2A-407 with respect to irrevocable promises in a finance lease that is not a consumer lease, and further subject to an enforceable "hell or high water" clause in the lease agreement. Section 2A-407 official comment.

No attempt is made to state how the set-off should occur; this is to be determined by the facts of each case.

10. There is no special treatment of the finance lease in this section. Absent supplemental principles of law and equity to the contrary, in the case of most finance leases, following the lessee's acceptance of the goods the lessee will have no rights or remedies against the lessor, because the lessor's obligations to the lessee are minimal. Sections 2A-210 and 2A-211(1). Since the lessee will look to the supplier for performance, this is appropriate. Section 2A-209.

Cross References:

Sections 1-102(3), 1-103, 1-106(1), Article 2, especially Sections 2-711, 2-717 and Sections 2A-103(4), 2A-209, 2A-210, 2A-211(1), 2A-407, 2A-501(2), 2A-501(4), 2A-509 through 2A-522, 2A-511(3), 2A-517(5), 2A-527(5) and Section 9-113.

Definitional Cross References:

"Conforming". Section 2A-103(1)(d).
 "Delivery". Section 1-201(14).
 "Good faith". Sections 1-201(19) and 2-103(1)(b).
 "Goods". Section 2A-103(1)(h).
 "Installment lease contract". Section 2A-103(1)(i).
 "Lease contract". Section 2A-103(1)(l).
 "Lessee". Section 2A-103(1)(n).
 "Lessor". Section 2A-103(1)(p).
 "Notifies". Section 1-201(26).
 "Receipt". Section 2-103(1)(c).
 "Remedy". Section 1-201(34).
 "Rights". Section 1-201(36).
 "Security interest". Section 1-201(37).
 "Value". Section 1-201(44).

§ 28:2A-509. Lessee's rights on improper delivery; rightful rejection.

(a) Subject to the provisions of § 28:2A-510 on default in installment lease contracts, if the goods or the tender or delivery fail in any respect to conform to the lease contract, the lessee may reject or accept the goods or accept any commercial unit or units and reject the rest of the goods.

(b) Rejection of goods is ineffective unless it is within a reasonable time after tender or delivery of the goods and the lessee seasonably notifies the lessor.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-508 and 28:2A-515.

Prior Codifications. — 1981 Ed., § 28:2A-509.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 2-601 and 2-602(1).

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

"Commercial unit". Section 2A-103(1)(c).

"Conforming". Section 2A-103(1)(d).

"Delivery". Section 1-201(14).

"Goods". Section 2A-103(1)(h).

"Installment lease contract". Section 2A-103(1)(i).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notifies". Section 1-201(26).

"Reasonable time". Section 1-204(1) and (2).

"Rights". Section 1-201(36).

"Seasonably". Section 1-204(3).

§ 28:2A-510. Installment lease contracts: rejection and default.

(a) Under an installment lease contract a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery and cannot be cured or the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (b) of this section and the lessor or the supplier gives adequate assurance of its cure, the lessee must accept that delivery.

(b) Whenever nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole, there is a default with respect to the whole. But, the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably notifying of cancellation or brings an action with respect only to past deliveries or demands performance as to future deliveries.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-406, 28:2A-508, 28:2A-509, and 28:2A-523.

Prior Codifications. — 1981 Ed., § 28:2A-510.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-612.
Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

"Action". Section 1-201(1).

"Aggrieved party". Section 1-201(2).

"Cancellation". Section 2A-103(1)(b).

"Conforming". Section 2A-103(1)(d).

"Delivery". Section 1-201(14).

"Installment lease contract". Section 2A-103(1)(i).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notifies". Section 1-201(26).

"Seasonably". Section 1-204(3).

"Supplier". Section 2A-103(1)(x).

"Value". Section 1-201(44).

§ 28:2A-511. Merchant lessee's duties as to rightfully rejected goods.

(a) Subject to any security interest of a lessee (§ 28:2A-508(e)), if a lessor or a supplier has no agent or place of business at the market of rejection, a merchant lessee, after rejection of goods in his or her possession or control, shall follow any reasonable instructions received from the lessor or the supplier with respect to the goods. In the absence of those instructions, a merchant lessee shall make reasonable efforts to sell, lease, or otherwise

dispose of the goods for the lessor's account if they threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(b) If a merchant lessee (subsection (a) of this section) or any other lessee (§ 28:2A-512) disposes of goods, he or she is entitled to reimbursement either from the lessor or the supplier or out of the proceeds for reasonable expenses of caring for and disposing of the goods and, if the expenses include no disposition commission, to such commission as is usual in the trade, or if there is none, to a reasonable sum not exceeding 10% of the gross proceeds.

(c) In complying with this section or § 28:2A-512, the lessee is held only to good faith. Good faith conduct hereunder is neither acceptance or conversion nor the basis of an action for damages.

(d) A purchaser who purchases in good faith from a lessee pursuant to this section or § 28:2A-512 takes the goods free of any rights of the lessor and the supplier even though the lessee fails to comply with one or more of the requirements of this article.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-305 and 28:2A-512.

Prior Codifications. — 1981 Ed., § 28:2A-511.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 2-603 and 2-706(5).

Changes: Revised to reflect leasing practices and terminology. This section, by its terms, applies to merchants as well as others. Thus, in construing the section it is important to note that under this Act the term good faith is defined differently for merchants (Section 2-103(1)(b)) than for others (Section 1-201(19)). Section 2A-103(3) and (4).

Definitional Cross References:

“Action”. Sections 1-201(1).

“Good faith”. Sections 1-201(19) and 2-103(1)(b).

“Goods”. Section 2A-103(1)(h).

“Lease”. Section 2A-103(1)(j).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Merchant lessee”. Section 2A-103(1)(t).

“Purchaser”. Section 1-201(33).

“Rights”. Section 1-201(36).

“Security interest”. Section 1-201(37).

“Supplier”. Section 2A-103(1)(x).

“Value”. Section 1-201(44).

§ 28:2A-512. Lessee's duties as to rightfully rejected goods.

(a) Except as otherwise provided with respect to goods that threaten to decline in value speedily (§ 28:2A-511) and subject to any security interest of a lessee (§ 28:2A-508(e)):

(1) The lessee, after rejection of goods in the lessee's possession, shall hold them with reasonable care at the lessor's or the supplier's disposition for a reasonable time after the lessee's seasonable notification of rejection;

(2) If the lessor or the supplier gives no instructions within a reasonable time after notification of rejection, the lessee may store the rejected goods for the lessor's or the supplier's account or ship them to the lessor or the supplier or dispose of them for the lessor's or the supplier's account with reimbursement in the manner provided in § 28:2A-511; but

(3) The lessee has no further obligations with regard to goods rightfully rejected.

(b) Action by the lessee pursuant to subsection (a) of this section is not acceptance or conversion.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-511.

Prior Codifications. — 1981 Ed., § 28:2A-512.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 2-602(2)(b) and (c) and 2-604.

Changes: Substantially rewritten.

Purposes: The introduction to subsection (1) references goods that threaten to decline in value speedily and not perishables, the reference in Section 2-604, the statutory analogue. This is a change in style, not substance, as the first phrase includes the second. Subparagraphs (a) and (c) are revised versions of the provisions of Section 2-602(2)(b) and (c). Subparagraph (a) states the rule with respect to the lessee's treatment of goods in its possession following rejection; subparagraph (b) states the rule regarding such goods if the lessor or supplier then fails to give instructions to the lessee.

If the lessee performs in a fashion consistent with subparagraphs (a) and (b), subparagraph (c) exonerates the lessee.

Cross References:

Sections 2-602(2)(b), 2-602(2)(c) and 2-604.

Definitional Cross References:

"Action". Section 1-201(1).

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notification". Section 1-201(26).

"Reasonable time". Section 1-204(1) and (2).

"Seasonably". Section 1-204(3).

"Security interest". Section 1-201(37).

"Supplier". Section 2A-103(1)(x).

"Value". Section 1-201(44).

§ 28:2A-513. Cure by lessor of improper tender or delivery; replacement.

(a) If any tender or delivery by the lessor or the supplier is rejected because nonconforming and the time for performance has not yet expired, the lessor or the supplier may seasonably notify the lessee of the lessor's or the supplier's intention to cure and may then make a conforming delivery within the time provided in the lease contract.

(b) If the lessee rejects a nonconforming tender that the lessor or the supplier had reasonable grounds to believe would be acceptable with or without money allowance, the lessor or the supplier may have a further reasonable time to substitute a conforming tender if he or she seasonably notifies the lessee.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-514.

Prior Codifications. — 1981 Ed., § 28:2A-513.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-508.
Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

“Conforming”. Section 2A-103(1)(d).

“Delivery”. Section 1-201(14).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Money”. Section 1-201(24).

“Notifies”. Section 1-201(26).

“Reasonable time”. Section 1-204(1) and (2).

“Seasonably”. Section 1-204(3).

“Supplier”. Section 2A-103(1)(x).

§ 28:2A-514. Waiver of lessee’s objections.

(a) In rejecting goods, a lessee’s failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default:

(1) If, stated seasonably, the lessor or the supplier could have cured it (§ 28:2A-513); or

(2) Between merchants if the lessor or the supplier after rejection has made a request in writing for a full and final written statement of all defects on which the lessee proposes to rely.

(b) A lessee’s failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent on the face of the documents.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-514.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-605.
Changes: Revised to reflect leasing practices and terminology.

Purposes: The principles applicable to the commercial practice of payment against documents (subsection 2) are explained in official comment 4 to Section 2-605, the statutory analogue to this section.

Cross Reference:

Section 2-605 official comment 4.

Definitional Cross References:

“Between merchants”. Section 2-104(3).

“Goods”. Section 2A-103(1)(h).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Rights”. Section 1-201(36).

“Seasonably”. Section 1-204(3).

“Supplier”. Section 2A-103(1)(x).

“Writing”. Section 1-201(46).

§ 28:2A-515. Acceptance of goods.

(a) Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods, and

(1) The lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity; or

(2) The lessee fails to make an effective rejection of the goods (§ 28:2A-509(b)).

(b) Acceptance of a part of any commercial unit is acceptance of that entire unit.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-515.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-606.

Changes: The provisions of Section 2-606(1)(a) were substantially rewritten to provide that the lessee's conduct may signify acceptance. Further, the provisions of Section 2-606(1)(c) were not incorporated as irrelevant given the lessee's possession and use of the leased goods.

Cross References:

Sections 2-606(1)(a) and 2-606(1)(c).

Definitional Cross References:

"Commercial unit". Section 2A-103(1)(c).

"Conforming". Section 2A-103(1)(d).

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Supplier". Section 2A-103(1)(x).

§ 28:2A-516. Effect of acceptance of goods; notice of default; burden of establishing default after acceptance; notice of claim or litigation to person answerable over.

(a) A lessee must pay rent for any goods accepted in accordance with the lease contract, with due allowance for goods rightfully rejected or not delivered.

(b) A lessee's acceptance of goods precludes rejection of the goods accepted. In the case of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it. In any other case, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. Acceptance does not of itself impair any other remedy provided by this article or the lease agreement for nonconformity.

(c) If a tender has been accepted:

(1) Within a reasonable time after the lessee discovers or should have discovered any default, the lessee shall notify the lessor and the supplier, if any, or be barred from any remedy against the party not notified;

(2) Except in the case of a consumer lease, within a reasonable time after the lessee receives notice of litigation for infringement or the like (§ 28:2A-211) the lessee shall notify the lessor or be barred from any remedy over for liability established by the litigation; and

(3) The burden is on the lessee to establish any default.

(d) If a lessee is sued for breach of a warranty or other obligation for which a lessor or a supplier is answerable over the following apply:

(1) The lessee may give the lessor or the supplier, or both, written notice of the litigation. If the notice states that the person notified may come in and defend and that if the person notified does not do so, that person will be bound

in any action against that person by the lessee by any determination of fact common to the 2 litigations, then unless the person notified after reasonable receipt of the notice does come in and defend, that person is so bound.

(2) The lessor or the supplier may demand in writing that the lessee turn over control of the litigation including settlement if the claim is one for infringement or the like (§ 28:2A-211) or else be barred from any remedy over. If the demand states that the lessor or the supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the lessee after reasonable receipt of the demand does turn over control the lessee is so barred.

(e) Subsections (c) and (d) of this section apply to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like (§ 28:2A-211).

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-519.

Prior Codifications. — 1981 Ed., § 28:2A-516.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-607.

Changes: Substantially revised.

Purposes:

1. Subsection (2) creates a special rule for finance leases, precluding revocation if acceptance is made with knowledge of nonconformity with respect to the lease agreement, as opposed to the supply agreement; this is not inequitable as the lessee has a direct claim against the supplier. Section 2A-209(1). Revocation of acceptance of a finance lease is permitted if the lessee's acceptance was without discovery of the nonconformity (with respect to the lease agreement, not the supply agreement) and was reasonably induced by the lessor's assurances. Section 2A-517(1)(b). Absent exclusion or modification, the lessor under a finance lease makes certain warranties to the lessee. Sections 2A-210 and 2A-211(1). Revocation of acceptance is not prohibited even after the lessee's promise has become irrevocable and independent. Section 2A-407 official comment. Where the finance lease creates a security interest, the rule may be to the contrary. *General Elec. Credit Corp. of Tennessee v. Ger-Beck Mach. Co.*, 806 F.2d 1207 (3rd Cir.1986).

2. Subsection (3)(a) requires the lessee to give notice of default, within a reasonable time after the lessee discovered or should have discovered the default. In a finance lease, notice may be given either to the supplier, the lessor, or both, but remedy is barred against the party not notified. In a finance lease, the lessor is usually not liable for defects in the goods and the essential notice is to the supplier. While notice to the finance lessor will often not give any

additional rights to the lessee, it would be good practice to give the notice since the finance lessor has an interest in the goods. Subsection (3)(a) does not use the term finance lease, but the definition of supplier is a person from whom a lessor buys or leases goods to be leased under a finance lease. Section 2A-103(1)(x). Therefore, there can be a "supplier" only in a finance lease. Subsection (4) applies similar notice rules as to lessors and suppliers if a lessee is sued for a breach of warranty or other obligation for which a lessor or supplier is answerable over.

3. Subsection (3)(b) requires the lessee to give the lessor notice of litigation for infringement or the like. There is an exception created in the case of a consumer lease. While such an exception was considered for a finance lease, it was not created because it was not necessary—the lessor in a finance lease does not give a warranty against infringement. Section 2A-211(2). Even though not required under subsection (3)(b), the lessee who takes under a finance lease should consider giving notice of litigation for infringement or the like to the supplier, because the lessee obtains the benefit of the suppliers' promises subject to the suppliers' defenses or claims. Sections 2A-209(1) and 2-607(3)(b).

Cross References:

Sections 2-607(3)(b), 2A-103(1)(x), 2A-209(1), 2A-210, 2A-211(1), 2A-211(2), 2A-407 official comment and 2A-517(1)(b).

Definitional Cross References:

"Action". Section 1-201(1).

"Agreement". Section 1-201(3).

"Burden of establishing". Section 1-201(8).

“Conforming”. Section 2A-103(1)(d).
 “Consumer lease”. Section 2A-103(1)(e).
 “Delivery”. Section 1-201(14).
 “Discover”. Section 1-201(25).
 “Finance lease”. Section 2A-103(1)(g).
 “Goods”. Section 2A-103(1)(h).
 “Knowledge”. Section 1-201(25).
 “Lease agreement”. Section 2A-103(1)(k).
 “Lease contract”. Section 2A-103(1)(l).
 “Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).
 “Notice”. Section 1-201(25).
 “Notifies”. Section 1-201(26).
 “Person”. Section 1-201(30).
 “Reasonable time”. Section 1-204(1) and (2).
 “Receipt”. Section 2-103(1)(c).
 “Remedy”. Section 1-201(34).
 “Seasonably”. Section 1-204(3).
 “Supplier”. Section 2A-103(1)(x).
 “Written”. Section 1-201(46).

§ 28:2A-517. Revocation of acceptance of goods.

(a) A lessee may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the lessee if the lessee has accepted it:

(1) Except in the case of a finance lease, on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(2) Without discovery of the nonconformity if the lessee’s acceptance was reasonably induced either by the lessor’s assurances or, except in the case of a finance lease, by the difficulty of discovery before acceptance.

(b) Except in the case of a financial lease that is not a consumer lease, a lessee may revoke acceptance of a lot or commercial unit if the lessor defaults under the lease contract and the default substantially impairs the value of that lot or commercial unit to the lessee.

(c) If the lease agreement so provides, the lessee may revoke acceptance of a lot or commercial unit because of other defaults by the lessor.

(d) Revocation of acceptance must occur within a reasonable time after the lessee discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by the nonconformity. Revocation is not effective until the lessee notifies the lessor.

(e) A lessee who so revokes has the same rights and duties with regard to the goods involved as if the lessee had rejected them.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-508.

Prior Codifications. — 1981 Ed., § 28:2A-517.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-608.

Changes: Revised to reflect leasing practices and terminology. Note that in the case of a finance lease the lessee retains a limited right to revoke acceptance. Sections 2A-517(1)(b) and 2A-516 official comment. New subsections (2) and (3) added.

Purposes:

1. The section states the situations under which the lessee may return the goods to the lessor and cancel the lease. Subsection (2) recognizes that the lessor may have continuing

obligations under the lease and that a default as to those obligations may be sufficiently material to justify revocation of acceptance of the leased items and cancellation of the lease by the lessee. For example, a failure by the lessor to fulfill its obligation to maintain leased equipment or to supply other goods which are necessary for the operation of the leased equipment may justify revocation of acceptance and cancellation of the lease.

2. Subsection (3) specifically provides that the lease agreement may provide that the les-

see can revoke acceptance for defaults by the lessor which in the absence of such an agreement might not be considered sufficiently serious to justify revocation. That is, the parties are free to contract on the question of what defaults are so material that the lessee can cancel the lease.

Cross References:

Section 2A-516 official comment.

Definitional Cross References:

"Commercial unit". Section 2A-103(1)(c).

"Conforming". Section 2A-103(1)(d).

"Discover". Section 1-201(25).

"Finance lease". Section 2A-103(1)(g).

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Lot". Section 2A-103(1)(s).

"Notifies". Section 1-201(26).

"Reasonable time". Section 1-204(1) and (2).

"Rights". Section 1-201(36).

"Seasonably". Section 1-204(3).

"Value". Section 1-201(44).

§ 28:2A-518. Cover; substitute goods.

(a) After default by a lessor under the lease contract of the type described in § 28:2A-508(a), or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor.

(b) Except as otherwise provided with respect to damages liquidated in the lease agreement (§ 28:2A-504) or otherwise determined pursuant to agreement of the parties (§ 28:1-102(3) and § 28:2A-503), if a lessee's cover is by a lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (i) the present value, as of the date of the commencement of the term of the new lease agreements, of the rent under the new lease agreement applicable to the period of the new lease which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (ii) any incidental or consequential damages, less expenses saved in consequence of the lessor's default.

(c) If a lessee's cover is by lease agreement that for any reason does not qualify for treatment under subsection (b) of this section, or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and § 28:2A-519 governs.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-508 and 28:2A-519.

Prior Codifications. — 1981 Ed., § 28:2A-518.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-712.

Changes: Substantially revised.

Purposes:

1. Subsection (1) allows the lessee to take action to fix its damages after default by the lessor. Such action may consist of the lease of goods. The decision to cover is a function of commercial judgment, not a statutory mandate

replete with sanctions for failure to comply. Cf. Section 9-507.

2. Subsection (2) states a rule for determining the amount of lessee's damages provided that there is no agreement to the contrary. The lessee's damages will be established using the new lease agreement as a measure if the following three criteria are met: (i) the lessee's

cover is by lease agreement, (ii) the lease agreement is substantially similar to the original lease agreement, and (iii) such cover was effected in good faith, and in a commercially reasonable manner. Thus, the lessee will be entitled to recover from the lessor the present value, as of the date of commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period which is comparable to the then remaining term of the original lease agreement less the present value of the rent reserved for the remaining term under the original lease, together with incidental or consequential damages less expenses saved in consequence of the lessor's default. Consequential damages may include loss suffered by the lessee because of deprivation of the use of the goods during the period between the default and the acquisition of the goods under the new lease agreement. If the lessee's cover does not satisfy the criteria of subsection (2), Section 2A-519 governs.

3. Two of the three criteria to be met by the lessee are familiar, but the concept of the new lease agreement being substantially similar to the original lease agreement is not. Given the many variables facing a party who intends to lease goods and the rapidity of change in the market place, the policy decision was made not to draft with specificity. It was thought unwise to seek to establish certainty at the cost of fairness. Thus, the decision of whether the new lease agreement is substantially similar to the original will be determined case by case.

4. While the section does not draw a bright line, it is possible to describe some of the factors that should be considered in finding that a new lease agreement is substantially similar to the original. First, the goods subject to the new lease agreement should be examined. For example, in a lease of computer equipment the new lease might be for more modern equipment. However, it may be that at the time of the lessor's breach it was not possible to obtain the same type of goods in the market place. Because the lessee's remedy under Section 2A-519 is intended to place the lessee in essentially the same position as if he had covered, if goods similar to those to have been delivered under the original lease are not available, then the computer equipment in this hypothetical should qualify as a commercially reasonable substitute. See Section 2-712(1).

5. Second, the various elements of the new lease agreement should also be examined. Those elements include the presence or absence of options to purchase or release; the lessor's representations, warranties and covenants to the lessee, as well as those to be provided by the lessee to the lessor; and the services, if any, to be provided by the lessor or by the lessee. All of these factors allocate cost and risk between the lessor and the lessee and thus affect the

amount of rent to be paid. If the differences between the original lease and the new lease can be easily valued, it would be appropriate for a court to adjust the difference in rental to take account of the difference between the two leases, find that the new lease is substantially similar to the old lease, and award cover damages under this section. If, for example, the new lease requires the lessor to insure the goods in the hands of the lessee, while the original lease required the lessee to insure, the usual cost of such insurance could be deducted from the rent due under the new lease before determining the difference in rental between the two leases.

6. Having examined the goods and the agreement, the test to be applied is whether, in light of these comparisons, the new lease agreement is substantially similar to the original lease agreement. These findings should not be made with scientific precision, as they are a function of economics, nor should they be made independently with respect to the goods and each element of the agreement, as it is important that a sense of commercial judgment pervade the finding. To establish the new lease as a proper measure of damage under subsection (2), these factors, taken as a whole, must result in a finding that the new lease agreement is substantially similar to the original.

7. A new lease can be substantially similar to the original lease even though its term extends beyond the remaining term of the original lease, so long as both (a) the lease terms are commercially comparable (e.g., it is highly unlikely that a one-month rental and a five-year lease would reflect similar commercial realities), and (b) the court can fairly apportion a part of the rental payments under the new lease to that part of the term of the new lease which is comparable to the remaining lease term under the original lease. Also, the lease term of the new lease may be comparable to the term of the original lease even though the beginning and ending dates of the two leases are not the same. For example, a two-month lease of agricultural equipment for the months of August and September may be comparable to a two-month lease running from the 15th of August to the 15th of October if in the particular location two-month leases beginning on August 15th are basically interchangeable with two-month leases beginning August 1st. Similarly, the term of a one-year truck lease beginning on the 15th of January may be comparable to the term of a one-year truck lease beginning January 2d. If the lease terms are found to be comparable, the court may base cover damages on the entire difference between the costs under the two leases.

Cross References:

Sections 2-712(1), 2A-519 and 9-507.

Definitional Cross References:

"Agreement". Section 1-201(3).

"Contract". Section 1-201(11).
 "Good faith". Sections 1-201(19) and 2-103(1)(b).
 "Goods". Section 2A-103(1)(h).
 "Lease". Section 2A-103(1)(j).
 "Lease agreement". Section 2A-103(1)(k).

"Lease contract". Section 2A-103(1)(l).
 "Lessee". Section 2A-103(1)(n).
 "Lessor". Section 2A-103(1)(p).
 "Party". Section 1-201(29).
 "Present value". Section 2A-103(1)(u).
 "Purchase". Section 2A-103(1)(v).

§ 28:2A-519. Lessee's damages for nondelivery, repudiation, default, and breach of warranty in regard to accepted goods.

(a) Except as otherwise provided with respect to damages liquidated in the lease agreement (§ 28:2A-504) or otherwise determined pursuant to agreement of the parties (§§ 28:1-102(c) and 28:2A-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under § 28:2A-518(b), or is by purchase or otherwise, the measure of damages for nondelivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(b) Market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

(c) Except as otherwise agreed, if the lessee has accepted goods and given notification (§ 28:2A-516(c)), the measure of damages for nonconforming tender or delivery or other default by a lessor is the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(d) Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-507, 28:2A-508, and 28:2A-518.

Prior Codifications. — 1981 Ed., § 28:2A-519.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 2-713 and 2-714.

Changes: Substantially revised.

Purposes:

1. Subsection (1), a revised version of the provisions of Section 2-713(1), states the basic

rule governing the measure of lessee's damages for non-delivery or repudiation by the lessor or for rightful rejection or revocation of acceptance by the lessee.

This measure will apply, absent agreement to the contrary, if the lessee does not cover or if the cover does not qualify under Section 2A-518. There is no sanction for cover that does not qualify.

2. The measure of damage is the present value, as of the date of default, of the market rent for the remaining term of the lease less the present value of the original rent for the remaining term of the lease, plus incidental and consequential damages less expenses saved in consequence of the default. Note that the reference in Section 2A-519(1) is to the date of default not to the date of an event of default. An event of default under a lease agreement becomes a default under a lease agreement only after the expiration of any relevant period of grace and compliance with any notice requirements under this Article and the lease agreement. American Bar Foundation, Commentaries on Indentures, s 5-1, at 216-217 (1971). Section 2A-501(1). This conclusion is also a function of whether, as a matter of fact or law, the event of default has been waived, suspended or cured. Sections 2A-103(4) and 1-103.

3. Subsection (2), a revised version of the provisions of Section 2-713(2), states the rule with respect to determining market rent.

4. Subsection (3), a revised version of the provisions of Section 2-714(1) and (3), states

the measure of damages where goods have been accepted and acceptance is not revoked. The subsection applies both to defaults which occur at the inception of the lease and to defaults which occur subsequently, such as failure to comply with an obligation to maintain the leased goods. The measure in essence is the loss, in the ordinary course of events, flowing from the default.

5. Subsection (4), a revised version of the provisions of Section 2-714(2), states the measure of damages for breach of warranty. The measure in essence is the present value of the difference between the value of the goods accepted and of the goods if they had been as warranted.

6. Subsections (1), (3) and (4) specifically state that the parties may by contract vary the damages rules stated in those subsections.

Cross References:

Sections 2-713(1), 2-713(2), 2-714 and Section 2A-518.

Definitional Cross References:

"Conforming". Section 2A-103(1)(d).

"Delivery". Section 1-201(14).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease agreement". Section 2A-103(1)(k).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Notification". Section 1-201(26).

"Present value". Section 2A-103(1)(u).

"Value". Section 1-201(44).

§ 28:2A-520. Lessee's incidental and consequential damages.

(a) Incidental damages resulting from a lessor's default include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected or goods the acceptance of which is justifiably revoked, any commercially reasonable charges, expenses or commissions in connection with effecting cover, and any other reasonable expense incident to the default.

(b) Consequential damages resulting from a lessor's default include:

(1) Any loss resulting from general or particular requirements and needs of which the lessor at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(2) Injury to person or property proximately resulting from any breach of warranty.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-508.

Prior Codifications. — 1981 Ed., § 28:2A-520.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-715.

Changes: Revised to reflect leasing terminology and practices.

Purposes: Subsection (1), a revised version of the provisions of Section 2-715(1), lists some examples of incidental damages resulting from a lessor's default; the list is not exhaustive. Subsection (1) makes clear that it applies not only to rightful rejection, but also to justifiable revocation.

Subsection (2), a revised version of the provisions of Section 2-715(2), lists some examples of

consequential damages resulting from a lessor's default; the list is not exhaustive.

Cross References:

Section 2-715.

Definitional Cross References:

"Goods". Section 2A-103(1)(h).

"Knows". Section 1-201(25).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Person". Section 1-201(30).

"Receipt". Section 2-103(1)(c).

§ 28:2A-521. Lessee's right to specific performance or replevin.

(a) Specific performance may be decreed if the goods are unique or in other proper circumstances.

(b) A decree for specific performance may include any terms and conditions as to payment of the rent, damages, or other relief that the court deems just.

(c) A lessee has a right of replevin, detinue, sequestration, claim and delivery, or the like for goods identified to the lease contract if after reasonable effort the lessee is unable to effect cover for those goods or the circumstances reasonably indicate that the effort will be unavailing.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-508.

Prior Codifications. — 1981 Ed., § 28:2A-521.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-501.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-716.

Changes: Revised to reflect leasing practices and terminology, and to expand the reference to the right of replevin in subsection (3) to include other similar rights of the lessee.

Definitional Cross References:

"Delivery". Section 1-201(14).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Rights". Section 1-201(36).

"Term". Section 1-201(42).

CASE NOTES

In general.

Under District of Columbia law, participant in airline's frequent flyer program had no right of detinue with respect to his frequent flyer

miles, where he did not obtain miles through sale of goods. *Ficken v. AMR Corp.*, 578 F.Supp.2d 134, 2008 U.S. Dist. LEXIS 75434 (2008).

§ 28:2A-522. Lessee's right to goods on lessor's insolvency.

(a) Subject to subsection (b) of this section and even though the goods have not been shipped, a lessee who has paid a part or all of the rent and security for goods identified to a lease contract (§ 28:2A-217) on making and keeping

good a tender of any unpaid portion of the rent and security due under the lease contract may recover the goods identified from the lessor if the lessor becomes insolvent within 10 days after receipt of the first installment of rent and security.

(b) A lessee acquires the right to recover goods identified to a lease contract only if they conform to the lease contract.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-508.

Prior Codifications. — 1981 Ed., § 28:2A-522.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-502.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

“Conforming”. Section 2A-103(1)(d).

“Goods”. Section 2A-103(1)(h).

“Insolvent”. Section 1-201(23).

“Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).

“Lessor”. Section 2A-103(1)(p).

“Receipt”. Section 2-103(1)(c).

“Rights”. Section 1-201(36).

Subpart C. Default by Lessee.

§ 28:2A-523. Lessor’s remedies.

(a) If a lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a part or the whole, then, with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (§ 28:2A-510), the lessee is in default under the lease contract and the lessor may:

(1) Cancel the lease contract (§ 28:2A-505(a));

(2) Proceed respecting goods not identified to the lease contract (§ 28:2A-524);

(3) Withhold delivery of the goods and take possession of goods previously delivered (§ 28:2A-525);

(4) Stop delivery of the goods by any bailee (§ 28:2A-526);

(5) Dispose of the goods and recover damages (§ 28:2A-527), or retain the goods and recover damages (§ 28:2A-528), or in a proper case recover rent (§ 28:2A-529); or

(6) Exercise any other rights or pursue any other remedies provided in the lease contract.

(b) If a lessor does not fully exercise a right or obtain a remedy to which the lessor is entitled under subsection (a) of this section, the lessor may recover the loss resulting in the ordinary course of events from the lessee’s default as determined in any reasonable manner, together with incidental damages, less expenses saved in consequence of the lessee’s default.

(c) If a lessee is otherwise in default under a lease contract, the lessor may exercise the rights and pursue the remedies provided in the lease contract

which may include a right to cancel the lease. In addition, unless otherwise provided in the lease contract:

(1) If the default substantially impairs the value of the lease contract to the lessor, the lessor may exercise the rights and pursue the remedies provided in subsections (a) and (b) of this section; or

(2) If the default does not substantially impair the value of the lease contract to the lessor, the lessor may recover as provided in subsection (b) of this section.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-524, 28:2A-525, 28:2A-527, 28:2A-528, and 28:2A-529.

Prior Codifications. — 1981 Ed., § 28:2A-523.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

Editor's notes. — The word "or," appearing in D.C. Law 9-128, was deleted from the end of (a)(4).

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-703.

Changes: Substantially revised.

Purposes:

1. Subsection (1) is an index to Sections 2A-524 through 2A-531 and states that the remedies provided in those sections are available for the defaults referred to in subsection (1): wrongful rejection or revocation of acceptance, failure to make a payment when due, or repudiation. In addition, remedies provided in the lease contract are available. Subsection (2) sets out a remedy if the lessor does not pursue to completion a right or actually obtain a remedy available under subsection (1), and subsection (3) sets out statutory remedies for defaults not specifically referred to in subsection (1). Subsection (3) provides that, if any default by the lessee other than those specifically referred to in subsection (1) is material, the lessor can exercise the remedies provided in subsection (1) or (2); otherwise the available remedy is as provided in subsection (3). A lessor who has brought an action seeking or has nonjudicially pursued one or more of the remedies available under subsection (1) may amend so as to claim or may nonjudicially pursue a remedy under subsection (2) unless the right or remedy first chosen has been pursued to an extent actually inconsistent with the new course of action. The intent of the provision is to reject the doctrine of election of remedies and to permit an alteration of course by the lessor unless such alteration would actually have an effect on the lessee that would be unreasonable under the circumstances. Further, the lessor may pursue remedies under both subsections (1) and (2) unless doing so would put the lessor in a better position than it would have been in had the lessee fully performed.

2. The lessor and the lessee can agree to modify the rights and remedies available under the Article; they can, among other things, provide that for defaults other than those specified in subsection (1) the lessor can exercise the rights and remedies referred to in subsection (1), whether or not the default would otherwise be held to substantially impair the value of the lease contract to the lessor; they can also create a new scheme of rights and remedies triggered by the occurrence of the default. Sections 2A-103(4) and 1-102(3).

3. Subsection (1), a substantially rewritten version of Section 2-703, lists various cumulative remedies of the lessor where the lessee wrongfully rejects or revokes acceptance, fails to make a payment when due, or repudiates. Section 2A-501(2) and (4). The subsection also allows the lessor to exercise any contractual remedy.

4. This Article rejects any general doctrine of election of remedy. Whether, in a particular case, one remedy bars another, is a function of whether lessor has been put in as good a position as if the lessee had fully performed the lease contract. Multiple remedies are barred only if the effect is to put the lessor in a better position than it would have been in had the lessee fully performed under the lease. Sections 2A-103(4), 2A-501(4), and 1-106(1).

5. Hypothetical: To better understand the application of subparagraphs (a) through (e), it is useful to review a hypothetical. Assume that A is a merchant in the business of selling and leasing new bicycles of various types. B is about to engage in the business of subleasing bicycles to summer residents of and visitors to an island resort. A, as lessor, has agreed to lease 60 bicycles to B. While there is one master lease,

deliveries and terms are staggered. 20 bicycles are to be delivered by A to B's island location on June 1; the term of the lease of these bicycles is four months. 20 bicycles are to be delivered by A to B's island location on July 1; the term of the lease of these bicycles is three months. Finally, 20 bicycles are to be delivered by A to B's island location on August 1; the term of the lease of these bicycles is two months. B is obligated to pay rent to A on the 15th day of each month during the term for the lease. Rent is \$50 per month, per bicycle. B has no option to purchase or release and must return the bicycles to A at the end of the term, in good condition, reasonable wear and tear excepted. Since the retail price of each bicycle is \$400 and bicycles used in the retail rental business have a useful economic life of 36 months, this transaction creates a lease. Sections 2A-103(1)(j) and 1-201(37).

6. A's current inventory of bicycles is not large. Thus, upon signing the lease with B in February, A agreed to purchase 60 new bicycles from A's principal manufacturer, with special instructions to drop ship the bicycles to B's island location in accordance with the delivery schedule set forth in the lease.

7. The first shipment of 20 bicycles was received by B on May 21. B inspected the bicycles, accepted the same as conforming to the lease and signed a receipt of delivery and acceptance. However, due to poor weather that summer, business was terrible and B was unable to pay the rent due on June 15. Pursuant to the lease A sent B notice of default and proceeded to enforce his rights and remedies against B.

8. A's counsel first advised A that under Section 2A-510(2) and the terms of the lease B's failure to pay was a default with respect to the whole. Thus, to minimize A's continued exposure, A was advised to take possession of the bicycles. If A had possession of the goods A could refuse to deliver. Section 2A-525(1). However, the facts here are different. With respect to the bicycles in B's possession, A has the right to take possession of the bicycles, without breach of the peace. Section 2A-525(2). If B refuses to allow A access to the bicycles, A can proceed by action, including replevin or injunctive relief.

9. With respect to the 40 bicycles that have not been delivered, this Article provides various alternatives. First, assume that 20 of the remaining 40 bicycles have been manufactured and delivered by the manufacturer to a carrier for shipment to B. Given the size of the shipment, the carrier was using a small truck for the delivery and the truck had not yet reached the island ferry when the manufacturer (at the request of A) instructed the carrier to divert the shipment to A's place of business. A's right to stop delivery is recognized under these circumstances. Section 2A-526(1). Second, assume

that the 20 remaining bicycles were in the process of manufacture when B defaulted. A retains the right (as between A as lessor and B as lessee) to exercise reasonable commercial judgment whether to complete manufacture or to dispose of the unfinished goods for scrap. Since A is not the manufacturer and A has a binding contract to buy the bicycles, A elected to allow the manufacturer to complete the manufacture of the bicycles, but instructed the manufacturer to deliver the completed bicycles to A's place of business. Section 2A-524(2).

10. Thus, so far A has elected to exercise the remedies referred to in subparagraphs (b) through (d) in subsection (1). None of these remedies bars any of the others because A's election and enforcement merely resulted in A's possession of the bicycles. Had B performed A would have recovered possession of the bicycles. Thus A is in the process of obtaining the benefit of his bargain. Note that A could exercise any other rights or pursue any other remedies provided in the lease contract (Section 2A-523(1)(f)), or elect to recover his loss due to the lessee's default under Section 2A-523(2).

11. A's counsel next would determine what action, if any, should be taken with respect to the goods. As stated in subparagraph (e) and as discussed fully in Section 2A-527(1) the lessor may, but has no obligation to, dispose of the goods by a substantially similar lease (indeed, the lessor has no obligation whatsoever to dispose of the goods at all) and recover damages based on that action, but lessor will not be able to recover damages which put it in a better position than performance would have done, nor will it be able to recover damages for losses which it could have reasonably avoided. In this case, since A is in the business of leasing and selling bicycles, A will probably inventory the 60 bicycles for its retail trade.

12. A's counsel then will determine which of the various, means of ascertaining A's damages against B are available. Subparagraph (e) catalogues each relevant section. First, under Section 2A-527(2) the amount of A's claim is computed by comparing the original lease between A and B with any subsequent lease of the bicycles but only if the subsequent lease is substantially similar to the original lease contract. While the section does not define this term, the official comment does establish some parameters. If, however, A elects to lease the bicycles to his retail trade, it is unlikely that the resulting lease will be substantially similar to the original, as leases to retail customers are considerably different from leases to wholesale customers like B. If, however, the leases were substantially similar, the damage claim is for accrued and unpaid rent to the beginning of the new lease, plus the present value as of the same date, of the rent reserved under the original lease for the balance of its term less the present

value as of the same date of the rent reserved under the replacement lease for a term comparable to the balance of the term of the original lease, together with incidental damages less expenses saved in consequence of the lessee's default.

13. If the new lease is not substantially similar or if A elects to sell the bicycles or to hold the bicycles, damages are computed under Section 2A-528 or 2A-529.

14. If A elects to pursue his claim under Section 2A-528(1) the damage rule is the same as that stated in Section 2A-527(2) except that damages are measured from default if the lessee never took possession of the goods or from the time when the lessor did or could have regained possession and that the standard of comparison is not the rent reserved under a substantially similar lease entered into by the lessor but a market rent, as defined in Section 2A-507. Further, if the facts of this hypothetical were more elaborate A may be able to establish that the measure of damage under subsection (1) is inadequate to put him in the same position that B's performance would have, in which case A can claim the present value of his lost profits.

15. Yet another alternative for computing A's damage claim against B which will be available in some situations is recovery of the present value, as of entry of judgment, of the rent for the then remaining lease term under Section 2A-529. However, this formulation is not available if the goods have been repossessed or tendered back to A. For the 20 bicycles repossessed and the remaining 40 bicycles, A will be able to recover the present value of the rent only if A is unable to dispose of them, or circumstances indicate the effort will be unavailing. If A has prevailed in an action for the rent, at any time up to collection of a judgment by A against B, A might dispose of the bicycles. In such case A's claim for damages against B is governed by Section 2A-527 or 2A-528. Section 2A-529(3). The resulting recalculation of claim should reduce the amount recoverable by A against B and the lessor is required to cause an appropriate credit to be entered against the earlier judgment. However, the nature of the post-judgment proceedings to resolve this issue, and the sanctions for a failure to comply, if any, will be determined by other law.

16. Finally, if the lease agreement had so provided pursuant to subparagraph (f), A's claim against B would not be determined under any of these statutory formulae, but pursuant to a liquidated damages clause. Section 2A-504(1).

17. These various methods of computing A's damage claim against B are alternatives subject to Section 2A-501(4). However, the pursuit of any one of these alternatives is not a bar to, nor has it been barred by, A's earlier action to

obtain possession of the 60 bicycles. These formulae, which vary as a function of an overt or implied mitigation of damage theory, focus on allowing A a recovery of the benefit of his bargain with B. Had B performed, A would have received the rent as well as the return of the 60 bicycles at the end of the term.

18. Finally, A's counsel should also advise A of his right to cancel the lease contract under subparagraph (a). Section 2A-505(1). Cancellation will discharge all existing obligations but preserve A's rights and remedies.

19. Subsection (2) recognizes that a lessor who is entitled to exercise the rights or to obtain a remedy granted by subsection (1) may choose not to do so. In such cases, the lessor can recover damages as provided in subsection (2). For example, for non-payment of rent, the lessor may decide not to take possession of the goods and cancel the lease, but rather to merely sue for the unpaid rent as it comes due plus lost interest or other damages "determined in any reasonable manner." Subsection (2) also negates any loss of alternative rights and remedies by reason of having invoked or commenced the exercise or pursuit of any one or more rights or remedies.

20. Subsection (3) allows the lessor access to a remedy scheme provided in this Article as well as that contained in the lease contract if the lessee is in default for reasons other than those stated in subsection (1). Note that the reference to this Article includes supplementary principles of law and equity, e.g., fraud, misrepresentation and duress. Sections 2A-103(4) and 1-103.

21. There is no special treatment of the finance lease in this section. Absent supplementary principles of law to the contrary, in most cases the supplier will have no rights or remedies against the defaulting lessee. Section 2A-209(2)(ii). Given that the supplier will look to the lessor for payment, this is appropriate. However, there is a specific exception to this rule with respect to the right to identify goods to the lease contract. Section 2A-524(2). The parties are free to create a different result in a particular case. Sections 2A-103(4) and 1-102(3).

Cross References:

Sections 1-102(3), 1-103, 1-106(1), 1-201(37), 2-703, 2A-103(1)(j), 2A-103(4), 2A-209(2)(ii), 2A-501(4), 2A-504(1), 2A-505(1), 2A-507, 2A-510(2), 2A-524 through 2A-531, 2A-524(2), 2A-525(1), 2A-525(2), 2A-526(1), 2A-527(1), 2A-527(2), 2A-528(1) and 2A-529(3).

Definitional Cross References:

"Delivery". Section 1-201(14).

"Goods". Section 2A-103(1)(h).

"Installment lease contract". Section 2A-103(1)(i).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).
 "Remedy". Section 1-201(34).

"Rights". Section 1-201(36).
 "Value". Section 1-201(44).

§ 28:2A-524. Lessor's right to identify goods to lease contract.

(a) A lessor aggrieved under § 28:2A-523(a) may:

(1) Identify to the lease contract conforming goods not already identified if at the time the lessor learned of the default they were in the lessor's or the supplier's possession or control; and

(2) Dispose of goods (§ 28:2A-527(a)) that demonstrably have been intended for the particular lease contract even though those goods are unfinished.

(b) If the goods are unfinished, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, an aggrieved lessor or the supplier may either complete manufacture and wholly identify the goods to the lease contract or cease manufacture and lease, sell, or otherwise dispose of the goods for scrap or salvage value or proceed in any other reasonable manner.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-402 and 28:2A-523.

Prior Codifications. — 1981 Ed., § 28:2A-524.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-704.

Changes: Revised to reflect leasing practices and terminology.

Purposes: The remedies provided by this section are available to the lessor (i) if there has been a default by the lessee which falls within Section 2A-523(1) or 2A-523(3)(a), or (ii) if there has been any other default for which the lease contract gives the lessor the remedies provided by this section. Under "(ii)", the lease contract may give the lessor the remedies of identification and disposition provided by this section in various ways. For example, a lease provision might specifically refer to the remedies of identification and disposition, or it might refer to

this section by number (i.e., 2A-524), or it might do so by a more general reference such as "all rights and remedies provided by Article 2A for default by the lessee."

Definitional Cross References:

"Aggrieved party". Section 1-201(2).

"Conforming". Section 2A-103(1)(d).

"Goods". Section 2A-103(1)(h).

"Learn". Section 1-201(25).

"Lease". Section 2A-103(1)(j).

"Lease contract". Section 2A-103(1)(l).

"Lessor". Section 2A-103(1)(p).

"Rights". Section 1-201(36).

"Supplier". Section 2A-103(1)(x).

"Value". Section 1-201(44).

§ 28:2A-525. Lessor's right to possession of goods.

(a) If a lessor discovers the lessee to be insolvent, the lessor may refuse to deliver the goods.

(b) After a default by the lessee under the lease contract of the type described in § 28:2A-523(a) or § 28:2A-523(c)(1) or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by

the lessor which is reasonably convenient to both parties. Without removal, the lessor may render unusable any goods employed in trade or business, and may dispose of goods on the lessee's premises (§ 28:2A-527).

(c) The lessor may proceed under subsection (b) of this section without judicial process if it can be done without breach of the peace or the lessor may proceed by action.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830; Apr. 18, 1996, D.C. Law 11-110, § 26, 43 DCR 530.)

Section references. — This section is referred to in §§ 28:2A-504, 28:2A-523, and 28:2A-527.

Prior Codifications. — 1981 Ed., § 28:2A-525.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

Legislative history of Law 11-110. — Law

11-110, the "Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-485, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 5, 1995, and January 4, 1996, respectively. Signed by the Mayor on January 26, 1996, it was assigned Act No. 11-199 and transmitted to both Houses of Congress for its review. D.C. Law 11-110 became effective on April 18, 1996.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Sections 2-702(1) and 9-503.

Changes: Substantially revised.

Purposes:

1. Subsection (1), a revised version of the provisions of Section 2-702(1), allows the lessor to refuse to deliver goods if the lessee is insolvent. Note that the provisions of Section 2-702(2), granting the unpaid seller certain rights of reclamation, were not incorporated in this section. Subsection (2) made this unnecessary.

2. Subsection (2), a revised version of the provisions of Section 9-503, allows the lessor, on a Section 2A-523(1) or 2A-523(3)(a) default by the lessee, the right to take possession of or reclaim the goods. Also, the lessor can contract for the right to take possession of the goods for other defaults by the lessee. Therefore, since the lessee's insolvency is an event of default in a standard lease agreement, subsection (2) is the functional equivalent of Section 2-702(2). Further, subsection (2) sanctions the classic crate and delivery clause obligating the lessee to assemble the goods and to make them available to the lessor. Finally, the lessor may leave the goods in place, render them unusable (if they are goods employed in trade or business), and dispose of them on the lessee's premises.

3. Subsection (3), a revised version of the provisions of Section 9-503, allows the lessor to proceed under subsection (2) without judicial process, absent breach of the peace, or by action. Sections 2A-501(3), 2A-103(4) and

1-201(1). In the appropriate case action includes injunctive relief. *Clark Equip. Co. v. Armstrong Equip. Co.*, 431 F.2d 54 (5th Cir.1970), cert. denied, 402 U.S. 909 (1971). This Section, as well as a number of other Sections in this Part, are included in the Article to codify the lessor's common law right to protect the lessor's reversionary interest in the goods. Section 2A-103(1)(q). These Sections are intended to supplement and not displace principles of law and equity with respect to the protection of such interest. Sections 2A-103(4) and 1-103. Such principles apply in many instances, e.g., loss or damage to goods if risk of loss passes to the lessee, failure of the lessee to return goods to the lessor in the condition stipulated in the lease, and refusal of the lessee to return goods to the lessor after termination or cancellation of the lease. See also Section 2A-532.

Cross References:

Sections 1-106(2), 2-702(2), 2A-103(4), 2A-501(3), 2A-532 and 9-503.

Definitional Cross References:

"Action". Section 1-201(1).
 "Delivery". Section 1-201(14).
 "Discover". Section 1-201(25).
 "Goods". Section 2A-103(1)(h).
 "Insolvent". Section 1-201(23).
 "Lease contract". Section 2A-103(1)(l).
 "Lessee". Section 2A-103(1)(n).
 "Lessor". Section 2A-103(1)(p).
 "Party". Section 1-201(29).
 "Rights". Section 1-201(36).

§ 28:2A-526. Lessor's stoppage of delivery in transit or otherwise.

(a) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.

(b) In pursuing its remedies under subsection (a) of this section, the lessor may stop delivery until:

- (1) Receipt of the goods by the lessee;
- (2) Acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or
- (3) Such an acknowledgment to the lessee by a carrier via reshipment or as warehouseman.

(c)(1) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(2) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.

(3) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-504, 28:2A-523, and 28:2A-527.

Prior Codifications. — 1981 Ed., § 28:2A-526.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-705.
Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

“Bill of lading”. Section 1-201(6).
 “Delivery”. Section 1-201(14).
 “Discover”. Section 1-201(25).
 “Goods”. Section 2A-103(1)(h).
 “Insolvent”. Section 1-201(23).
 “Lease contract”. Section 2A-103(1)(l).

“Lessee”. Section 2A-103(1)(n).
 “Lessor”. Section 2A-103(1)(p).
 “Notifies” and “Notification”. Section 1-201(26).
 “Person”. Section 1-201(30).
 “Receipt”. Section 2-103(1)(c).
 “Remedy”. Section 1-201(34).
 “Rights”. Section 1-201(36).
HISTORICAL NOTES

§ 28:2A-527. Lessor's rights to dispose of goods.

(a) After a default by a lessee under the lease contract of the type described in § 28:2A-523(a) or § 28:2A-523(c) or after the lessor refuses to deliver or takes possession of goods (§ 28:2A-525 or § 28:2A-526), or, if agreed, after other default by a lessee, the lessor may dispose of the goods concerned or the undelivered balance thereof by lease, sale, or otherwise.

(b) Except as otherwise provided with respect to damages liquidated in the lease agreement (§ 28:2A-504) or otherwise determined pursuant to agreement of the parties (§ 28:1-102(3) and § 28:2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under § 28:2A-530, less expenses saved in consequence of the lessee's default.

(c) If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under subsection (b) of this section, or is by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and § 28:2A-528 governs.

(d) A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under this section takes the goods free of the original lease contract and any rights of the original lessee even though the lessor fails to comply with one or more of the requirements of this article.

(e) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (§ 28:2A-508(e)).

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830; July 25, 1995, D.C. Law 11-30, § 7(e), 42 DCR 1547.)

Section references. — This section is referred to in §§ 28:2A-304, 28:2A-508, 28:2A-523, 28:2A-524, 28:2A-525, 28:2A-528, and 28:2A-529.

Prior Codifications. — 1981 Ed., § 28:2A-527.

Legislative history of Law 9-128. — For

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

Legislative history of Law 11-30. — For legislative history of D.C. Law 11-30, see Historical and Statutory Notes following § 28:2A-209.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-706(1), (5) and (6).

Changes: Substantially revised.

Purposes:

1. Subsection (1), a revised version of the first sentence of subsection 2-706(1), allows the lessor the right to dispose of goods after a statutory or other material default by the lessee (even if the goods remain in the lessee's possession—Section 2A-525(2)), after the lessor refuses to deliver or takes possession of the goods,

or, if agreed, after other contractual default. The lessor's decision to exercise this right is a function of a commercial judgment, not a statutory mandate replete with sanctions for failure to comply. Cf. Section 9-507. As the owner of the goods, in the case of a lessor, or as the prime lessee of the goods, in the case of a sublessor, compulsory disposition of the goods is inconsistent with the nature of the interest held by the lessor or the sublessor and is not necessary because the interest held by the lessee or the

sublessee is not protected by a right of redemption under the common law or this Article. Subsection 2A-527(5).

2. The rule for determining the measure of damages recoverable by the lessor against the lessee is a function of several variables. If the lessor has elected to effect disposition under subsection (1) and such disposition is by lease that qualifies under subsection (2), the measure of damages set forth in subsection (2) will apply, absent agreement to the contrary. Sections 2A-504, 2A-103(4) and 1-102(3).

3. The lessor's damages will be established using the new lease agreement as a measure if the following three criteria are satisfied: (i) the lessor disposed of the goods by lease, (ii) the lease agreement is substantially similar to the original lease agreement, and (iii) such disposition was in good faith, and in a commercially reasonable manner. Thus, the lessor will be entitled to recover from the lessee the accrued and unpaid rent as of the date of default commencement of the term of the new lease, and the present value, as of the same date, of the rent under the original lease for the then remaining term less the present value as of the same date of the rent under the new lease agreement applicable to the period of the new lease comparable to the remaining term under the original lease, together with incidental damages less expenses saved in consequence of the lessee's default. If the lessor's disposition does not satisfy the criteria of subsection (2), the lessor may calculate its claim against the lessee pursuant to Section 2A-528. Section 2A-523(1)(e).

4. Two of the three criteria to be met by the lessor are familiar, but the concept of the new lease agreement that is substantially similar to the original lease agreement is not. Given the many variables facing a party who intends to lease goods and the rapidity of change in the market place, the policy decision was made not to draft with specificity. It was thought unwise to seek to establish certainty at the cost of fairness. The decision of whether the new lease agreement is substantially similar to the original will be determined case by case.

5. While the section does not draw a bright line, it is possible to describe some of the factors that should be considered in a finding that a new lease agreement is substantially similar to the original. The various elements of the new lease agreement should be examined. Those elements include the options to purchase or release; the lessor's representations, warranties and covenants to the lessee as well as those to be provided by the lessee to the lessor; and the services, if any, to be provided by the lessor or by the lessee. All of these factors allocate cost and risk between the lessor and the lessee and thus affect the amount of rent to be paid. These findings should not be made with scientific

precision, as they are a function of economics, nor should they be made independently, as it is important that a sense of commercial judgment pervade the finding. See Section 2A-507(2). To establish the new lease as a proper measure of damage under subsection (2), these various factors, taken as a whole, must result in a finding that the new lease agreement is substantially similar to the original. If the differences between the original lease and the new lease can be easily valued, it would be appropriate for a court to find that the new lease is substantially similar to the old lease, adjust the difference in the rent between the two leases to take account of the differences, and award damages under this section. If, for example, the new lease requires the lessor to insure the goods in the hands of the lessee, while the original lease required the lessee to insure, the usual cost of such insurance could be deducted from rent due under the new lease before the difference in rental between the two leases is determined.

6. The following hypothetical illustrates the difficulty of providing a bright line. Assume that A buys a jumbo tractor for \$1 million and then leases the tractor to B for a term of 36 months. The tractor is delivered to and is accepted by B on May 1. On June 1 B fails to pay the monthly rent to A. B returns the tractor to A, who immediately releases the tractor to C for a term identical to the term remaining under the lease between A and B. All terms and conditions under the lease between A and C are identical to those under the original lease between A and B, except that C does not provide any property damage or other insurance coverage, and B agreed to provide complete coverage. Coverage is expensive and difficult to obtain. It is a question of fact whether it is so difficult to adjust the recovery to take account of the difference between the two leases as to insurance that the second lease is not substantially similar to the original.

7. A new lease can be substantially similar to the original lease even though its term extends beyond the remaining term of the original lease, so long as both (a) the lease terms are commercially comparable (e.g., it is highly unlikely that a one-month rental and a five-year lease would reflect similar realities), and (b) the court can fairly apportion a part of the rental payments under the new lease to that part of the term of the new lease which is comparable to the remaining lease term under the original lease. Also, the lease term of the new lease may be comparable to the remaining term of the original lease even though the beginning and ending dates of the two leases are not the same. For example, a two-month lease of agricultural equipment for the months of August and September may be comparable to a two-month lease running from the 15th of August to the

15th of October if in the particular location two-month leases beginning on August 15th are basically interchangeable with two-month leases beginning August 1st. Similarly, the term of a one-year truck lease beginning on the 15th of January may be comparable to the term of a one-year truck lease beginning January 2nd. If the lease terms are found to be comparable, the court may base cover damages on the entire difference between the costs under the two leases.

8. Subsection (3), which is new, provides that if the lessor's disposition is by lease that does not qualify under subsection (2), or is by sale or otherwise, Section 2A-528 governs.

9. Subsection (4), a revised version of subsection 2-706(5), applies to protect a subsequent buyer or lessee who buys or leases from the lessor in good faith and for value, pursuant to a disposition under this section. Note that by its terms, the rule in subsection 2A-304(1), which provides that the subsequent lessee takes subject to the original lease contract, is controlled by the rule stated in this subsection.

10. Subsection (5), a revised version of subsection 2-706(6), provides that the lessor is not

accountable to the lessee for any profit made by the lessor on a disposition. This rule follows from the fundamental premise of the bailment for hire that the lessee under a lease of goods has no equity of redemption to protect.

Cross References:

Sections 1-102(3), 2-706(1), 2-706(5), 2-706(6), 2A-103(4), 2A-304(1), 2A-504, 2A-507(2), 2A-523(1)(e), 2A-525(2), 2A-527(5), 2A-528 and 9-507.

Definitional Cross References:

"Buyer" and "Buying". Section 2-103(1)(a).
 "Delivery". Section 1-201(14).
 "Good faith". Sections 1-201(19) and 2-103(1)(b).
 "Goods". Section 2A-103(1)(h).
 "Lease". Section 2A-103(1)(j).
 "Lease contract". Section 2A-103(1)(l).
 "Lessee". Section 2A-103(1)(n).
 "Lessor". Section 2A-103(1)(p).
 "Present value". Section 2A-103(1)(u).
 "Rights". Section 1-201(36).
 "Sale". Section 2-106(1).
 "Security interest". Section 1-201(37).
 "Value". Section 1-201(44).

§ 28:2A-528. Lessor's damages for nonacceptance, failure to pay, repudiation, or other default.

(a) Except as otherwise provided with respect to damages liquidated in the lease agreement (§ 28:2A-504) or otherwise determined pursuant to agreement of the parties (§§ 28:1-102(3) and 28:2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under § 28:2A-527(b), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in § 28:2A-523(c)(1), or, if agreed, for other default of the lessee (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of this subsection of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental damages allowed under § 28:2A-530, less expenses saved in consequence of the lessee's default.

(b) If the measure of damages provided in subsection (a) of this section is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under § 28:2A-530, due allow-

ance for costs reasonably incurred and due credit for payments or proceeds of disposition.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-507, 28:2A-523, 28:2A-527, and 28:2A-529.

Prior Codifications. — 1981 Ed., § 28:2A-528.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-708.

Changes: Substantially revised.

Purposes:

1. Subsection (1), a substantially revised version of Section 2-708(1), states the basic rule governing the measure of lessor's damages for a default described in Section 2A-523(1) or (3)(a), and, if agreed, for a contractual default. This measure will apply if the lessor elects to retain the goods (whether undelivered, returned by the lessee, or repossessed by the lessor after acceptance and default by the lessee) or if the lessor's disposition does not qualify under subsection 2A-527(2). Section 2A-527(3). Note that under some of these conditions, the lessor may recover damages from the lessee pursuant to the rule set forth in Section 2A-529. There is no sanction for disposition that does not qualify under subsection 2A-527(2). Application of the rule set forth in this section is subject to agreement to the contrary. Sections 2A-504, 2A-103(4) and 1-102(3).

2. If the lessee has never taken possession of the goods, the measure of damage is the accrued and unpaid rent as of the date of default together with the present value, as of the date of default, of the original rent for the remaining term of the lease less the present value as of the same date of market rent, and incidental damages, less expenses saved in consequence of the default. Note that the reference in Section 2A-528(1)(i) and (ii) is to the date of default not to the date of an event of default. An event of default under a lease agreement becomes a default under a lease agreement only after the expiration of any relevant period of grace and compliance with any notice requirements under this Article and the lease agreement. American Bar Foundation, Commentaries on Indentures, s 5-1, at 216-217 (1971). Section 2A-501(1). This conclusion is also a function of whether, as a matter of fact or law, the event of default has been waived, suspended or cured. Sections 2A-103(4) and 1-103. If the lessee has taken possession of the goods, the measure of damages is the accrued and unpaid rent as of the earlier of the time the lessor repossesses the goods or the time the lessee tenders the

goods to the lessor plus the difference between the present value, as of the same time, of the rent under the lease for the remaining lease term and the present value, as of the same time, of the market rent.

3. Market rent will be computed pursuant to Section 2A-507.

4. Subsection (2), a somewhat revised version of the provisions of subsection 2-708(2), states a measure of damages which applies if the measure of damages in subsection (1) is inadequate to put the lessor in as good a position as performance would have. The measure of damage is the lessor's profit, including overhead, together with incidental damages, with allowance for costs reasonably incurred and credit for payments or proceeds of disposition. In determining the amount of due credit with respect to proceeds of disposition a proper value should be attributed to the lessor's residual interest in the goods. Sections 2A-103(1)(q) and 2A-507(4).

5. In calculating profit, a court should include any expected appreciation of the goods, e.g. the foal of a leased brood mare. Because this subsection is intended to give the lessor the benefit of the bargain, a court should consider any reasonable benefit or profit expected by the lessor from the performance of the lease agreement. See *Honeywell, Inc. v. Lithonia Lighting, Inc.*, 317 F.Supp. 406, 413 (N.D.Ga.1970); *Locks v. Wade*, 36 N.J.Super. 128, 131, 114 A.2d 875, 877 (Super.Ct.App.Div.1955). Further, in calculating profit the concept of present value must be given effect. *Taylor v. Commercial credit Equip. Corp.*, 170 Ga.App. 322, 316 S.E.2d 788 (Ct.App.1984). See generally Section 2A-103(1)(u).

Cross References:

Sections 1-102(3), 2-708, 2A-103(1)(u), 2A-402, 2A-504, 2A-507, 2A-527(2) and 2A-529.

Definitional Cross References:

"Agreement". Section 1-201(3).

"Goods". Section 2A-103(1)(h).

"Lease". Section 2A-103(1)(j).

"Lease agreement". Section 2A-103(1)(k).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Party". Section 1-201(29).

"Present value". Section 2A-103(1)(u).

"Sale". Section 2-106(1).

CASE NOTES

In general.

Evidence that rental cost of the equipment through term of lease was \$15,889.81 and that equipment retained by lessee was worth \$11,146, and customer statement that lessor sent to lessee, stating that lessee owed lessor

\$37,823.54, supported award of \$27,559.73 to lessor, for lessee's breach of lease of automated computer airline reservation and ticketing system. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 2001 D.C. App. LEXIS 132 (2001).

§ 28:2A-529. Lessor's action for the rent.

(a) After default by the lessee under the lease contract of the type described in § 28:2A-523(a) or § 28:2A-523(c) or, if agreed, after other default by the lessee, if the lessor complies with subsection (b) of this section, the lessor may recover from the lessee as damages:

(1) For goods accepted by the lessee and not repossessed by or tendered to the lessor, and for conforming goods lost or damaged within a commercially reasonable time after risk of loss passes to the lessee (§ 28:2A-219), (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under § 28:2A-530, less expenses saved in consequence of the lessee's default; and

(2) For goods identified to the lease contract if the lessor is unable after reasonable effort to dispose of them at a reasonable price or the circumstances reasonably indicate that effort will be unavailing, (i) accrued and unpaid rent as of the date of default, (ii) the present value as of the date of default of the rent for the remaining lease term of the lease agreement, and (iii) any incidental damages allowed under § 28:2A-530, less expenses saved in consequence of the lessee's default.

(b) Except as provided in subsection (c) of this section, the lessor shall hold for the lessee for the remaining lease term of the lease agreement any goods that have been identified to the lease contract and are in the lessor's control.

(c) The lessor may dispose of the goods at any time before collection of the judgment for damages obtained pursuant to subsection (a) of this section. If the disposition is before the end of the remaining lease term of the lease agreement, the lessor's recovery against the lessee for damages is governed by § 28:2A-527 or § 28:2A-528, and the lessor will cause an appropriate credit to be provided against a judgment for damages to the extent that the amount of the judgment exceeds the recovery available pursuant to § 28:2A-527 or § 28:2A-528.

(d) Payment of the judgment for damages obtained pursuant to subsection (a) of this section entitles the lessee to the use and possession of the goods not then disposed of for the remaining lease term of and in accordance with the lease agreement.

(e) After a lessee has wrongfully rejected or revoked acceptance of goods, has failed to pay rent then due, or has repudiated (§ 28:2A-402), a lessor who is

held not entitled to rent under this section must nevertheless be awarded damages for nonacceptance under §§ 28:2A-527 and 28:2A-528.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in § 28:2A-523.

Prior Codifications. — 1981 Ed., § 28:2A-529.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-709.

Changes: Substantially revised.

Purposes:

1. Absent a lease contract provision to the contrary, an action for the full unpaid rent (discounted to present value as of the time of entry of judgment as to rent due after that time) is available as to goods not lost or damaged only if the lessee retains possession of the goods or the lessor is or apparently will be unable to dispose of them at a reasonable price after reasonable effort. There is no general right in a lessor to recover the full rent from the lessee upon holding the goods for the lessee. If the lessee tenders goods back to the lessor, and the lessor refuses to accept the tender, the lessor will be limited to the damages it would have suffered had it taken back the goods. The rule in Article 2 that the seller can recover the price of accepted goods is rejected here. In a lease, the lessor always has a residual interest in the goods which the lessor usually realizes upon at the end of a lease term by either sale or a new lease. Therefore, it is not a substantial imposition on the lessor to require it to take back and dispose of the goods if the lessee chooses to tender them back before the end of the lease term: the lessor will merely do earlier what it would have done anyway, sell or relet the goods. Further, the lessee will frequently encounter substantial difficulties if the lessee attempts to sublet the goods for the remainder of the lease term. In contrast to the buyer who owns the entire interest in goods and can easily dispose of them, the lessee is selling only the right to use the goods under the terms of the lease and the sublessee must assume a relationship with the lessor. In that situation, it is usually more efficient to eliminate the original lessee as a middleman by allowing the lessee to return the goods to the lessor who can then redispense of them.

2. In some situations even where possession of the goods is reacquired, a lessor will be able to recover as damages the present value of the full rent due, not under this section, but under 2A-528(2) which allows a lost profit recovery if necessary to put the lessor in the position it would have been in had the lessee performed.

Following is an example of such a case. A is a lessor of construction equipment and maintains a substantial inventory. B leases from A a backhoe for a period of two weeks at a rental of \$1,000. After three days, B returns the backhoe and refuses to pay the rent. A has five backhoes in inventory, including the one returned by B. During the next 11 days after the return by B of the backhoe, A rents no more than three backhoes at any one time and, therefore, always has two on hand. If B had kept the backhoe for the full rental period, A would have earned the full rental on that backhoe, plus the rental on the other backhoes it actually did rent during that period. Getting this backhoe back before the end of the lease term did not enable A to make any leases it would not otherwise have made. The only way to put A in the position it would have been in had the lessee fully performed is to give the lessor the full rentals. A realized no savings at all because the backhoe was returned early and might even have incurred additional expense if it was paying for parking space for equipment in inventory. A has no obligation to relet the backhoe for the benefit of B rather than leasing the backhoe or any other in inventory for its own benefit. Further, it is probably not reasonable to expect A to dispose of the backhoe by sale when it is returned in an effort to reduce damages suffered by B. Ordinarily, the loss of a two-week rental would not require A to reduce the size of its backhoe inventory. Whether A would similarly be entitled to full rentals as lost profit in a one-year lease of a backhoe is a question of fact: in any event the lessor, subject to mitigation of damages rules, is entitled to be put in as good a position as it would have been had the lessee fully performed the lease contract.

3. Under subsection (2) a lessor who is able and elects to sue for the rent due under a lease must hold goods not lost or damaged for the lessee. Subsection (3) creates an exception to the subsection (2) requirement. If the lessor disposes of those goods prior to collection of the judgment (whether as a matter of law or agreement), the lessor's recovery is governed by the measure of damages in Section 2A-527 if the disposition is by lease that is substantially

similar to the original lease, or otherwise by the measure of damages in Section 2A-528. Section 2A-523 official comment.

4. Subsection (4), which is new, further reinforces the requisites of Subsection (2). In the event the judgment for damages obtained by the lessor against the lessee pursuant to subsection (1) is satisfied, the lessee regains the right to use and possession of the remaining goods for the balance of the original lease term; a partial satisfaction of the judgment creates no right in the lessee to use and possession of the goods.

5. The relationship between subsections (2) and (4) is important to understand. Subsection (2) requires the lessor to hold for the lessee identified goods in the lessor's possession. Absent agreement to the contrary, whether in the lease or otherwise, under most circumstances the requirement that the lessor hold the goods for the lessee for the term will mean that the lessor is not allowed to use them. Sections 2A-103(4) and 1-203. Further, the lessor's use of the goods could be viewed as a disposition of the goods that would bar the lessor from recovery under this section, remitting the lessor to the two preceding sections for a determination of the lessor's claim for damages against the lessee.

6. Subsection (5), the analogue of subsection 2-709(3), further reinforces the thrust of subsection (3) by stating that a lessor who is held not entitled to rent under this section has not elected a remedy; the lessor must be awarded damages under Sections 2A-527 and 2A-528. This is a function of two significant policies of this Article—that resort to a remedy is optional, unless expressly agreed to be exclusive (Section 2A-503(2)) and that rights and remedies provided in this Article generally are cumulative. (Section 2A-501(2) and (4)).

Cross References:

Sections 1-203, 2-709, 2-709(3), 2A-103(4), 2A-501(2), 2A-501(4), 2A-503(2), 2A-504, 2A-523(1)(e), 2A-525(2), 2A-527, 2A-528 and 2A-529(2).

Definitional Cross References:

"Action". Section 1-201(1).
 "Conforming". Section 2A-103(1)(d).
 "Goods". Section 2A-103(1)(h).
 "Lease". Section 2A-103(1)(j).
 "Lease agreement". Section 2A-103(1)(k).
 "Lease contract". Section 2A-103(1)(l).
 "Lessee". Section 2A-103(1)(n).
 "Lessor". Section 2A-103(1)(p).
 "Present value". Section 2A-103(1)(u).
 "Reasonable time". Section 1-204(1) and (2).

§ 28:2A-530. Lessor's incidental damages.

Incidental damages to an aggrieved lessor include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the lessee's default, in connection with return or disposition of the goods, or otherwise resulting from the default.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Section references. — This section is referred to in §§ 28:2A-528 and 28:2A-529.

Prior Codifications. — 1981 Ed., § 28:2A-530.

Legislative history of Law 9-128. — For legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-710.

Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

"Aggrieved party". Section 1-201(2).

"Delivery". Section 1-201(14).

"Goods". Section 2A-103(1)(h).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

§ 28:2A-531. Standing to sue third parties for injury to goods.

(a) If a third party so deals with goods that have been identified to a lease contract as to cause actionable injury to a party to the lease contract:

- (1) The lessor has a right of action against the third party, and
 (2) The lessee also has a right of action against the third party if the lessee:

(A) Has a security interest in the goods;
 (B) Has an insurable interest in the goods; or
 (C) Bears the risk of loss under the lease contract or has since the injury assumed that risk as against the lessor and the goods have been converted or destroyed.

(b) If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the lease contract and there is no arrangement between them for disposition of the recovery, his or her suit or settlement, subject to his or her own interest, is as a fiduciary for the other party to the lease contract.

(c) Either party with the consent of the other may sue for the benefit of whom it may concern.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-531.

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

Legislative history of Law 9-128. — For

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: Section 2-722.
Changes: Revised to reflect leasing practices and terminology.

Definitional Cross References:

"Action". Section 1-201(1).

"Goods". Section 2A-103(1)(h).

"Lease contract". Section 2A-103(1)(l).

"Lessee". Section 2A-103(1)(n).

"Lessor". Section 2A-103(1)(p).

"Party". Section 1-201(29).

"Rights". Section 1-201(36).

"Security interest". Section 1-201(37).

§ 28:2A-532. Lessor's rights to residual interest.

In addition to any other necessary recovery permitted by this article or other law, the lessor may recover from the lessee an amount that will fully compensate the lessor for any loss or damage to the lessor's residual interest in the goods caused by the default of the lessee.

(July 22, 1992, D.C. Law 9-128, § 2(b), 39 DCR 3830.)

Prior Codifications. — 1981 Ed., § 28:2A-532.

legislative history of D.C. Law 9-128, see Historical and Statutory Notes following § 28:2A-101.

Legislative history of Law 9-128. — For

UNIFORM COMMERCIAL CODE COMMENT

Uniform Statutory Source: None.

This section recognizes the right of the lessor to recover under this Article (as well as under other law) from the lessee for failure to comply with the lease obligations as to the condition of

leased goods when returned to the lessor, for failure to return the goods at the end of the lease, or for any other default which causes loss or injury to the lessor's residual interest in the goods.

ARTICLE 3. NEGOTIABLE INSTRUMENTS.

Part 1. General Provisions and Definitions

- Sec.
 28:3-101. Short title.
 28:3-102. Subject matter.
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Sec.

- 28:3-310. Effect of instrument on obligation for which taken.
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Part 5. Dishonor

- 28:3-501. Presentment.
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- 28:3-601. Discharge and effect of discharge.
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*Part 1. General Provisions and Definitions.***§ 28:3-101. Short title.**

This article may be cited as the “Uniform Commercial Code—Negotiable Instruments”.

(Dec. 30, 1963, 77 Stat. 672, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-101.

1973 Ed., § 28:3-101.

Legislative history of Law 10-249. — Law 10-249, the “Uniform Commercial Code—Negotiable Instruments Act of 1994,” was introduced in Council and assigned Bill No. 10-240, which was referred to the Committee on Consumer

and Regulatory Affairs. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on January 18, 1995, it was assigned Act No. 10-396 and transmitted to both Houses of Congress for its review. D.C. Law became effective on March 23, 1995.

§ 28:3-102. Subject matter.

(a) This article applies to negotiable instruments. It does not apply to money, to payment orders governed by Article 4A, or to securities governed by Article 8.

(b) If there is conflict between this article and Article 4 or 9, Article 4 or 9 governs.

(c) Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the Federal Reserve Banks supersede any inconsistent provision of this article to the extent of the inconsistency.

(Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-102.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Former Article 3 had no provision affirmatively stating its scope. Former Section 3-103 was a limitation on scope. In revised Article 3, Section 3-102 states that Article 3 applies to “negotiable instruments,” defined in Section 3-104. Section 3-104(b) also defines the term “instrument” as a synonym for “negotiable instrument.” In most places Article 3 uses the shorter term “instrument.” This follows the convention used in former Article 3.

2. The reference in former Section 3-103(1) to “documents of title” is omitted as superfluous because these documents contain no promise to pay money. The definition of “payment order” in Section 4A-103(a)(1)(iii) excludes drafts which are governed by Article 3. Section 3-102(a) makes clear that a payment order governed by Article 4A is not governed by Article 3. Thus, Article 3 and Article 4A are mutually exclusive.

Article 8 states in Section 8-103(d) that “A writing that is a security certificate is governed by this Article and not by Article 3, even though it also meets the requirements of that Article.” Section 3-102(a) conforms to this provision. With respect to some promises or orders to pay money, there may be a question whether the promise or order is an instrument under Section 3-104(a) or a certificated security under Section 8-102(a)(4) and (15). Whether a writing is covered by Article 3 or Article 8 has important consequences. Among other things, under Section 8-207, the issuer of a certificated security may treat the registered owner as the owner for all purposes until the presentment for registration of a transfer. The issuer of a negotiable instrument, on the other hand, may discharge its obligation to pay the instrument only by paying a person entitled to enforce

under Section 3-301. There are also important consequences to an indorser. An indorser of a security does not undertake the issuer's obligation or make any warranty that the issuer will honor the underlying obligation, while an indorser of a negotiable instrument becomes secondarily liable on the underlying obligation. Amendments approved by the Permanent Editorial Board for Uniform Commercial Code November 4, 1995.

Ordinarily the distinction between instruments and certificated securities in non-bearer form should be relatively clear. A certificated security under Article 8 must be in registered form (Section 8-102(a)(13)) so that it can be registered on the issuer's records. By contrast, registration plays no part in Article 3. The distinction between an instrument and a certificated security in bearer form may be somewhat more difficult and will generally lie in the economic functions of the two writings. Ordinarily, negotiable instruments under Article 3 will be separate and distinct instruments, while certificated securities under Article 8 will be either one of a class or series or by their terms divisible into a class or series (Section 8-102(a)(15)(ii)). Thus, a promissory note in bearer form could come under either Article 3 if it were simply an individual note, or under Article 8 if it were one of a series of notes or divisible into a series. An additional distinction is whether the instrument is of the type commonly dealt in on securities exchanges or markets or commonly recognized as a medium for investment (Section 8-102(a)(15)(iii)). Thus, a check written in bearer form (i.e., a check made payable to "cash") would not be a certificated security within Article 8 of the Uniform Commercial Code. Amendments approved by the Permanent Editorial Board for Uniform Commercial Code November 4, 1995.

Occasionally, a particular writing may fit the definition of both a negotiable instrument under Article 3 and of an investment security under Article 8. In such cases, the instrument is subject exclusively to the requirements of Article 8. Section 8-102(3)(d) and Section 3-102(a). Amendments approved by the permanent Editorial Board for Uniform Commercial Code November 4, 1995.

3. Although the terms of Article 3 apply to transactions by Federal Reserve Banks, federal preemption would make ineffective any Article 3 provision that conflicts with federal law. The activities of the Federal Reserve Banks are

governed by regulations of the Federal Reserve Board and by operating circulars issued by the Reserve Banks themselves. In some instances, the operating circulars are issued pursuant to a Federal Reserve Board regulation. In other cases, the Reserve Bank issues the operating circular under its own authority under the Federal Reserve Act, subject to review by the Federal Reserve Board. Section 3-102(c) states that Federal Reserve Board regulations and operating circulars of the Federal Reserve Banks supersede any inconsistent provision of Article 3 to the extent of the inconsistency. Federal Reserve Board regulations, being valid exercises of regulatory authority pursuant to a federal statute, take precedence over state law if there is an inconsistency. *Childs v. Federal Reserve Bank of Dallas*, 719 F.2d 812 (5th Cir.1983), reh. den. 724 F.2d 127 (5th Cir.1984). Section 3-102(c) treats operating circulars as having the same effect whether issued under the Reserve Bank's own authority or under a Federal Reserve Board regulation. Federal statutes may also preempt Article 3. For example, the Expedited Funds Availability Act, 12 U.S.C. s 4001 et seq., provides that the Act and the regulations issued pursuant to the Act supersede any inconsistent provisions of the UCC. 12 U.S.C. s 4007(b).

4. In *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), the Court held that if the United States is a party to an instrument, its rights and duties are governed by federal common law in the absence of a specific federal statute or regulation. In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), the Court stated a three-pronged test to ascertain whether the federal common-law rule should follow the state rule. In most instances courts under the Kimbell test have shown a willingness to adopt UCC rules in formulating federal common law on the subject. In Kimbell the Court adopted the priorities rules of Article 9.

5. In 1989 the United Nations Commission on International Trade Law completed a Convention on International Bills of Exchange and International Promissory Notes. If the United States becomes a party to this Convention, the Convention will preempt state law with respect to international bills and notes governed by the Convention. Thus, an international bill of exchange or promissory note that meets the definition of instrument in Section 3-104 will not be governed by Article 3 if it is governed by the Convention.

CASE NOTES

Construction and application.

Statute dealing with liability of an authorized representative who signs his own name to a negotiable instrument did not apply to unlim-

ited guaranty signed by president of corporation, where neither the guaranty nor a subsequently made promissory note were made payable to order or to bearer and where the

guaranty contained a promise to pay "any and all liabilities" of corporation to bank. D.C. Code 1981, §§ 28:3-102(e)(1), 28:3-104(1)(b, d), 28:3-

403. *King v. Industrial Bank of Washington*, 474 A.2d 151, 1984 D.C. App. LEXIS 368 (1984).

§ 28:3-103. Definitions.

(a) In this article, the term

(1) "Acceptor" means a drawee who has accepted a draft.

(2) "Drawee" means a person ordered in a draft to make payment.

(3) "Drawer" means a person who signs or is identified in a draft as a person ordering payment.

(4) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(5) "Maker" means a person who signs or is identified in a note as a person undertaking to pay.

(6) "Order" means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative, but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay.

(7) "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this article or Article 4.

(8) "Party" means a party to an instrument.

(9) "Promise" means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.

(10) "Prove", with respect to a fact, means to meet the burden of establishing the fact (section 28:1-201(8)).

(11) "Remitter" means a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.

(b) Other definitions applying to this article and the sections in which they appear are:

"Acceptance".	Section 28:3-409.
"Accommodated party".	Section 28:3-419.
"Accommodation party".	Section 28:3-419.
"Alteration".	Section 28:3-407.
"Anomalous indorsement".	Section 28:3-205.
"Blank indorsement".	Section 28:3-205.
"Cashier's check".	Section 28:3-104.
"Certificate of deposit".	Section 28:3-104.

"Certified check".	Section 28:3-409.
"Check".	Section 28:3-104.
"Consideration".	Section 28:3-303.
"Draft".	Section 28:3-104.
"Holder in due course".	Section 28:3-302.
"Incomplete instrument".	Section 28:3-115.
"Indorsement".	Section 28:3-204.
"Indorser".	Section 28:3-204.
"Instrument".	Section 28:3-104.
"Issue".	Section 28:3-105.
"Issuer".	Section 28:3-105.
"Negotiable instrument".	Section 28:3-104.
"Negotiation".	Section 28:3-201.
"Note".	Section 28:3-104.
"Payable at a definite time".	Section 28:3-108.
"Payable on demand".	Section 28:3-108.
"Payable to bearer".	Section 28:3-109.
"Payable to order".	Section 28:3-109.
"Payment".	Section 28:3-602.
"Person entitled to enforce".	Section 28:3-301.
"Presentment".	Section 28:3-501.
"Reacquisition".	Section 28:3-207.
"Special indorsement".	Section 28:3-205.
"Teller's check".	Section 28:3-104.
"Transfer of instrument".	Section 28:3-203.
"Traveler's check".	Section 28:3-104.
"Value".	Section 28:3-303.

(c) The following definitions in other articles apply to this article:

"Bank".	Section 28:4-105.
"Banking day".	Section 28:4-104.
"Clearing house".	Section 28:4-104.
"Collecting bank".	Section 28:4-105.
"Depository bank".	Section 28:4-105.
"Documentary draft".	Section 28:4-104.
"Intermediary bank".	Section 28:4-105.
"Item".	Section 28:4-104.
"Payor bank".	Section 28:4-105.
"Suspends payments".	Section 28:4-104.

(d) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

(Dec. 30, 1963, 77 Stat. 672, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-103.

1973 Ed., § 28:3-102.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) defines some common terms used throughout the Article that were not defined by former Article 3 and adds the definitions of "order" and "promise" found in former Section 3-102(1)(b) and (c).

2. The definition of "order" includes an instruction given by the signer to itself. The most common example of this kind of order is a cashier's check: a draft with respect to which the drawer and drawee are the same bank or branches of the same bank. Former Section 3-118(a) treated a cashier's check as a note. It stated "a draft drawn on the drawer is effective as a note." Although it is technically more correct to treat a cashier's check as a promise by the issuing bank to pay rather than an order to pay, a cashier's check is in the form of a check and it is normally referred to as a check. Thus, revised Article 3 follows banking practice in referring to a cashier's check as both a draft and a check rather than a note. Some insurance companies also follow the practice of issuing drafts in which the drawer draws on itself and makes the draft payable at or through a bank. These instruments are also treated as drafts. The obligation of the drawer of a cashier's check or other draft drawn on the drawer is stated in Section 3-412.

An order may be addressed to more than one person as drawee either jointly or in the alternative. The authorization of alternative drawees follows former Section 3-102(1)(b) and recognizes the practice of drawers, such as corporations issuing dividend checks, who for commercial convenience name a number of drawees, usually in different parts of the country. Section 3-501(b)(1) provides that presentment may be made to any one of multiple drawees. Drawees in succession are not permitted because the holder should not be required to make more than one presentment. Dishonor by any drawee named in the draft entitles the holder to rights of recourse against the drawer or indorsers.

3. The last sentence of subsection (a)(9) is intended to make it clear that an I.O.U. or

other written acknowledgement of indebtedness is not a note unless there is also an undertaking to pay the obligation.

4. Subsection (a)(4) introduces a definition of good faith to apply to Articles 3 and 4. Former Articles 3 and 4 used the definition in Section 1-201(19). The definition in subsection (a)(4) is consistent with the definitions of good faith applicable to Articles 2, 2A, 4, and 4A. The definition requires not only honesty in fact but also "observance of reasonable commercial standards of fair dealing." Although fair dealing is a broad term that must be defined in context, it is clear that it is concerned with the fairness of conduct rather than the care with which an act is performed. Failure to exercise ordinary care in conducting a transaction is an entirely different concept than failure to deal fairly in conducting the transaction. Both fair dealing and ordinary care, which is defined in Section 3-103(a)(7), are to be judged in the light of reasonable commercial standards, but those standards in each case are directed to different aspects of commercial conduct.

5. Subsection (a)(7) is a definition of ordinary care which is applicable not only to Article 3 but to Article 4 as well. See Section 4-104(c). The general rule is stated in the first sentence of subsection (a)(7) and it applies both to banks and to persons engaged in businesses other than banking. Ordinary care means observance of reasonable commercial standards of the relevant business prevailing in the area in which the person is located. The second sentence of subsection (a)(7) is a particular rule limited to the duty of a bank to examine an instrument taken by a bank for processing for collection or payment by automated means. This particular rule applies primarily to Section 4-406 and it is discussed in Comment 4 to that section. Nothing in Section 3-103(a)(7) is intended to prevent a customer from proving that the procedures followed by a bank are unreasonable, arbitrary, or unfair.

6. In subsection (c) reference is made to a new definition of "bank" in amended Article 4.

§ 28:3-104. Negotiable instrument.

(a) Except as provided in subsections (c) and (d) of this section, the term "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) Is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person

promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

(b) “Instrument” means a negotiable instrument.

(c) An order that meets all of the requirements of subsection (a) of this section, except paragraph (1), and otherwise falls within the definition of “check” in subsection (f) of this section is a negotiable instrument and a check.

(d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this article.

(e) An instrument is a “note” if it is a promise and is a “draft” if it is an order. If an instrument falls within the definition of both “note” and “draft”, a person entitled to enforce the instrument may treat it as either.

(f) “Check” means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier’s check or teller’s check. An instrument may be a check even though it is described on its face by another term, such as “money order”.

(g) “Cashier’s check” means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

(h) “Teller’s check” means a draft drawn by a bank on another bank, or payable at or through a bank.

(i) “Traveler’s check” means an instrument that (i) is payable on demand, (ii) is drawn on or payable at or through a bank, (iii) is designated by the term “traveler’s check” or by a substantially similar term, and (iv) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.

(j) “Certificate of deposit” means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank.

(Dec. 30, 1963, 77 Stat. 673, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in §§ 28:2-103, 28:3-103, 28:3-106, 28:3-115, 28:4-104, 28:5-103, and 28:9-105.

Prior Codifications. — 1981 Ed., § 28:3-104.

1973 Ed., § 28:3-104.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. The definition of “negotiable instrument” defines the scope of Article 3 since Section 3-102 states: “This Article applies to negotiable instruments.” The definition in Section 3-104(a)

incorporates other definitions in Article 3. An instrument is either a “promise,” defined in Section 3-103(a)(9), or “order,” defined in Section 3-103(a)(6). A promise is a written under-

taking to pay money signed by the person undertaking to pay. An order is a written instruction to pay money signed by the person giving the instruction. Thus, the term “negotiable instrument” is limited to a signed writing that orders or promises payment of money. “Money” is defined in Section 1-201(24) and is not limited to United States dollars. It also includes a medium of exchange established by a foreign government or monetary units of account established by an intergovernmental organization or by agreement between two or more nations. Five other requirements are stated in Section 3-104(a): First, the promise or order must be “unconditional.” The quoted term is explained in Section 3-106. Second, the amount of money must be “a fixed amount * * * with or without interest or other charges described in the promise or order.” Section 3-112(b) relates to “interest.” Third, the promise or order must be “payable to bearer or to order.” The quoted phrase is explained in Section 3-109. An exception to this requirement is stated in subsection (c). Fourth, the promise or order must be payable “on demand or at a definite time.” The quoted phrase is explained in Section 3-108. Fifth, the promise or order may not state “any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money” with three exceptions. The quoted phrase is based on the first sentence of N.I.L. Section 5 which is the precursor of “no other promise, order, obligation or power given by the maker or drawer” appearing in former Section 3-104(1)(b). The words “instruction” and “undertaking” are used instead of “order” and “promise” that are used in the N.I.L. formulation because the latter words are defined terms that include only orders or promises to pay money. The three exceptions stated in Section 3-104(a)(3) are based on and are intended to have the same meaning as former Section 3-112(1)(b), (c), (d), and (e), as well as N.I.L. s 5(1), (2), and (3). Subsection (b) states that “instrument” means a “negotiable instrument.” This follows former Section 3-102(1)(e) which treated the two terms as synonymous.

2. Unless subsection (c) applies, the effect of subsection (a)(1) and Section 3-102(a) is to exclude from Article 3 any promise or order that is not payable to bearer or to order. There is no provision in revised Article 3 that is comparable to former Section 3-805. The comment to former Section 3-805 states that the typical example of a writing covered by that section is a check reading “Pay John Doe.” Such a check was governed by former Article 3 but there could not be a holder in due course of the check. Under Section 3-104(c) such a check is governed by revised Article 3 and there can be a holder in due course of the check. But subsection (c) applies only to checks. The comment to

former Section 3-805 does not state any example other than the check to illustrate that section. Subsection (c) is based on the belief that it is good policy to treat checks, which are payment instruments, as negotiable instruments whether or not they contain the words “to the order of”. These words are almost always pre-printed on the check form. Occasionally the drawer of a check may strike out these words before issuing the check. In the past some credit unions used check forms that did not contain the quoted words. Such check forms may still be in use but they are no longer common. Absence of the quoted words can easily be overlooked and should not affect the rights of holders who may pay money or give credit for a check without being aware that it is not in the conventional form.

Total exclusion from Article 3 of other promises or orders that are not payable to bearer or to order serves a useful purpose. It provides a simple device to clearly exclude a writing that does not fit the pattern of typical negotiable instruments and which is not intended to be a negotiable instrument. If a writing could be an instrument despite the absence of “to order” or “to bearer” language and a dispute arises with respect to the writing, it might be argued that the writing is a negotiable instrument because the other requirements of subsection (a) are somehow met. Even if the argument is eventually found to be without merit it can be used as a litigation ploy. Words making a promise or order payable to bearer or to order are the most distinguishing feature of a negotiable instrument and such words are frequently referred to as “words of negotiability.” Article 3 is not meant to apply to contracts for the sale of goods or services or the sale or lease of real property or similar writings that may contain a promise to pay money. The use of words of negotiability in such contracts would be an aberration. Absence of the words precludes any argument that such contracts might be negotiable instruments.

An order or promise that is excluded from Article 3 because of the requirements of Section 3-104(a) may nevertheless be similar to a negotiable instrument in many respects. Although such a writing cannot be made a negotiable instrument within Article 3 by contract or conduct of its parties, nothing in Section 3-104 or in Section 3-102 is intended to mean that in a particular case involving such a writing a court could not arrive at a result similar to the result that would follow if the writing were a negotiable instrument. For example, a court might find that the obligor with respect to a promise that does not fall within Section 3-104(a) is precluded from asserting a defense against a bona fide purchaser. The preclusion could be based on estoppel or ordinary principles of contract. It does not depend upon the law of negotiable

instruments. An example is stated in the paragraph following Case # 2 in Comment 4 to Section 3-302.

Moreover, consistent with the principle stated in Section 1-102(2)(b), the immediate parties to an order or promise that is not an instrument may provide by agreement that one or more of the provisions of Article 3 determine their rights and obligations under the writing. Upholding the parties' choice is not inconsistent with Article 3. Such an agreement may bind a transferee of the writing if the transferee has notice of it or the agreement arises from usage of trade and the agreement does not violate other law or public policy. An example of such an agreement is a provision that a transferee of the writing has the rights of a holder in due course stated in Article 3 if the transferee took rights under the writing in good faith, for value, and without notice of a claim or defense.

Even without an agreement of the parties to an order or promise that is not an instrument, it may be appropriate, consistent with the principles stated in Section 1-102(2), for a court to apply one or more provisions of Article 3 to the writing by analogy, taking into account the expectations of the parties and the differences between the writing and an instrument governed by Article 3. Whether such application is appropriate depends upon the facts of each case.

3. Subsection (d) allows exclusion from Article 3 of a writing that would otherwise be an instrument under subsection (a) by a statement to the effect that the writing is not negotiable or is not governed by Article 3. For example, a promissory note can be stamped with the legend NOT NEGOTIABLE. The effect under subsection (d) is not only to negate the possibility of a holder in due course, but to prevent the writing from being a negotiable instrument for any purpose. Subsection (d) does not, however, apply to a check. If a writing is excluded from Article 3 by subsection (d), a court could, nevertheless, apply Article 3 principles to it by analogy as stated in Comment 2.

4. Instruments are divided into two general categories: drafts and notes. A draft is an instrument that is an order. A note is an instrument that is a promise. Section 3-104(e). The term "bill of exchange" is not used in Article 3. It is generally understood to be a synonym for

the term "draft." Subsections (f) through (j) define particular instruments that fall within the categories of draft and note. The term "draft," defined in subsection (e), includes a "check" which is defined in subsection (f). "Check" includes a share draft drawn on a credit union payable through a bank because the definition of bank (Section 4-105) includes credit unions. However, a draft drawn on an insurance payable through a bank is not a check because it is not drawn on a bank. "Money orders" are sold both by banks and non-banks. They vary in form and their form determines how they are treated in Article 3. The most common form of money order sold by banks is that of an ordinary check drawn by the purchaser except that the amount is machine impressed. That kind of money order is a check under Article 3 and is subject to a stop order by the purchaser-drawer as in the case of ordinary checks. The seller bank is the drawee and has no obligation to a holder to pay the money order. If a money order falls within the definition of a teller's check, the rules applicable to teller's checks apply. Postal money orders are subject to federal law. "Teller's check" is separately defined in subsection (h). A teller's check is always drawn by a bank and is usually drawn on another bank. In some cases a teller's check is drawn on a nonbank but is made payable at or through a bank. Article 3 treats both types of teller's check identically, and both are included in the definition of "check." A cashier's check, defined in subsection (g), is also included in the definition of "check." Traveler's checks are issued both by banks and nonbanks and may be in the form of a note or draft. Subsection (i) states the essential characteristics of a traveler's check. The requirement that the instrument be "drawn on or payable at or through a bank" may be satisfied without words on the instrument that identify a bank as drawee or paying agent so long as the instrument bears an appropriate routing number that identifies a bank as paying agent.

The definitions in Regulation CC s 229.2 of the terms "check," "cashier's check," "teller's check," and "traveler's check" are different from the definitions of those terms in Article 3.

Certificates of deposit are treated in former Article 3 as a separate type of instrument. In revised Article 3, Section 3-104(j) treats them as notes.

CASE NOTES

ANALYSIS

False pretenses.
In general.
Variable interest rate.

Words of negotiability.

False pretenses.

Uniform Commercial Code definitions of negotiable instruments and of holders in due

course were irrelevant to issue of defendant's criminal liability for false pretenses based upon defendant's negotiation of check, payment of which had been stopped. D.C. Code §§ 22-1301, 28:3-104. *Clemons v. United States*, 400 A.2d 1048, 1979 D.C. App. LEXIS 344 (1979).

In general.

Student loan contracts were not "negotiable instruments" and thus guaranty agencies and loan marketing association could not qualify as holders in due course so as to preclude student loan recipients from raising defenses attributable to original lender's conduct. D.C. Code 1981, §§ 28-3809, 28:3-104(1). *Jackson v. Culinary School of Washington*, 788 F. Supp. 1233, 1992 U.S. Dist. LEXIS 3650 (1992), dismissed by 811 F. Supp. 714, 1993 U.S. Dist. LEXIS 94 (D.D.C. 1993).

Under District of Columbia law, deed of trust note evidencing construction loan agreement was not "negotiable instrument," where deed of trust note was for principal sum of specified amount or so much thereof as might be advanced, together with interest payable thereon as subsequently provided; deed of trust note did not contain unconditional promise to pay sum

certain. D.C. Code 1981, § 28:3-104. *In re 1301 Connecticut Ave. Assoc.*, 126 B.R. 823, 1991 Bankr. LEXIS 631 (1991).

Variable interest rate.

Note with variable interest rate tied to prime rate is not "negotiable instrument," under District of Columbia law, because note does not contain unconditional promise to pay sum certain. D.C. Code 1981, § 28:3-104. *Beitzell & Co. v. FDIC (In re Beitzell & Co.)*, 163 B.R. 637, 1993 Bankr. LEXIS 2054 (1993).

Notes signed by borrower which were subject of borrower's suit against bank were not "negotiable instruments" under District of Columbia law, where notes provided for variable rate of interest tied to prime rate. D.C. Code 1981, § 28:3-104. *Beitzell & Co. v. FDIC (In re Beitzell & Co.)*, 163 B.R. 637, 1993 Bankr. LEXIS 2054 (1993).

Words of negotiability.

Where money orders were made "payable to" named payee and were not "payable to order or to bearer" they were not negotiable. D.C. Code § 28:3-104(1)(d). *Nation-Wide Check Corp. v. Banks*, 260 A.2d 367, 1969 D.C. App. LEXIS 369 (App. 1969).

§ 28:3-105. Issue of instrument.

(a) "Issue" means the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person.

(b) An unissued instrument, or an unissued incomplete instrument that is completed, is binding on the maker or drawer, but nonissuance is a defense. An instrument that is conditionally issued or is issued for a special purpose is binding on the maker or drawer, but failure of the condition or special purpose to be fulfilled is a defense.

(c) "Issuer" applies to issued and unissued instruments and means a maker or drawer of an instrument.

(Mar. 23, 1995, D.C. Law 10-249, § 2(d) 42 DCR 467.)

Section references. — This section is referred to in § 28:3-103.

Prior Codifications. — 1981 Ed., § 28:3-105.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Under former Section 3-102(1)(a) "issue" was defined as the first delivery to a "holder or a remitter" but the term "remitter" was neither defined nor otherwise used. In revised Article 3, Section 3-105(a) defines "issue" more broadly to include the first delivery to anyone by the drawer or maker for the purpose of giving rights to anyone on the instrument. "Delivery"

with respect to instruments is defined in Section 1-201(14) as meaning "voluntary transfer of possession."

2. Subsection (b) continues the rule that nonissuance, conditional issuance or issuance for a special purpose is a defense of the maker or drawer of an instrument. Thus, the defense can be asserted against a person other than a

holder in due course. The same rule applies to nonissuance of an incomplete instrument later completed.

3. Subsection (c) defines "issuer" to include the signer of an unissued instrument for convenience of reference in the statute.

§ 28:3-106. Unconditional promise or order.

(a) Except as provided in this section, for the purposes of section 28:3-104(a), a promise or order is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another writing, or (iii) that rights or obligations with respect to the promise or order are stated in another writing. A reference to another writing does not of itself make the promise or order conditional.

(b) A promise or order is not made conditional (i) by a reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration, or (ii) because payment is limited to resort to a particular fund or source.

(c) If a promise or order requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the promise or order, the condition does not make the promise or order conditional for the purposes of section 28:3-104(a). If the person whose specimen signature appears on an instrument fails to countersign the instrument, the failure to countersign is a defense to the obligation of the issuer, but the failure does not prevent a transferee of the instrument from becoming a holder of the instrument.

(d) If a promise or order at the time it is issued or first comes into possession of a holder contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of section 28:3-104(a); but if the promise or order is an instrument, there cannot be a holder in due course of the instrument.

(Dec. 30, 1963, 77 Stat. 674, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-106.

1973 Ed., § 28:3-105.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This provision replaces former Section 3-105. Its purpose is to define when a promise or order fulfills the requirement in Section 3-104(a) that it be an "unconditional" promise or order to pay. Under Section 3-106(a) a promise or order is deemed to be unconditional unless one of the two tests of the subsection make the promise or order conditional. If the promise or order states an express condition to payment, the promise or order is not an instrument. For example, a promise states, "I promise to pay \$100,000 to the order of John Doe if he

conveys title to Blackacre to me." The promise is not an instrument because there is an express condition to payment. However, suppose a promise states, "In consideration of John Doe's promise to convey title to Blackacre I promise to pay \$100,000 to the order of John Doe." That promise can be an instrument if Section 3-104 is otherwise satisfied. Although the recital of the executory promise of Doe to convey Blackacre might be read as an implied condition that the promise be performed, the condition is not an express condition as re-

quired by Section 3-106(a)(i). This result is consistent with former Section 3-105(1)(a) and (b). Former Section 3-105(1)(b) is not repeated in Section 3-106 because it is not necessary. It is an example of an implied condition. Former Section 3-105(1)(d), (e), and (f) and the first clause of former Section 3-105(1)(c) are other examples of implied conditions. They are not repeated in Section 3-106 because they are not necessary. The law is not changed.

Section 3-106(a)(ii) and (iii) carry forward the substance of former Section 3-105(2)(a). The only change is the use of "writing" instead of "agreement" and a broadening of the language that can result in conditionality. For example, a promissory note is not an instrument defined by Section 3-104 if it contains any of the following statements: 1. "This note is subject to a contract of sale dated April 1, 1990 between the payee and maker of this note." 2. "This note is subject to a loan and security agreement dated April 1, 1990 between the payee and maker of this note." 3. "Rights and obligations of the parties with respect to this note are stated in an agreement dated April 1, 1990 between the payee and maker of this note." It is not relevant whether any condition to payment is or is not stated in the writing to which reference is made. The rationale is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment. But subsection (b)(i) permits reference to a separate writing for information with respect to collateral, prepayment, or acceleration.

Many notes issued in commercial transactions are secured by collateral, are subject to acceleration in the event of default, or are subject to prepayment, or acceleration does not prevent the note from being an instrument if the statement is in the note itself. See Section 3-104(a)(3) and Section 3-108(b). In some cases it may be convenient not to include a statement concerning collateral, prepayment, or acceleration in the note, but rather to refer to an accompanying loan agreement, security agreement or mortgage for that statement. Subsection (b)(i) allows a reference to the appropriate writing for a statement of these rights. For example, a note would not be made conditional by the following statement: "This note is secured by a security interest in collateral described in a security agreement dated April 1, 1990 between the payee and maker of this note. Rights and obligations with respect to the collateral are [stated in] [governed by] the security agreement." The bracketed words are alternatives, either of which complies.

Subsection (b)(ii) addresses the issues covered by former Section 3-105(1)(f), (g), and (h) and Section 3-105(2)(b). Under Section 3-106(a) a promise or order is not made conditional

because payment is limited to payment from a particular source or fund.

This reverses the result of former Section 3-105(2)(b). There is no cogent reason why the general credit of a legal entity must be pledged to have a negotiable instrument. Market forces determine the marketability of instruments of this kind. If potential buyers don't want promises or orders that are payable only from a particular source or fund, they won't take them, but Article 3 should apply.

2. Subsection (c) applies to traveler's checks or other instruments that may require a countersignature. Although the requirement of a countersignature is a condition to the obligation to pay, traveler's checks are treated in the commercial world as money substitutes and therefore should be governed by Article 3. The first sentence of subsection (c) allows a traveler's check to meet the definition of instrument by stating that the countersignature condition does not make it conditional for the purposes of Section 3-104. The second sentence states the effect of a failure to meet the condition. Suppose a thief steals a traveler's check and cashes it by skillfully imitating the specimen signature so that the countersignature appears to be authentic. The countersignature is for the purpose of identification of the owner of the instrument. It is not an indorsement. Subsection (c) provides that the failure of the owner to countersign does not prevent a transferee from becoming a holder. Thus, the merchant or bank that cashed the traveler's check becomes a holder when the traveler's check is taken. The forged countersignature is a defense to the obligation of the issuer to pay the instrument, and is included in defenses under Section 3-305(a)(2). These defenses may not be asserted against a holder in due course. Whether a holder has notice of the defense is a factual question. If the countersignature is a very bad forgery, there may be notice. But if the merchant or bank cashed a traveler's check and the countersignature appeared to be similar to the specimen signature, there might not be notice that the countersignature was forged. Thus, the merchant or bank could be a holder in due course.

3. Subsection (d) concerns the effect of a statement to the effect that the rights of a holder or transferee are subject to claims and defenses that the issuer could assert against the original payee. The subsection applies only if the statement is required by Statutory or administrative law. The prime example is the Federal Trade Commission Rule (16 C.F.R. Part 433) preserving consumers' claims and defenses in consumer credit sales. The intent of the FTC rule is to make it impossible for there to be a holder in due course of a note bearing the FTC legend and undoubtedly that is the result. But, under former Article 3, the legend

may also have had the unintended effect of making the note conditional, thus excluding the note from former Article 3 altogether. Subsection (d) is designed to make it possible to preclude the possibility of a holder in due course without excluding the instrument from Article 3. Most of the provisions of Article 3 are not affected by the holder-in-due-course doctrine and there is no reason why Article 3 should not apply to a note bearing the FTC legend if holder-in-due-course rights are not involved. Under subsection (d) the statement does not make the note conditional. If the note otherwise meets the requirements of Section 3-104(a) it is a negotiable instrument for all purposes except that there cannot be a holder

in due course of the note. No particular form of legend or statement is required by subsection (d). The form of a particular legend or statement may be determined by the other statute or administrative law. For example, the FTC legend required in a note taken by the seller in a consumer sale of goods or services is tailored to that particular transaction and therefore uses language that is somewhat different from that stated in subsection (d), but the difference in expression does not affect the essential similarity of the message conveyed. The effect of the FTC legend is to make the rights of a holder or transferee subject to claims or defenses that the issuer could assert against the original payee of the note.

§ 28:3-107. Instrument payable in foreign money.

Unless the instrument otherwise provides, an instrument that states the amount payable in foreign money may be paid in the foreign money or in an equivalent amount in dollars calculated by using the current bank-offered spot rate at the place of payment for the purchase of dollars on the day on which the instrument is paid.

(Dec. 30, 1963, 77 Stat. 674, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-107.

1973 Ed., § 28:3-107.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

The definition of instrument in Section 3-104 requires that the promise or order be payable in “money.” That term is defined in Section 1-201(24) and is not limited to United States dollars. Section 3-107 states that an instrument payable in foreign money may be paid in dollars if the instrument does not prohibit it. It

also states a conversion rate which applies in the absence of a different conversion rate stated in the instrument. The reference in former Section 3-107(1) to instruments payable in “currency” or “current funds” has been dropped as superfluous.

§ 28:3-108. Payable on demand or at definite time.

(a) A promise or order is “payable on demand” if it (i) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (ii) does not state any time of payment.

(b) A promise or order is “payable at a definite time” if it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued, subject to rights of (i) prepayment, (ii) acceleration, (iii) extension at the option of the holder, or (iv) extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

(c) If an instrument, payable at a fixed date, is also payable upon demand made before the fixed date, the instrument is payable on demand until the

fixed date and, if demand for payment is not made before that date, becomes payable at a definite time on the fixed date.

(Dec. 30, 1963, 77 Stat. 675, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in § 28:3-103.

Prior Codifications. — 1981 Ed., § 28:3-108.
1973 Ed., § 28:3-108.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

This section is a restatement of former Section 3-108 and Section 3-109. Subsection (b) broadens former Section 3-109 somewhat by providing that a definite time includes a time readily ascertainable at the time the promise or order is issued. Subsection (b)(iii) and (iv) restates former Section 3-109(1)(d). It adopts the generally accepted rule that a clause providing for extension at the option of the holder, even without a time limit, does not affect negotiability since the holder is given only a right which

the holder would have without the clause. If the extension is to be at the option of the maker or acceptor or is to be automatic, a definite time limit must be stated or the time of payment remains uncertain and the order or promise is not a negotiable instrument. If a definite time limit is stated, the effect upon certainty of time of payment is the same as if the instrument were made payable at the ultimate date with a term providing for acceleration.

§ 28:3-109. Payable to bearer or to order.

(a) A promise or order is payable to bearer if it:

(1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;

(2) Does not state a payee; or

(3) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

(b) A promise or order that is not payable to bearer is payable to order if it is payable to the order of an identified person or to an identified person or order. A promise or order that is payable to order is payable to the identified person.

(c) An instrument payable to bearer may become payable to an identified person if it is specially indorsed pursuant to section 28:3-205(a). An instrument payable to an identified person may become payable to bearer if it is indorsed in blank pursuant to section 28:3-205(b).

(Dec. 30, 1963, 77 Stat. 675, Pub. L. 88-243, § 1; 1973, Ed., § 28:3-110; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-109.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Under Section 3-104(a), a promise or order cannot be an instrument unless the instrument

is payable to bearer or to order when it is issued or unless Section 3-104(c) applies. The terms

“payable to bearer” and “payable to order” are defined in Section 3-109. The quoted terms are also relevant in determining how an instrument is negotiated. If the instrument is payable to bearer it can be negotiated by delivery alone. Section 3-201(b). An instrument that is payable to an identified person cannot be negotiated without the indorsement of the identified person. Section 3-201(b). An instrument payable to order is payable to an identified person. Section 3-109(b). Thus, an instrument payable to order requires the indorsement of the person to whose order the instrument is payable.

2. Subsection (a) states when an instrument is payable to bearer. An instrument is payable to bearer if it states that it is payable to bearer, but some instruments use ambiguous terms. For example, check forms usually have the words “to the order of” printed at the beginning of the line to be filled in for the name of the payee. If the drawer writes in the word “bearer” or “cash,” the check reads “to the order of bearer” or “to the order of cash.” In each case the check is payable to bearer. Sometimes the drawer will write the name of the payee “John Doe” but will add the words “or bearer.” In that case the check is payable to bearer. Subsection (a). Under subsection (b), if an instrument is payable to bearer it can’t be payable to order. This is different from former Section 3-110(3).

An instrument that purports to be payable both to order and bearer states contradictory terms. A transferee of the instrument should be able to rely on the bearer term and acquire rights as a holder without obtaining the indorsement of the identified payee. An instrument is also payable to bearer if it does not state a payee.

Instruments that do not state a payee are in most cases incomplete instruments. In some cases the drawer of a check may deliver or mail it to the person to be paid without filling in the line for the name of the payee. Under subsection (a) the check is payable to bearer when it is sent or delivered. It is also an incomplete instrument. This case is discussed in Comment 2 to Section 3-115. Subsection (a)(3) contains the words “otherwise indicates that it is not payable to an identified person.” The quoted words are meant to cover uncommon cases in which an instrument indicates that it is not meant to be payable to a specific person. Such an instrument is treated like a check payable to “cash.” The quoted words are not meant to apply to an instrument stating that it is payable to an identified person such as “ABC Corporation” if ABC Corporation is a nonexistent company. Although the holder of the check cannot be the nonexistent company, the instrument is not payable to bearer. Negotiation of such an instrument is governed by Section 3-404(b).

§ 28:3-110. Identification of person to whom instrument is payable.

(a) The person to whom an instrument is initially payable is determined by the intent of the person, whether or not authorized, signing as, or in the name or behalf of, the issuer of the instrument. The instrument is payable to the person intended by the signer even if that person is identified in the instrument by a name or other identification that is not that of the intended person. If more than one person signs in the name or behalf of the issuer of an instrument and all the signers do not intend the same person as payee, the instrument is payable to any person intended by one or more of the signers.

(b) If the signature of the issuer of an instrument is made by automated means, such as a check-writing machine, the payee of the instrument is determined by the intent of the person who supplied the name or identification of the payee, whether or not authorized to do so.

(c) A person to whom an instrument is payable may be identified in any way, including by name, identifying number, office, or account number. For the purpose of determining the holder of an instrument, the following rules apply:

(1) If an instrument is payable to an account and the account is identified only by number, the instrument is payable to the person to whom the account is payable. If an instrument is payable to an account identified by number and by the name of a person, the instrument is payable to the named person, whether or not that person is the owner of the account identified by number.

(2) If an instrument is payable to:

(A) A trust, an estate, or a person described as trustee or representative of a trust or estate, the instrument is payable to the trustee, the representative, or a successor of either, whether or not the beneficiary or estate is also named;

(B) A person described as agent or similar representative of a named or identified person, the instrument is payable to the represented person, the representative, or a successor of the representative;

(C) A fund or organization that is not a legal entity, the instrument is payable to a representative of the members of the fund or organization; or

(D) An office or to a person described as holding an office, the instrument is payable to the named person, the incumbent of the office, or a successor to the incumbent.

(d) If an instrument is payable to 2 or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to 2 or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them. If an instrument payable to 2 or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively.

(Dec. 30, 1963, 77 Stat. 676, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-110.

1973 Ed., § 28:3-116.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Section 3-110 states rules for determining the identity of the person to whom an instrument is initially payable if the instrument is payable to an identified person. This issue usually arises in a dispute over the validity of an indorsement in the name of the payee. Subsection (a) states the general rule that the person to whom an instrument is payable is determined by the intent of “the person, whether or not authorized, signing as, or in the name or behalf of, the issuer of the instrument.” “Issuer” means the maker or drawer of the instrument. Section 3-105(c). If X signs a check as drawer of a check on X’s account, the intent of X controls. If X, as President of Corporation, signs a check as President in behalf of Corporation as drawer, the intent of X controls. If X forges Y’s signature as drawer of a check, the intent of X also controls. Under Section 3-103(a)(3), Y is referred to as the drawer of the check because the signing of Y’s name identifies Y as the drawer. But since Y’s signature was forged Y has no liability as drawer (Section 3-403(a)) unless some other provision of Article 3 or Article 4 makes Y liable. Since X, even

though unauthorized, signed in the name of Y as issuer, the intent of X determines to whom the check is payable.

In the case of a check payable to “John Smith,” since there are many people in the world named “John Smith” it is not possible to identify the payee of the check unless there is some further identification or the intention of the drawer is determined. Name alone is sufficient under subsection (a), but the intention of the drawer determines which John Smith is the person to whom the check is payable. The same issue is presented in cases of misdescriptions of the payee. The drawer intends to pay a person known to the drawer as John Smith. In fact that person’s name is James Smith or John Jones or some other entirely different name. If the check identifies the payee as John Smith, it is nevertheless payable to the person intended by the drawer. That person may indorse the check in either the name John Smith or the person’s correct name or in both names. Section 3-204(d). The intent of the drawer is also controlling in fictitious payee cases. Section 3-404(b). The last sentence of subsection (a)

refers to rare cases in which the signature of an organization requires more than one signature and the persons signing on behalf of the organization do not all intend the same person as payee. Any person intended by a signer for the organization is the payee and an indorsement by that person is an effective indorsement.

Subsection (b) recognizes the fact that in a large number of cases there is no human signer of an instrument because the instrument, usually a check, is produced by automated means such as a check-writing machine. In that case, the relevant intent is that of the person who supplied the name of the payee. In most cases that person is an employee of the drawer, but in some cases the person could be an outsider who is committing a fraud by introducing names of payees of checks into the system that produces the checks. A check-writing machine is likely to be operated by means of a computer in which is stored information as to name and address of the payee and the amount of the check. Access to the computer may allow production of fraudulent checks without knowledge of the organization that is the issuer of the check. Section 3-404(b) is also concerned with this issue. See Case #4 in Comment 2 to Section 3-404.

2. Subsection (c) allows the payee to be identified in any way including the various ways stated. Subsection (c)(1) relates to instruments payable to bank accounts. In some cases the account might be identified by name and number, and the name and number might refer to different persons. For example, a check is payable to "X Corporation Account No. 12345 in Bank of Podunk." Under the last sentence of subsection (c)(1), this check is payable to X Corporation and can be negotiated by X Corporation even if Account No. 12345 is some other person's account or the check is not deposited in that account. In other cases the payee is identified by an account number and the name of the owner of the account is not stated. For example, Debtor pays Creditor by issuing a check drawn on Payor Bank. The check is payable to a bank account owned by Creditor but identified only by number. Under the first sentence of subsection (c)(1) the check is payable to Creditor and, under Section 1-201(20), Creditor becomes the holder when the check is delivered. Under Section 3-201(b), further negotiation of the check requires the indorsement of Creditor.

But under Section 4-205(a), if the check is taken by a depository bank for collection, the bank may become a holder without the indorse-

ment. Under Section 3-102(b), provisions of Article 4 prevail over those of Article 3. The depository bank warrants that the amount of the check was credited to the payee's account.

3. Subsection (c)(2) replaces former Section 3-117 and subsection (1)(e), (f), and (g) of former Section 3-110. This provision merely determines who can deal with an instrument as a holder. It does not determine ownership of the instrument or its proceeds. Subsection (c)(2)(i) covers trusts and estates. If the instrument is payable to the trust or estate or to the trustee or representative of the trust or estate, the instrument is payable to the trustee or representative or any successor. Under subsection (c)(2)(ii), if the instrument states that it is payable to Doe, President of X Corporation, either Doe or X Corporation can be holder of the instrument. Subsection (c)(2)(iii) concerns informal organizations that are not legal entities such as unincorporated clubs and the like. Any representative of the members of the organization can act as holder. Subsection (c)(2)(iv) applies principally to instruments payable to public offices such as a check payable to County Tax Collector.

4. Subsection (d) replaces former Section 3-116. An instrument payable to X or Y is governed by the first sentence of subsection (d). An instrument payable to X and Y is governed by the second sentence of subsection (d). If an instrument is payable to X or Y, either is the payee and if either is in possession that person is the holder and the person entitled to enforce the instrument.

Section 3-301. If an instrument is payable to X and Y, neither X nor Y acting alone is the person to whom the instrument is payable. Neither person, acting alone, can be the holder of the instrument. The instrument is "payable to an identified person."

The "identified person" is X and Y acting jointly. Section 3-109(b) and Section 1-102(5)(a). Thus, under Section 1-201(20) X or Y, acting alone, cannot be the holder or the person entitled to enforce or negotiate the instrument because neither, acting alone, is the identified person stated in the instrument.

The third sentence of subsection (d) is directed to cases in which it is not clear whether an instrument is payable to multiple payees alternatively. In the case of ambiguity persons dealing with the instrument should be able to rely on the indorsement of a single payee. For example, an instrument payable to X and/or Y is treated like an instrument payable to X or Y.

CASE NOTES

ANALYSIS

Multiple payees.
Summary judgment.

Multiple payees.

Under Washington D.C. Code, a check drawn payable to two payees whose names are separated by a virgule is payable to the payees in the alternative and, hence, bank was not guilty of negligence and conversion in accepting and crediting such a check on signature of only one of the payees. D.C. Code § 28:3-116. *Dynalectron Corp. v. Union First Nat. Bank*,

488 F.Supp. 868, 1980 U.S. Dist. LEXIS 12635 (1980).

Summary judgment.

Material issues of fact existed as to whether creditor benefited from two payments made by Chapter 7 debtor during 90-day preference period, precluding summary judgment for either trustee or creditor on issue of whether payments were made to or for creditor's benefit and thus subject to avoidance as preferential transfers. *Webster v. Mgmt. Network Group, Inc. (In re NeTtel Corp.)*, 364 B.R. 433, 2006 Bankr. LEXIS 3293 (2006).

§ 28:3-111. Place of payment.

Except as otherwise provided for items in Article 4, an instrument is payable at the place of payment stated in the instrument. If no place of payment is stated, an instrument is payable at the address of the drawee or maker stated in the instrument. If no address is stated, the place of payment is the place of business of the drawee or maker. If a drawee or maker has more than one place of business, the place of payment is any place of business of the drawee or maker chosen by the person entitled to enforce the instrument. If the drawee or maker has no place of business, the place of payment is the residence of the drawee or maker.

(Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-111.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

If an instrument is payable at a bank in the United States, Section 3-501(b)(1) states that presentment must be made at the place of

payment, i.e. the bank. The place of presentment of a check is governed by Regulation CC § 229.36.

§ 28:3-112. Interest.

(a) Unless otherwise provided in the instrument, (i) an instrument is not payable with interest, and (ii) interest on an interest-bearing instrument is payable from the date of the instrument.

(b) Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. If an instrument provides for interest, but the amount of interest payable cannot be ascertained from the description, interest is payable at the judgment rate in

effect at the place of payment of the instrument and at the time interest first accrues.

(Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-112.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Under Section 3-104(a) the requirement of a “fixed amount” applies only to principal. The amount of interest payable is that described in the instrument. If the description of interest in the instrument does not allow for the amount of interest to be ascertained, interest is payable at the judgment rate. Hence, if an instrument calls for interest, the amount of interest will always be determinable. If a variable rate of interest is prescribed, the amount of interest is

ascertainable by reference to the formula or index described or referred to in the instrument. The last sentence of subsection (b) replaces subsection (d) of former Section 3-118.

2. The purpose of subsection (b) is to clarify the meaning of “interest” in the introductory clause of Section 3-104(a). It is not intended to validate a provision for interest in an instrument if that provision violates other law.

§ 28:3-113. Date of instrument.

(a) An instrument may be antedated or postdated. The date stated determines the time of payment if the instrument is payable at a fixed period after date. Except as provided in section 28:4-401(c), an instrument payable on demand is not payable before the date of the instrument.

(b) If an instrument is undated, its date is the date of its issue or, in the case of an unissued instrument, the date it first comes into possession of a holder.

(Dec. 30, 1963, 77 Stat. 676, Pub. L. 88-243, § 1; Mar. 23 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-113.

1973 Ed., § 28:3-114.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

This section replaces former Section 3-114. Subsections (1) and (3) of former Section 3-114 are deleted as unnecessary. Section 3-113(a) is based in part on subsection (2) of former Section 3-114. The rule that a demand instrument is not payable before the date of the instrument

is subject to Section 4-401(c) which allows the payor bank to pay a postdated check unless the drawer has notified the bank of the postdating pursuant to a procedure prescribed in that subsection. With respect to an undated instrument, the date is the date of issue.

CASE NOTES

ANALYSIS

Choice of law.

Limitation of actions.

Choice of law.

In determining whether sub-subcontractor’s assignment to prime contractor of all monies

due and to become payable under the sub-subcontract was effective, in view of nonassignability provision of sub-subcontractor, court would apply not the law of the federal forum chosen for sub-subcontractor’s suit against subcontractor, but rather the law of the jurisdiction having the more essential contacts

with the contract transaction. *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., Inc.*, 452 F.2d 1346, 1971 U.S. App. LEXIS 7658 (C.A.D.C. 1971).

Limitation of actions.

Where prime contractor's cause of action on note of sub-subcontractor ripened on October 27, 1963, the day after the note matured without payment, and prime contractor's suit

against sub-subcontractor on the note was brought during 1964, action tolled running of statute on the note, but the suit on the note did not interrupt running of the statute as to prime contractor's claim against subcontractor on the obligations assigned by sub-subcontractor as security for the note. D.C. Code § 28:3-122. *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., Inc.*, 452 F.2d 1346, 1971 U.S. App. LEXIS 7658 (C.A.D.C. 1971).

§ 28:3-114. Contradictory terms of instrument.

If an instrument contains contradictory terms, typewritten terms prevail over printed terms, handwritten terms prevail over both, and words prevail over numbers.

(Dec. 30, 1963, 77 Stat. 677, Pub. L. 88-243, § 1; Mar. 23 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-114.
1973 Ed., § 28:3-118.

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

Legislative history of Law 10-249. — For

UNIFORM COMMERCIAL CODE COMMENT

Section 3-114 replaces subsections (b) and (c) of former Section 3-118.

§ 28:3-115. Incomplete instrument.

(a) "Incomplete instrument" means a signed writing, whether or not issued by the signer, the contents of which show at the time of signing that it is incomplete, but that the signer intended it to be completed by the addition of words or numbers.

(b) Subject to subsection (c) of this section, if an incomplete instrument is an instrument under section 28:3-104, it may be enforced according to its terms if it is not completed, or according to its terms as augmented by completion. If an incomplete instrument is not an instrument under section 28:3-104, but, after completion, the requirements of section 28:3-104 are met, the instrument may be enforced according to its terms as augmented by completion.

(c) If words or numbers are added to an incomplete instrument without authority of the signer, there is an alteration of the incomplete instrument under section 28:3-407.

(d) The burden of establishing that words or numbers were added to an incomplete instrument without authority of the signer is on the person asserting the lack of authority.

(Dec. 30, 1963, 77 Stat. 676, Pub. L. 88-243, § 1; Mar. 23 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in §§ 28:3-103, 28:3-412, 28:3-413, 28:3-414, 28:3-415, and 28:4-207.

Prior Codifications. — 1981 Ed., § 28:3-115.

1973 Ed., § 28:3-115.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section generally carries forward the rules set out in former Section 3-115. The term “incomplete instrument” applies both to an “instrument,” i.e. a writing meeting all the requirements of Section 3-104, and to a writing intended to be an instrument that is signed but lacks some element of an instrument. The test in both cases is whether the contents show that it is incomplete and that the signer intended that additional words or numbers be added.

2. If an incomplete instrument meets the requirements of Section 3-104 and is not completed it may be enforced in accordance with its terms. Suppose, in the following two cases, that a note delivered to the payee is incomplete solely because a space on the pre-printed note form for the due date is not filled in:

Case #1. If the incomplete instrument is never completed, the note is payable on demand. Section 3-108(a)(ii). However, if the payee and the maker agreed to a due date, the maker may have a defense under Section 3-117 if demand for payment is made before the due date agreed to by the parties.

Case #2. If the payee completes the note by filling in the due date agreed to by the parties, the note is payable on the due date stated. However, if the due date filled in was not the date agreed to by the parties there is an alter-

ation of the note. Section 3-407 governs the case.

Suppose Debtor pays Creditor by giving Creditor a check on which the space for the name of the payee is left blank. The check is an instrument but it is incomplete. The check is enforceable in its incomplete form and it is payable to bearer because it does not state a payee. Section 3-109(a)(2). Thus, Creditor is a holder of the check. Normally in this kind of case Creditor would simply fill in the space with Creditor's name. When that occurs the check becomes payable to the Creditor.

3. In some cases the incomplete instrument does not meet the requirements of Section 3-104. An example is a check with the amount not filled in. The check cannot be enforced until the amount is filled in. If the payee fills in an amount authorized by the drawer the check meets the requirements of Section 3-104 and is enforceable as completed. If the payee fills in an unauthorized amount there is an alteration of the check and Section 3-407 applies.

4. Section 3-302(a)(1) also bears on the problem of incomplete instruments. Under that section a person cannot be a holder in due course of the instrument if it is so incomplete as to call into question its validity. Subsection (d) of Section 3-115 is based on the last clause of subsection (2) of former Section 3-115.

§ 28:3-116. Joint and several liability; contribution.

(a) Except as otherwise provided in the instrument, 2 or more persons who have the same liability on an instrument as makers, drawers, acceptors, indorsers who indorse as joint payees, or anomalous indorsers are jointly and severally liable in the capacity in which they sign.

(b) Except as provided in section 28:3-419(e) or by agreement of the affected parties, a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law.

(c) Discharge of one party having joint and several liability by a person entitled to enforce the instrument does not affect the right under subsection (b) of this section of a party having the same joint and several liability to receive contribution from the party discharged.

(Mar. 23 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-116.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see His-

torical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) replaces subsection (e) of former Section 3-118. Subsection (b) states contribution rights of parties with joint and several liability by referring to applicable law. But subsection (b) is subject to Section 3-419(e). If one of the parties with joint and several liability is an accommodation party and the other is the accommodated party, Section 3-419(e) applies. Subsection (c) deals with discharge. The discharge of a jointly and severally liable obligor does not affect the right of other obligors to seek contribution from the discharged obligor.

2. Indorsers normally do not have joint and several liability. Rather, an earlier indorser has

liability to a later indorser. But indorsers can have joint and several liability in two cases. If an instrument is payable to two payees jointly, both payees must indorse. The indorsement is a joint indorsement and the indorsers have joint and several liability and subsection (b) applies. The other case is that of two or more anomalous indorsers. The term is defined in Section 3-205(d). An anomalous indorsement normally indicates that the indorser signed as an accommodation party. If more than one accommodation party indorses a note as an accommodation to the maker, the indorsers have joint and several liability and subsection (b) applies.

CASE NOTES

In general.

Under Washington D.C. Code, a check drawn payable to two payees whose names are separated by a virgule is payable to the payees in the alternative and, hence, bank was not guilty of negligence and conversion in accepting and

crediting such a check on signature of only one of the payees. D.C. Code § 28:3-116. *Dynalelectron Corp. v. Union First Nat. Bank*, 488 F.Supp. 868, 1980 U.S. Dist. LEXIS 12635 (1980).

§ 28:3-117. Other agreements affecting instrument.

Subject to applicable law regarding exclusion of proof of contemporaneous or previous agreements, the obligation of a party to an instrument to pay the instrument may be modified, supplemented, or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement. To the extent an obligation is modified, supplemented, or nullified by an agreement under this section, the agreement is a defense to the obligation.

(Dec. 30, 1963, 77 Stat. 677, Pub. L. 88-243, § 1; Mar. 23 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-117.

1973 Ed., § 28:3-119.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. The separate agreement might be a security agreement or mortgage or it might be an agreement that contradicts the terms of the instrument. For example, a person may be induced to sign an instrument under an agreement that the signer will not be liable on the instrument unless certain conditions are met.

Suppose X requested credit from Creditor who is willing to give the credit only if an acceptable accommodation party will sign the note of X as co-maker. Y agrees to sign as co-maker on the condition that Creditor also obtain the signature of Z as co-maker. Creditor agrees and Y signs as co-maker with X. Creditor fails to

obtain the signature of Z on the note. Under Sections 3-412 and 3-419(b), Y is obliged to pay the note, but Section 3-117 applies. In this case, the agreement modifies the terms of the note by stating a condition to the obligation of Y to pay the note. This case is essentially similar to a case in which a maker of a note is induced to sign the note by fraud of the holder. Although the agreement that Y not be liable on the note unless Z also signs may not have been fraudulently made, a subsequent attempt by Creditor to require Y to pay the note in violation of the agreement is a bad faith act. Section 3-117, in treating the agreement as a defense, allows Y to assert the agreement against Creditor, but the defense would not be good against a subsequent holder in due course of the note that took it without notice of the agreement. If there cannot be a holder in due course because of Section 3-106(d), a subsequent holder that took the

note in good faith, for value and without knowledge of the agreement would not be able to enforce the liability of Y. This result is consistent with the risk that a holder not in due course takes with respect to fraud in inducing issuance of an instrument.

2. The effect of merger or integration clauses to the effect that a writing is intended to be the complete and exclusive statement of the terms of the agreement or that the agreement is not subject to conditions is left to the supplementary law of the jurisdiction pursuant to Section 1-103. Thus, in the case discussed in Comment 1, whether Y is permitted to prove the condition to Y's obligation to pay the note is determined by that law. Moreover, nothing in this section is intended to validate an agreement which is fraudulent or void as against public policy, as in the case of a note given to deceive a bank examiner.

§ 28:3-118. Statute of limitations.

(a) Except as provided in subsection (e) of this section, an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within 6 years after the due date or dates stated in the note, or, if a due date is accelerated, within 6 years after the accelerated due date.

(b) Except as provided in subsection (d) or (e) of this section, if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within 6 years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years.

(c) Except as provided in subsection (d) of this section, an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within 3 years after dishonor of the draft or 10 years after the date of the draft, whichever period expires first.

(d) An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or traveler's check must be commenced within 3 years after demand for payment is made to the acceptor or issuer, as the case may be.

(e) An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within 6 years after demand for payment is made to the maker, but if the instrument states a due date and the maker is not required to pay before that date, the 6-year period begins when a demand for payment is in effect and the due date has passed.

(f) An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced (i) within 6 years after the due date or dates stated in the draft or acceptance if the obligation of the acceptor is payable at a definite time, or (ii) within 6 years after the date of the acceptance if the obligation of the acceptor is payable on demand.

(g) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and

received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this article and not governed by this section must be commenced within 3 years after the cause of action accrues.

(Mar. 23 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-118.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Section 3-118 differs from former Section 3-122, which states when a cause of action accrues on an instrument. Section 3-118 does not define when a cause of action accrues. Accrual of a cause of action is stated in other sections of Article 3 such as those that state the various obligations of parties to an instrument. The only purpose of Section 3-118 is to define the time within which an action to enforce an obligation, duty, or right arising under Article 3 must be commenced. Section 3-118 does not attempt to state all rules with respect to a statute of limitations. For example, the circumstances under which the running of a limitations period may be tolled is left to other law pursuant to Section 1-103.

2. The first six subsections apply to actions to enforce an obligation of any party to an instrument to pay the instrument. This changes present law in that indorsers who may become liable on an instrument after issue are subject to a period of limitations running from the same date as that of the maker or drawer. Subsections (a) and (b) apply to notes. If the note is payable at a definite time, a six-year limitations period starts at the due date of the note, subject to prior acceleration. If the note is payable on demand, there are two limitations periods. Although a note payable on demand could theoretically be called a day after it was issued, the normal expectation of the parties is that the note will remain outstanding until there is some reason to call it. If the law provides that the limitations period does not start until demand is made, the cause of action to enforce it may never be barred. On the other hand, if the limitations period starts when demand for payment may be made, i.e. at any time after the note was issued, the payee of a note on which interest or portions of principal are being paid could lose the right to enforce the note even though it was treated as a continuing obligation by the parties. Some demand notes are not enforced because the payee has forgiven the debt. This is particularly true in family and other noncommercial transactions. A demand note found after the death of the payee may be presented for payment many years after it was

issued. The maker may be a relative and it may be difficult to determine whether the note represents a real or a forgiven debt. Subsection (b) is designed to bar notes that no longer represent a claim to payment and to require reasonably prompt action to enforce notes on which there is default. If a demand for payment is made to the maker, a six-year limitations period starts to run when demand is made. The second sentence of subsection (b) bars an action to enforce a demand note if no demand has been made on the note and no payment of interest or principal has been made for a continuous period of 10 years. This covers the case of a note that does not bear interest or a case in which interest due on the note has not been paid. This kind of case is likely to be a family transaction in which a failure to demand payment may indicate that the holder did not intend to enforce the obligation but neglected to destroy the note. A limitations period that bars stale claims in this kind of case is appropriate if the period is relatively long.

3. Subsection (c) applies primarily to personal uncertified checks. Checks are payment instruments rather than credit instruments. The limitations period expires three years after the date of dishonor or 10 years after the date of the check, whichever is earlier. Teller's checks, cashier's checks, certified checks, and traveler's checks are treated differently under subsection (d) because they are commonly treated as cash equivalents. A great delay in presenting a cashier's check for payment in most cases will occur because the check was mislaid during that period. The person to whom traveler's checks are issued may hold them indefinitely as a safe form of cash for use in an emergency. There is no compelling reason for barring the claim of the owner of the cashier's check or traveler's check. Under subsection (d) the claim is never barred because the three-year limitations period does not start to run until demand for payment is made. The limitations period in subsection (d) in effect applies only to cases in which there is a dispute about the legitimacy of the claim of the person demanding payment.

4. Subsection (e) covers certificates of deposit. The limitations period of six years doesn't start to run until the depositor demands payment. Most certificates of deposit are payable on demand even if they state a due date. The effect of a demand for payment before maturity is usually that the bank will pay, but that a penalty will be assessed against the depositor in the form of a reduction in the amount of interest that is paid. Subsection (e) also provides for cases in which the bank has no obligation to pay until the due date. In that case the limitations period doesn't start to run until there is a demand for payment in effect and the due date has passed.

5. Subsection (f) applies to accepted drafts other than certified checks. When a draft is accepted it is in effect turned into a note of the acceptor. In almost all cases the acceptor will agree to pay at a definite time. Subsection (f)

states that in that case the six-year limitations period starts to run on the due date. In the rare case in which the obligation of the acceptor is payable on demand, the six-year limitations period starts to run at the date of the acceptance.

6. Subsection (g) covers warranty and conversion cases and other actions to enforce obligations or rights arising under Article 3. A three-year period is stated and subsection (g) follows general law in stating that the period runs from the time the cause of action accrues. Since the traditional term "cause of action" may have been replaced in some states by "claim for relief" or some equivalent term, the words "cause of action" have been bracketed to indicate that the words may be replaced by an appropriate substitute to conform to local practice.

CASE NOTES

ANALYSIS

Nature, validity and construction of statutes of limitation.

Tolling of limitations period.

Nature, validity and construction of statutes of limitation.

Statutes of limitation are statutes of repose; their purpose is to quiet stale controversies, the evidence as to which may be eroded by time. *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., Inc.*, 452 F.2d 1346, 1971 U.S. App. LEXIS 7658 (C.A.D.C. 1971).

Tolling of limitations period.

Where sub-subcontractor which had made assignment to prime contractor of all monies due and to become due under sub-subcontract and sub-subcontractor instituted suit against subcontractor, within limitation period, on the same claim that had previously been assigned to prime contractor, and prime contractor inter-

vened by leave of court in sub-subcontractor's action, sub-subcontractor's suit arrested statute of limitations, not only for itself, but also upon prime contractor's intervention. *Fed.Rules Civ.Proc. rule 17(a)*, 18 U.S.C. *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., Inc.*, 452 F.2d 1346, 1971 U.S. App. LEXIS 7658 (C.A.D.C. 1971).

Where prime contractor's cause of action on note of sub-subcontractor ripened on October 27, 1963, the day after the note matured without payment, and prime contractor's suit against sub-subcontractor on the note was brought during 1964, action tolled running of statute on the note, but the suit on the note did not interrupt running of the statute as to prime contractor's claim against subcontractor on the obligations assigned by sub-subcontractor as security for the note. *D.C. Code § 28:3-122*. *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., Inc.*, 452 F.2d 1346, 1971 U.S. App. LEXIS 7658 (C.A.D.C. 1971).

§ 28:3-119. Notice of right to defend action.

In an action for breach of an obligation for which a third person is answerable over pursuant to this article or Article 4, the defendant may give the third person written notice of the litigation, and the person notified may then give similar notice to any other person who is answerable over. If the notice states (i) that the person notified may come in and defend and (ii) that failure to do so will bind the person notified in an action later brought by the person giving the notice as to any determination of fact common to the 2 litigations, the person notified is so bound unless after seasonable receipt of the notice the person notified does come in and defend.

(Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-119.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

This section is a restatement of former Section 3-803.

Part 2. Negotiation, Transfer, and Indorsement.

§ 28:3-201. Negotiation.

(a) “Negotiation” means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.

(b) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

(Dec. 30, 1963, 77 Stat. 678, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-201.

1973 Ed., § 28:3-202.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsections (a) and (b) are based in part on subsection (1) of former Section 3-202. A person can become holder of an instrument when the instrument is issued to that person, or the status of holder can arise as the result of an event that occurs after issuance. “Negotiation” is the term used in Article 3 to describe this post-issuance event. Normally, negotiation occurs as the result of a voluntary transfer of possession of an instrument by a holder to another person who becomes the holder as a result of the transfer. Negotiation always requires a change in possession of the instrument because nobody can be a holder without possessing the instrument, either directly or through an agent. But in some cases the transfer of possession is involuntary and in some cases the person transferring possession is not a holder. In defining “negotiation” former Section 3-202(1) used the word “transfer,” an undefined term, and “delivery,” defined in Section 1-201(14) to mean voluntary change of possession. Instead, subsections (a) and (b) use the term “transfer of possession” and, subsection (a) states that negotiation can occur by an involuntary transfer of possession. For exam-

ple, if an instrument is payable to bearer and it is stolen by Thief or is found by Finder, Thief or Finder becomes the holder of the instrument when possession is obtained. In this case there is an involuntary transfer of possession that results in negotiation to Thief or Finder.

2. In most cases negotiation occurs by a transfer of possession by a holder or remitter. Remitter transactions usually involve a cashier’s or teller’s check. For example, Buyer buys goods from Seller and pays for them with a cashier’s check of Bank that Buyer buys from Bank. The check is issued by Bank when it is delivered to Buyer, regardless of whether the check is payable to Buyer or to Seller. Section 3-105(a). If the check is payable to Buyer, negotiation to Seller is done by delivery of the check to Seller after it is indorsed by Buyer. It is more common, however, that the check when issued will be payable to Seller. In that case Buyer is referred to as the “remitter.” Section 3-103(a)(11). The remitter, although not a party to the check, is the owner of the check until ownership is transferred to Seller by delivery. This transfer is a negotiation because Seller becomes the holder of the check when Seller

obtains possession. In some cases Seller may have acted fraudulently in obtaining possession of the check. In those cases Buyer may be entitled to rescind the transfer to Seller because of the fraud and assert a claim of ownership to the check under Section 3-306 against Seller or a subsequent transferee of the check.

Section 3-202(b) provides for rescission of negotiation, and that provision applies to rescission by a remitter as well as by a holder.

3. Other sections of Article 3 may modify the rule stated in the first sentence of subsection (b). See for example, Sections 3-404, 3-405 and 3-406.

CASE NOTES

Indorsement.

Physical holder of unendorsed note drawn to order is not a "holder in due course." D.C. Code 1981, § 28:3-302. *Big Builders v. Israel*, 709 A.2d 74, 1998 D.C. App. LEXIS 54 (1998).

Signature on separate unattached paper is not an "indorsement" of the commercial paper. D.C. Code 1981, § 28:3-204(a). *Big Builders v.*

Israel, 709 A.2d 74, 1998 D.C. App. LEXIS 54 (1998).

Indorsement on separate paper, called an "allonge," may be used only when there is no room for indorsement on instrument itself. *Big Builders v. Israel*, 709 A.2d 74, 1998 D.C. App. LEXIS 54 (1998).

§ 28:3-202. Negotiation subject to rescission.

(a) Negotiation is effective even if obtained (i) from an infant, a corporation exceeding its powers, or a person without capacity, (ii) by fraud, duress, or mistake, or (iii) in breach of duty or as part of an illegal transaction.

(b) To the extent permitted by other law, negotiation may be rescinded or may be subject to other remedies, but those remedies may not be asserted against a subsequent holder in due course or a person paying the instrument in good faith and without knowledge of facts that are a basis for rescission or other remedy.

(Dec. 30, 1963, 77 Stat. 678, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-202.

1973 Ed., § 28:3-207.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section is based on former Section 3-207. Subsection (2) of former Section 3-207 prohibited rescission of a negotiation against holders in due course. Subsection (b) of Section 3-202 extends this protection to payor banks.

2. Subsection (a) applies even though the lack of capacity or the illegality, is of a character which goes to the essence of the transaction and makes it entirely void. It is inherent in the character of negotiable instruments that any person in possession of an instrument which by its terms is payable to that person or to bearer is a holder and may be dealt with by anyone as a holder. The principle finds its most extreme application in the well settled rule that a holder in due course may take the instrument even from a thief and be protected against the claim of the rightful owner. The policy of subsection

(a) is that any person to whom an instrument is negotiated is a holder until the instrument has been recovered from that person's possession. The remedy of a person with a claim to an instrument is to recover the instrument by replevin or otherwise; to impound it or to enjoin its enforcement, collection or negotiation; to recover its proceeds from the holder; or to intervene in any action brought by the holder against the obligor. As provided in Section 3-305(c), the claim of the claimant is not a defense to the obligor unless the claimant defends the action.

3. There can be no rescission or other remedy against a holder in due course or a person who pays in good faith and without notice, even though the prior negotiation may have been fraudulent or illegal in its essence and entirely

void. As against any other party the claimant may have any remedy permitted by law. This section is not intended to specify what that remedy may be, or to prevent any court from imposing conditions or limitations such as prompt action or return of the consideration received.

All such questions are left to the law of the particular jurisdiction. Section 3-202 gives no right that would not otherwise exist. The section is intended to mean that any remedies afforded by other law are cut off only by a holder in due course.

CASE NOTES

In general.

Putative settlor who, in oral declarations to sister-in-law and in letters executed in sister-in-law's presence, imperatively and unambiguously designated daughter as beneficiary, appointed sister-in-law as trustee, and identified endorsed checks as trust property, who simultaneously unconditionally negotiated checks to

sister-in-law, and who later surrendered key to sister-in-law's house, adequately manifested his intention to create trust and complied with formalities necessary to bring about such result. D.C. Code 1981, §§ 28:3-201 et seq., 28:3-202, 28:3-204(2). *Cabaniss v. Cabaniss*, 464 A.2d 87, 1983 D.C. App. LEXIS 415 (1983).

§ 28:3-203. Transfer of instrument; rights acquired by transfer.

(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. In this case, the transferee obtains no rights under this article and has only the rights of a partial assignee.

(Dec. 30, 1963, 77 Stat. 678, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-203.

1973 Ed., § 28:3-201.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Section 3-203 is based on former Section 3-201 which stated that a transferee received such rights as the transferor had. The former

section was confusing because some rights of the transferor are not vested in the transferee unless the transfer is a negotiation. For exam-

ple, a transferee that did not become the holder could not negotiate the instrument, a right that the transferor had. Former Section 3-201 did not define "transfer." Subsection (a) defines transfer by limiting it to cases in which possession of the instrument is delivered for the purpose of giving to the person receiving delivery the right to enforce the instrument.

Although transfer of an instrument might mean in a particular case that title to the instrument passes to the transferee, that result does not follow in all cases. The right to enforce an instrument and ownership of the instrument are two different concepts. A thief who steals a check payable to bearer becomes the holder of the check and a person entitled to enforce it, but does not become the owner of the check. If the thief transfers the check to a purchaser the transferee obtains the right to enforce the check. If the purchaser is not a holder in due course, the owner's claim to the check may be asserted against the purchaser. Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend upon whether the instrument was transferred under Section 3-203. Moreover, a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument. For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying all of X's right, title, and interest in the instrument to Y. Although the document may be effective to give Y a claim to ownership of the instrument, Y is not a person entitled to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under Section 3-203(a) until it is delivered to Y.

An instrument is a reified right to payment. The right is represented by the instrument itself. The right to payment is transferred by delivery of possession of the instrument "by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." The quoted phrase excludes issue of an instrument, defined in Section 3-105, and cases in which a delivery of possession is for some purpose other than transfer of the right to enforce. For example, if a check is presented for payment by delivering the check to the drawee, no transfer of the check to the drawee occurs because there is no intent to give the drawee the right to enforce the check.

2. Subsection (b) states that transfer vests in the transferee any right of the transferor to enforce the instrument "including any right as a holder in due course." If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled

to enforce the instrument under Section 3-301 if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder. Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 3-308 that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it. Proof of a transfer to the transferee by a holder is proof that the transferee has acquired the rights of a holder. At that point the transferee is entitled to the presumption under Section 3-308.

Under subsection (b) a holder in due course that transfers an instrument transfers those rights as a holder in due course to the purchaser. The policy is to assure the holder in due course a free market for the instrument. There is one exception to this rule stated in the concluding clause of subsection (b). A person who is party to fraud or illegality affecting the instrument is not permitted to wash the instrument clean by passing it into the hands of a holder in due course and then repurchasing it.

3. Subsection (c) applies only to a transfer for value. It applies only if the instrument is payable to order or specially indorsed to the transferor. The transferee acquires, in the absence of a contrary agreement, the specifically enforceable right to the indorsement of the transferor. Unless otherwise agreed, it is a right to the general indorsement of the transferor with full liability as indorser, rather than to an indorsement without recourse. The question may arise if the transferee has paid in advance and the indorsement is omitted fraudulently or through oversight. A transferor who is willing to indorse only without recourse or unwilling to indorse at all should make those intentions clear before transfer. The agreement of the transferee to take less than an unqualified indorsement need not be an express one, and the understanding may be implied from conduct, from past practice, or from the circumstances of the transaction. Subsection (c) provides that there is no negotiation of the instrument until the indorsement by the transferor is made. Until that time the transferee does not become a holder, and if earlier notice of a defense or claim is received, the transferee does not qualify as a holder in due course under Section 3-302.

4. The operation of Section 3-203 is illustrated by the following cases. In each case Payee, by fraud, induced Maker to issue a note to Payee. The fraud is a defense to the obliga-

tion of Maker to pay the note under Section 3-305(a)(2).

Case #1. Payee negotiated the note to X who took as a holder in due course. After the instrument became overdue X negotiated the note to Y who had notice of the fraud. Y succeeds to X's rights as a holder in due course and takes free of Maker's defense of fraud.

Case #2. Payee negotiated the note to X who took as a holder in due course. Payee then repurchased the note from X. Payee does not succeed to X's rights as a holder in due course and is subject to Maker's defense of fraud.

Case #3. Payee negotiated the note to X who took as a holder in due course. X sold the note to Purchaser who received possession. The note, however, was indorsed to X and X failed to indorse it. Purchaser is a person entitled to enforce the instrument under Section 3-301 and succeeds to the rights of X as holder in due course. Purchaser is not a holder, however, and under Section 3-308 Purchaser will have to prove the transaction with X under which the rights of X as holder in due course were acquired.

Case #4. Payee sold the note to Purchaser who took for value, in good faith and without notice of the defense of Maker. Purchaser received possession of the note but Payee neglected to indorse it. Purchaser became a per-

son entitled to enforce the instrument but did not become the holder because of the missing indorsement. If Purchaser received notice of the defense of Maker before obtaining the indorsement of Payee, Purchaser cannot become a holder in due course because at the time notice was received the note had not been negotiated to Purchaser. If indorsement by Payee was made after Purchaser received notice, Purchaser had notice of the defense when it became the holder.

5. Subsection (d) restates former Section 3-202(3). The cause of action on an instrument cannot be split. Any indorsement which purports to convey to any party less than the entire amount of the instrument is not effective for negotiation. This is true of either "Pay A one-half," or "Pay A two-thirds and B one-third." Neither A nor B becomes a holder. On the other hand an indorsement reading merely "Pay A and B" is effective, since it transfers the entire cause of action to A and B as tenants in common. An indorsement purporting to convey less than the entire instrument does, however, operate as a partial assignment of the cause of action. Subsection (d) makes no attempt to state the legal effect of such an assignment, which is left to other law. A partial assignee of an instrument has rights only to the extent the applicable law gives rights, either at law or in equity, to a partial assignee.

CASE NOTES

Nonnegotiable instruments.

Bank that purchased assignee of note secured by deed of trust was rightful note holder, and thus could properly commence non-judicial foreclosure proceedings after borrower defaulted, even though bank did not properly record assignment of note, where note was endorsed in blank and transferred to bank, and bank provided written notice and in all other ways complied with requirements for foreclosure proceedings. *Leake v. Prensky*, 798 F.Supp.2d 254, 2011 U.S. Dist. LEXIS 80307 (2011).

Where money orders were made "payable to" named payee and were not "payable to order or to bearer" they were not negotiable. D.C. Code § 28:3-104(1)(d). *Nation-Wide Check Corp. v.*

Banks, 260 A.2d 367, 1969 D.C. App. LEXIS 369 (App. 1969).

Bank in which payee deposited non-negotiable money orders had no greater rights than the payee. D.C. Code § 28:3-201(1). *Nation-Wide Check Corp. v. Banks*, 260 A.2d 367, 1969 D.C. App. LEXIS 369 (App. 1969).

Where payee transferred nonnegotiable money orders, transferee, although not holder in due course, could establish case against payor, which had stopped payment on the money orders, by production of instruments and burden of proving want of consideration or other defense was upon payor. D.C. Code §§ 28:3-306, 28:3-307(2), 28:3-805. *Nation-Wide Check Corp. v. Banks*, 260 A.2d 367, 1969 D.C. App. LEXIS 369 (App. 1969).

§ 28:3-204. Indorsement.

(a) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms

of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.

(b) "Indorser" means a person who makes an indorsement.

(c) For the purpose of determining whether the transferee of an instrument is a holder, an indorsement that transfers a security interest in the instrument is effective as an unqualified indorsement of the instrument.

(d) If an instrument is payable to a holder under a name that is not the name of the holder, indorsement may be made by the holder in the name stated in the instrument or in the holder's name or both, but signature in both names may be required by a person paying or taking the instrument for value or collection.

(Dec. 30, 1963, 77 Stat. 678, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-204.

1973 Ed., § 28:3-203.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) is a definition of "indorsement," a term which was not defined in former Article 3. Indorsement is defined in terms of the purpose of the signature. If a blank or special indorsement is made to give rights as a holder to a transferee the indorsement is made for the purpose of negotiating the instrument. Subsection (a)(i). If the holder of a check has an account in the drawee bank and wants to be sure that payment of the check will be made by credit to the holder's account, the holder can indorse the check by signing the holder's name with the accompanying words "for deposit only" before presenting the check for payment to the drawee bank. In that case the purpose of the quoted words is to restrict payment of the instrument. Subsection (a)(ii). If X wants to guarantee payment of a note signed by Y as maker, X can do so by signing X's name to the back of the note as an indorsement. This indorsement is known as an anomalous indorsement (Section 3-205(d)) and is made for the purpose of incurring indorser's liability on the note. Subsection (a)(iii). In some cases an indorsement may serve more than one purpose. For example, if the holder of a check deposits it to the holder's account in a depository bank for collection and indorses the check by signing the holder's name with the accompanying words "for deposit only" the purpose of the indorsement is both to negotiate the check to the depository bank and to restrict payment of the check.

The "but" clause of the first sentence of subsection (a) elaborates on former Section 3-402. In some cases it may not be clear whether a signature was meant to be that of an indorser, a party to the instrument in some other capacity such as drawer, maker or acceptor, or a person who was not signing as a party. The general rule is that a signature is an indorsement if the instrument does not indicate an unambiguous intent of the signer not to sign as an indorser. Intent may be determined by words accompanying the signature, the place of signature, or other circumstances. For example, suppose a depository bank gives cash for a check properly indorsed by the payee. The bank requires the payee's employee to sign the back of the check as evidence that the employee received the cash. If the signature consists only of the initials of the employee it is not reasonable to assume that it was meant to be an indorsement. If there was a full signature but accompanying words indicated that it was meant as a receipt for the cash given for the check, it is not an indorsement. If the signature is not qualified in any way and appears in the place normally used for indorsements, it may be an indorsement even though the signer intended the signature to be a receipt. To take another example, suppose the drawee of a draft signs the draft on the back in the space usually used for indorsements. No words accompany the signature. Since the drawee has no reason to sign a draft unless the intent is to accept the

draft, the signature is effective as an acceptance. Custom and usage may be used to determine intent. For example, by long-established custom and usage, a signature in the lower right hand corner of an instrument indicates an intent to sign as the maker of a note or the drawer of a draft. Any similar clear indication of an intent to sign in some other capacity or for some other purpose may establish that a signature is not an indorsement. For example, if the owner of a traveler's check countersigns the check in the process of negotiating it, the countersignature is not an indorsement. The countersignature is a condition to the issuer's obligation to pay and its purpose is to provide a means of verifying the identity of the person negotiating the traveler's check by allowing comparison of the specimen signature and the countersignature. The countersignature is not necessary for negotiation and the signer does not incur indorser's liability. See Comment 2 to Section 3-106.

The last sentence of subsection (a) is based on subsection (2) of former Section 3-202. An indorsement on an allonge is valid even though there is sufficient space on the instrument for an indorsement.

2. Assume that Payee indorses a note to Creditor as security for a debt. Under subsection

(b) of Section 3-203 Creditor takes Payee's rights to enforce or transfer the instrument subject to the limitations imposed by Article 9. Subsection (c) of Section 3-204 makes clear that Payee's indorsement to Creditor, even though it mentions creation of a security interest, is an unqualified indorsement that gives to Creditor the right to enforce the note as its holder.

3. Subsection (d) is a restatement of former Section 3-203. Section 3-110(a) states that an instrument is payable to the person intended by the person signing as or in the name or behalf of the issuer even if that person is identified by a name that is not the true name of the person. In some cases the name used in the instrument is a misspelling of the correct name and in some cases the two names may be entirely different. The payee may indorse in the name used in the instrument, in the payee's correct name, or in both. In each case the indorsement is effective. But because an indorsement in a name different from that used in the instrument may raise a question about its validity and an indorsement in a name that is not the correct name of the payee may raise a problem of identifying the indorser, the accepted commercial practice is to indorse in both names. Subsection (d) allows a person paying or taking the instrument for value or collection to require indorsement in both names.

CASE NOTES

ANALYSIS

In general.

Words of negotiability.

In general.

Signature on separate unattached paper is not an "indorsement" of the commercial paper. D.C. Code 1981, § 28:3-204(a). *Big Builders v. Israel*, 709 A.2d 74, 1998 D.C. App. LEXIS 54 (1998).

Where payee transferred nonnegotiable money orders, transferee, although not holder in due course, could establish case against payor, which had stopped payment on the

money orders, by production of instruments and burden of proving want of consideration or other defense was upon payor. D.C. Code §§ 28:3-306, 28:3-307(2), 28:3-805. *Nation-Wide Check Corp. v. Banks*, 260 A.2d 367, 1969 D.C. App. LEXIS 369 (App. 1969).

Words of negotiability.

Where money orders were made "payable to" named payee and were not "payable to order or to bearer" they were not negotiable. D.C. Code § 28:3-104(1)(d). *Nation-Wide Check Corp. v. Banks*, 260 A.2d 367, 1969 D.C. App. LEXIS 369 (App. 1969).

§ 28:3-205. Special indorsement; blank indorsement; anomalous indorsement.

(a) If an indorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a "special indorsement". When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person. The principles stated in section 28:3-110 apply to special indorsements.

(b) If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a "blank indorsement". When indorsed in blank, an

instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

(c) The holder may convert a blank indorsement that consists only of a signature into a special indorsement by writing, above the signature of the indorser, words identifying the person to whom the instrument is made payable.

(d) "Anomalous indorsement" means an indorsement made by a person who is not the holder of the instrument. An anomalous indorsement does not affect the manner in which the instrument may be negotiated.

(Dec. 30, 1963, 77 Stat. 678, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-205.

1973 Ed., § 28:3-204.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) is based on subsection (1) of former Section 3-204. It states the test of a special indorsement to be whether the indorsement identifies a person to whom the instrument is payable. Section 3-110 states rules for identifying the payee of an instrument. Section 3-205(a) incorporates the principles stated in Section 3-110 in identifying an indorsee. The language of Section 3-110 refers to language used by the issuer of the instrument. When that section is used with respect to an indorsement, Section 3-110 must be read as referring to the language used by the indorser.

2. Subsection (b) is based on subsection (2) of former Section 3-204. An indorsement made by the holder is either a special or blank indorsement. If the indorsement is made by a holder and is not a special indorsement, it is a blank indorsement. For example, the holder of an instrument, intending to make a special indorsement, writes the words "Pay to the order of" without completing the indorsement by writing the name of the indorsee. The holder's signature appears under the quoted words. The indorsement is not a special indorsement because it does not identify a person to whom it makes the instrument payable. Since it is not a

special indorsement it is a blank indorsement and the instrument is payable to bearer. The result is analogous to that of a check in which the name of the payee is left blank by the drawer. In that case the check is payable to bearer. See the last paragraphs of Comment 2 to Section 3-115.

A blank indorsement is usually the signature of the indorser on the back of the instrument without other words. Subsection (c) is based on subsection (3) of former Section 3-204. A "restrictive indorsement" described in Section 3-206 can be either a blank indorsement or a special indorsement. "Pay to T, in trust for B" is a restrictive indorsement. It is also a special indorsement because it identifies T as the person to whom the instrument is payable. "For deposit only" followed by the signature of the payee of a check is a restrictive indorsement. It is also a blank indorsement because it does not identify the person to whom the instrument is payable.

3. The only effect of an "anomalous indorsement," defined in subsection (d), is to make the signer liable on the instrument as an indorser. Such an indorsement is normally made by an accommodation party. Section 3-419.

§ 28:3-206. Restrictive indorsement.

(a) An indorsement limiting payment to a particular person or otherwise prohibiting further transfer or negotiation of the instrument is not effective to prevent further transfer or negotiation of the instrument.

(b) An indorsement stating a condition to the right of the indorsee to receive payment does not affect the right of the indorsee to enforce the instrument. A person paying the instrument or taking it for value or collection may disregard

the condition, and the rights and liabilities of that person are not affected by whether the condition has been fulfilled.

(c) If an instrument bears an indorsement (i) described in section 28:4-201(b), or (ii) in blank or to a particular bank using the words “for deposit”, “for collection”, or other words indicating a purpose of having the instrument collected by a bank for the indorser or for a particular account, the following rules apply:

(1) A person, other than a bank, who purchases the instrument when so indorsed converts the instrument unless the amount paid for the instrument is received by the indorser or applied consistently with the indorsement.

(2) A depositary bank that purchases the instrument or takes it for collection when so indorsed converts the instrument unless the amount paid by the bank with respect to the instrument is received by the indorser or applied consistently with the indorsement.

(3) A payor bank that is also the depositary bank or that takes the instrument for immediate payment over the counter from a person other than a collecting bank converts the instrument unless the proceeds of the instrument are received by the indorser or applied consistently with the indorsement.

(4) Except as otherwise provided in paragraph (3) of this subsection, a payor bank or intermediary bank may disregard the indorsement and is not liable if the proceeds of the instrument are not received by the indorser or applied consistently with the indorsement.

(d) Except for an indorsement covered by subsection (c) of this section, if an instrument bears an indorsement using words to the effect that payment is to be made to the indorsee as agent, trustee, or other fiduciary for the benefit of the indorser or another person, the following rules apply:

(1) Unless there is notice of breach of fiduciary duty as provided in section 28:3-307, a person who purchases the instrument from the indorsee or takes the instrument from the indorsee for collection or payment may pay the proceeds of payment or the value given for the instrument to the indorsee without regard to whether the indorsee violates a fiduciary duty to the indorser.

(2) A subsequent transferee of the instrument or person who pays the instrument is neither given notice nor otherwise affected by the restriction in the indorsement unless the transferee or payor knows that the fiduciary dealt with the instrument or its proceeds in breach of fiduciary duty.

(e) The presence on an instrument of an indorsement to which this section applies does not prevent a purchaser of the instrument from becoming a holder in due course of the instrument unless the purchaser is a converter under subsection (c) of this section or has notice or knowledge of breach of fiduciary duty as stated in subsection (d) of this section.

(f) In an action to enforce the obligation of a party to pay the instrument, the obligor has a defense if payment would violate an indorsement to which this section applies and the payment is not permitted by this section.

(Dec. 30, 1963, 77 Stat. 679, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in § 28:3-102.

Prior Codifications. — 1981 Ed., § 28:3-206.

1973 Ed., § 28:3-205.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section replaces former Sections 3-205 and 3-206 and clarifies the law of restrictive indorsements.

2. Subsection (a) provides that an indorsement that purports to limit further transfer or negotiation is ineffective to prevent further transfer or negotiation. If a payee indorses "Pay A only," A may negotiate the instrument to subsequent holders who may ignore the restriction on the indorsement. Subsection (b) provides that an indorsement that states a condition to the right of a holder to receive payment is ineffective to condition payment. Thus if a payee indorses "Pay A if A ships goods complying with our contract," the right of A to enforce the instrument is not affected by the condition. In the case of a note, the obligation of the maker to pay A is not affected by the indorsement. In the case of a check, the drawee can pay A without regard to the condition, and if the check is dishonored the drawer is liable to pay A. If the check was negotiated by the payee to A in return for a promise to perform a contract and the promise was not kept, the payee would have a defense or counterclaim against A if the check were dishonored and A sued the payee as indorser, but the payee would have that defense or counterclaim whether or not the condition to the right of A was expressed in the indorsement. Former Section 3-206 treated a conditional indorsement like indorsements for deposit or collection. In revised Article 3, Section 3-206(b) rejects that approach and makes the conditional indorsement ineffective with respect to parties other than the indorser and indorsee. Since the indorsements referred to in subsections (a) and (b) are not effective as restrictive indorsements, they are no longer described as restrictive indorsements.

3. The great majority of restrictive indorsements are those that fall within subsection (c) which continues previous law. The depositary bank or the payor bank, if it takes the check for immediate payment over the counter, must act consistently with the indorsement, but an in-

termediary bank or payor bank that takes the check from a collecting bank is not affected by the indorsement. Any other person is also bound by the indorsement. For example, suppose a check is payable to X, who indorses in blank but writes above the signature the words "For deposit only." The check is stolen and is cashed at a grocery store by the thief. The grocery store indorses the check and deposits it in Depositary Bank. The account of the grocery store is credited and the check is forwarded to Payor Bank which pays the check. Under subsection (c), the grocery store and Depositary Bank are converters of the check because X did not receive the amount paid for the check. Payor Bank and any intermediary bank in the collection process are not liable to X. This Article does not displace the law of waiver as it may apply to restrictive indorsements. The circumstances under which a restrictive indorsement may be waived by the person who made it is not determined by this Article.

4. Subsection (d) replaces subsection (4) of former Section 3-206. Suppose Payee indorses a check "Pay to T in trust for B." T indorses in blank and delivers it to (a) Holder for value; (b) Depositary Bank for collection; or (c) Payor Bank for payment. In each case these takers can safely pay T so long as they have no notice under Section 3-307 of any breach of fiduciary duty that T may be committing. For example, under subsection (b)* of Section 3-307 these takers have notice of a breach of trust if the check was taken in any transaction known by the taker to be for T's personal benefit. Subsequent transferees of the check from Holder or Depositary Bank are not affected by the restriction unless they have knowledge that T dealt with the check in breach of trust. * Previous incorrect reference corrected by Permanent Editorial Board action November 1992.

5. Subsection (f) allows a restrictive indorsement to be used as a defense by a person obliged to pay the instrument if that person would be liable for paying in violation of the indorsement.

§ 28:3-207. Reacquisition.

Reacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise. A former holder who reacquires the instrument may cancel indorsements made after the reacquirer first became a holder of the instrument. If the cancellation causes the instrument to be payable to the

reacquirer or to bearer, the reacquirer may negotiate the instrument. An indorser whose indorsement is canceled is discharged, and the discharge is effective against any subsequent holder.

(Dec. 30, 1963, 77 Stat. 679, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-207.

1973 Ed., § 28:3-208.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

Section 3-207 restates former Section 3-208. Reacquisition refers to cases in which a former holder reacquires the instrument either by negotiation from the present holder or by a transfer other than negotiation. If the reacquisition is by negotiation, the former holder reacquires the status of holder. Although Section 3-207 allows the holder to cancel all indorsements made after the holder first acquired holder status, cancellation is not necessary. Status of holder is not affected whether or not cancellation is made. But if the reacquisition is not the result of negotiation the former holder can obtain holder status only by striking the former holder's indorsement and any subsequent indorsements. The latter case is an exception to the general rule that if an instrument is payable to an identified person, the indorsement of that person is necessary to allow a subsequent transferee to obtain the status of holder. Reacquisition without indorsement by the person to whom the instrument is payable is illustrated by two examples:

Case #1. X, a former holder, buys the instrument from Y, the present holder. Y delivers the instrument to X but fails to indorse it. Negotiation does not occur because the transfer of possession did not result in X's becoming holder. Section 3-201(a). The instrument by its terms is payable to Y, not to X. But X can obtain the status of holder by striking X's indorsement

and all subsequent indorsements. When these indorsements are struck, the instrument by its terms is payable either to X or to bearer, depending upon how X originally became holder. In either case X becomes holder. Section 1-201(20).

Case #2. X, the holder of an instrument payable to X, negotiates it to Y by special indorsement. The negotiation is part of an underlying transaction between X and Y. The underlying transaction is rescinded by agreement of X and Y, and Y returns the instrument without Y's indorsement. The analysis is the same as that in Case #1. X can obtain holder status by canceling X's indorsement to Y.

In Case #1 and Case #2, X acquired ownership of the instrument after reacquisition, but X's title was clouded because the instrument by its terms was not payable to X. Normally, X can remedy the problem by obtaining Y's indorsement, but in some cases X may not be able to conveniently obtain that indorsement. Section 3-207 is a rule of convenience which relieves X of the burden of obtaining an indorsement that serves no substantive purpose. The effect of cancellation of any indorsement under Section 3-207 is to nullify it. Thus, the person whose indorsement is canceled is relieved of indorser's liability. Since cancellation is notice of discharge, discharge is effective even with respect to the rights of a holder in due course. Sections 3-601 and 3-604.

Part 3. Enforcement of Instruments.

§ 28:3-301. Person entitled to enforce instrument.

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 28:3-309 or 28:3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

(Dec. 30, 1963, 77 Stat. 680, Pub.-L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in §§ 28:3-103, 28:3-308, and 28:4-104.

Prior Codifications. — 1981 Ed., § 28:3-301.

1973 Ed., § 28:3-301.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

This section replaces former Section 3-301 that stated the rights of a holder. The rights stated in former Section 3-301 to transfer, negotiate, enforce, or discharge an instrument are stated in other sections of Article 3. In revised Article 3, Section 3-301 defines “person entitled to enforce” an instrument. The definition recognizes that enforcement is not limited to holders. The quoted phrase includes a person enforcing

a lost or stolen instrument. Section 3-309. It also includes a person in possession of an instrument who is not a holder. A nonholder in possession of an instrument includes a person that acquired rights of a holder by subrogation or under Section 3-203(a). It also includes any other person who under applicable law is a successor to the holder or otherwise acquires the holder’s rights.

§ 28:3-302. Holder in due course.

(a) Subject to subsection (c) of this section and section 28:3-106(d), “holder in due course” means the holder of an instrument if:

(1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in section 28:3-306, and (vi) without notice that any party has a defense or claim in recoupment described in section 28:3-305(a).

(b) Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense under subsection (a) of this section, but discharge is effective against a person who became a holder in due course with notice of the discharge. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument.

(c) Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken (i) by legal process or by purchase in an execution, bankruptcy, or creditor’s sale or similar proceeding, (ii) by purchase as part of a bulk transaction not in ordinary course of business of the transferor, or (iii) as the successor in interest to an estate or other organization.

(d) If, under section 28:3-303(a)(1), the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of

the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance.

(e) If the person entitled to enforce an instrument has only a security interest in the instrument and the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument which, at the time of enforcement of the instrument, does not exceed the amount of the unpaid obligation secured.

(f) To be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it.

(g) This section is subject to any law limiting status as a holder in due course in particular classes of transactions.

(Dec. 30, 1963, 77 Stat. 680, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in §§ 28:3-102, 28:3-103, 28:4-104, 28:4-205, 28:4-211, 28:5-103, 28:5-114, 28:9-105, 28:9-309, and 32-404.

Prior Codifications. — 1981 Ed., § 28:3-302.

1973 Ed., § 28:3-302.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a)(1) is a return to the N.I.L. rule that the taker of an irregular or incomplete instrument is not a person the law should protect against defenses of the obligor or claims of prior owners. This reflects a policy choice against extending the holder in due course doctrine to an instrument that is so incomplete or irregular “as to call into question its authenticity.” The term “authenticity” is used to make it clear that the irregularity or incompleteness must indicate that the instrument may not be what it purports to be. Persons who purchase or pay such instruments should do so at their own risk. Under subsection (1) of former Section 3-304, irregularity or incompleteness gave a purchaser notice of a claim or defense. But it was not clear from that provision whether the claim or defense had to be related to the irregularity or incomplete aspect of the instrument. This ambiguity is not present in subsection (a)(1).

2. Subsection (a)(2) restates subsection (1) of former Section 3-302. Section 3-305(a) makes a distinction between defenses to the obligation to pay an instrument and claims in recoupment by the maker or drawer that may be asserted to reduce the amount payable on the instrument. Because of this distinction, which was not made in former Article 3, the reference in subsection (a)(2)(vi) is to both a defense and a claim in recoupment. Notice of forgery or alteration is

stated separately because forgery and alteration are not technically defenses under subsection (a) of Section 3-305.

3. Discharge is also separately treated in the first sentence of subsection (b). Except for discharge in an insolvency proceeding, which is specifically stated to be a real defense in Section 3-305(a)(1), discharge is not expressed in Article 3 as a defense and is not included in Section 3-305(a)(2). Discharge is effective against anybody except a person having rights of a holder in due course who took the instrument without notice of the discharge. Notice of discharge does not disqualify a person from becoming a holder in due course. For example, a check certified after it is negotiated by the payee may subsequently be negotiated to a holder. If the holder had notice that the certification occurred after negotiation by the payee, the holder necessarily had notice of the discharge of the payee as indorser. Section 3-415(d). Notice of that discharge does not prevent the holder from becoming a holder in due course, but the discharge is effective against the holder. Section 3-601(b). Notice of a defense under Section 3-305(a)(1) of a maker, drawer or acceptor based on a bankruptcy discharge is different. There is no reason to give holder in due course status to a person with notice of that defense. The second sentence of subsection (b) is from former Section 3-304(5).

4. Professor Britton in his treatise *Bills and Notes* 309 (1961) stated: "A substantial number of decisions before the [N.I.L.] indicates that at common law there was nothing in the position of the payee as such which made it impossible for him to be a holder in due course." The courts were divided, however, about whether the payee of an instrument could be a holder in due course under the N.I.L. Some courts read N.I.L. s 52(4) to mean that a person could be a holder in due course only if the instrument was "negotiated" to that person. N.I.L. s 30 stated that "an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof." Normally, an instrument is "issued" to the payee; it is not transferred to the payee. N.I.L. s 191 defined "issue" as the "first delivery of the instrument * * * to a person who takes it as a holder." Thus, some courts concluded that the payee never could be a holder in due course. Other courts concluded that there was no evidence that the N.I.L. was intended to change the common law rule that the payee could be a holder in due course. Professor Britton states on p. 318: "The typical situations which raise the [issue] are those where the defense of a maker is interposed because of fraud by a [maker who is] principal debtor * * * against a surety co-maker, or where the defense of fraud by a purchasing remitter is interposed by the drawer of the instrument against the good faith purchasing payee."

Former Section 3-302(2) stated: "A payee may be a holder in due course." This provision was intended to resolve the split of authority under the N.I.L. It made clear that there was no intent to change the common-law rule that allowed a payee to become a holder in due course. See Comment 2 to former Section 3-302. But there was no need to put subsection (2) in former Section 3-302 because the split in authority under the N.I.L. was caused by the particular wording of N.I.L. s 52(4). The troublesome language in that section was not repeated in former Article 3 nor is it repeated in revised Article 3. Former Section 3-302(2) has been omitted in revised Article 3 because it is surplusage and may be misleading. The payee of an instrument can be a holder in due course, but use of the holder-in-due-course doctrine by the payee of an instrument is not the normal situation.

The primary importance of the concept of holder in due course is with respect to assertion of defenses or claims in recoupment (Section 3-305) and of claims to the instrument (Section 3-306). The holder-in-due-course doctrine assumes the following case as typical. Obligor issues a note or check to Oblige. Obligor is the maker of the note or drawer of the check. Oblige is the payee. Obligor has some defense to Obligor's obligation to pay the instrument.

For example, Obligor issued the instrument for goods that Oblige promised to deliver. Oblige never delivered the goods. The failure of Oblige to deliver the goods is a defense. Section 3-303(b). Although Obligor has a defense against Oblige, if the instrument is negotiated to Holder and the requirements of subsection (a) are met, Holder may enforce the instrument against Obligor free of the defense. Section 3-305(b). In the typical case the holder in due course is not the payee of the instrument. Rather, the holder in due course is an immediate or remote transferee of the payee. If Obligor in our example is the only obligor on the check or note, the holder-in-due-course doctrine is irrelevant in determining rights between Obligor and Oblige with respect to the instrument.

But in a small percentage of cases it is appropriate to allow the payee of an instrument to assert rights as a holder in due course. The cases are like those referred to in the quotation from Professor Britton referred to above, or other cases in which conduct of some third party is the basis of the defense of the issuer of the instrument. The following are examples:

Case #1. Buyer pays for goods bought from Seller by giving to Seller a cashier's check bought from Bank. Bank has a defense to its obligation to pay the check because Buyer bought the check from Bank with a check known to be drawn on an account with insufficient funds to cover the check. If Bank issued the check to Buyer as payee and Buyer indorsed it over to Seller, it is clear that Seller can be a holder in due course taking free of the defense if Seller had no notice of the defense. Seller is a transferee of the check. There is no good reason why Seller's position should be any different if Bank drew the check to the order of Seller as payee. In that case, when Buyer took delivery of the check from Bank, Buyer became the owner of the check even though Buyer was not the holder. Buyer was a remitter. Section 3-103(a)(11). At that point nobody was the holder. When Buyer delivered the check to Seller, ownership of the check was transferred to Seller who also became the holder. This is a negotiation.

Section 3-201. The rights of Seller should not be affected by the fact that in one case the negotiation to Seller was by a holder and in the other case the negotiation was by a remitter. Moreover, it should be irrelevant whether Bank delivered the check to Buyer and Buyer delivered it to Seller or whether Bank delivered it directly to Seller. In either case Seller can be a holder in due course that takes free of Bank's defense.

Case #2. X fraudulently induces Y to join X in a spurious venture to purchase a business. The purchase is to be financed by a bank loan for part of the price. Bank lends money to X and Y by deposit in a joint account of X and Y who sign

a note payable to Bank for the amount of the loan. X then withdraws the money from the joint account and absconds. Bank acted in good faith and without notice of the fraud of X against Y. Bank is payee of the note executed by Y, but its right to enforce the note against Y should not be affected by the fact that Y was induced to execute the note by the fraud of X. Bank can be a holder in due course that takes free of the defense of Y. Case #2 is similar to Case #1. In each case the payee of the instrument has given value to the person committing the fraud in exchange for the obligation of the person against whom the fraud was committed. In each case the payee was not party to the fraud and had no notice of it.

Suppose in Case #2 that the note does not meet the requirements of Section 3-104(a) and thus is not a negotiable instrument covered by Article 3. In that case, Bank cannot be a holder in due course but the result should be the same. Bank's rights are determined by general principles of contract law. Restatement Second, Contracts s 164(2) governs the case. If Y is induced to enter into a contract with Bank by a fraudulent misrepresentation by X, the contract is voidable by Y unless Bank "in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction." Comment e to s 164(2) states:

"This is the same principle that protects an innocent person who purchases goods or commercial paper in good faith, without notice and for value from one who obtained them from the original owner by a misrepresentation. See Uniform Commercial Code ss 2-403(1), 3-305. In the cases that fall within [s 164(2)], however, the innocent person deals directly with the recipient of the misrepresentation, which is made by one not a party to the contract."

The same result follows in Case #2 if Y had been induced to sign the note as an accommodation party (Section 3-419). If Y signs as co-maker of a note for the benefit of X, Y is a surety with respect to the obligation of X to pay the note but is liable as maker of the note to pay Bank. Section 3-419(b). If Bank is a holder in due course, the fraud of X cannot be asserted against Bank under Section 3-305(b). But the result is the same without resort to holder-in-due-course doctrine. If the note is not a negotiable instrument governed by Article 3, general rules of suretyship apply. Restatement, Security s 119 states that the surety (Y) cannot assert a defense against the creditor (Bank) based on the fraud of the principal (X) if the creditor "without knowledge of the fraud * * * extended credit to the principal on the security of the surety's promise * * *." The underlying principle of s 119 is the same as that of s 164(2) of Restatement Second, Contracts.

Case #3. Corporation draws a check payable to Bank. The check is given to an officer of

Corporation who is instructed to deliver it to Bank in payment of a debt owed by Corporation to Bank. Instead, the officer, intending to defraud Corporation, delivers the check to Bank in payment of the officer's personal debt, or the check is delivered to Bank for deposit to the officer's personal account. If Bank obtains payment of the check, Bank has received funds of Corporation which have been used for the personal benefit of the officer. Corporation in this case will assert a claim to the proceeds of the check against Bank. If Bank was a holder in due course of the check it took the check free of Corporation's claim. Section 3-306. The issue in this case is whether Bank had notice of the claim when it took the check. If Bank knew that the officer was a fiduciary with respect to the check, the issue is governed by Section 3-307.

Case #4. Employer, who owed money to X, signed a blank check and delivered it to Secretary with instructions to complete the check by typing in X's name and the amount owed to X. Secretary fraudulently completed the check by typing in the name of Y, a creditor to whom Secretary owed money. Secretary then delivered the check to Y in payment of Secretary's debt. Y obtained payment of the check. This case is similar to Case #3. Since Secretary was authorized to complete the check, Employer is bound by Secretary's act in making the check payable to Y. The drawee bank properly paid the check. Y received funds of Employer which were used for the personal benefit of Secretary. Employer asserts a claim to these funds against Y. If Y is a holder in due course, Y takes free of the claim. Whether Y is a holder in due course depends upon whether Y had notice of Employer's claim.

5. Subsection (c) is based on former Section 3-302(3). Like former Section 3-302(3), subsection (c) is intended to state existing case law. It covers a few situations in which the purchaser takes an instrument under unusual circumstances. The purchaser is treated as a successor in interest to the prior holder and can acquire no better rights. But if the prior holder was a holder in due course, the purchaser obtains rights of a holder in due course.

Subsection (c) applies to a purchaser in an execution sale or sale in bankruptcy. It applies equally to an attaching creditor or any other person who acquires the instrument by legal process or to a representative, such as an executor, administrator, receiver or assignee for the benefit of creditors, who takes the instrument as part of an estate. Subsection (c) applies to bulk purchases lying outside of the ordinary course of business of the seller. For example, it applies to the purchase by one bank of a substantial part of the paper held by another bank which is threatened with insolvency and seeking to liquidate its assets. Subsection (c) would also apply when a new partnership takes over

for value all of the assets of an old one after a new member has entered the firm, or to a reorganized or consolidated corporation taking over the assets of a predecessor.

In the absence of controlling state law to the contrary, subsection (c) applies to a sale by a state bank commissioner of the assets of an insolvent bank. However, subsection (c) may be preempted by federal law if the Federal Deposit Insurance Corporation takes over an insolvent bank. Under the governing federal law, the FDIC and similar financial institution insurers are given holder in due course status and that status is also acquired by their assignees under the shelter doctrine.

6. Subsections (d) and (e) clarify two matters not specifically addressed by former Article 3:

Case #5. Payee negotiates a \$1,000 note to Holder who agrees to pay \$900 for it. After paying \$500, Holder learns that Payee defrauded Maker in the transaction giving rise to the note. Under subsection (d) Holder may assert rights as a holder in due course to the extent of \$555.55 ($\$500 / \$900 = .555 \times \$1,000 = \555.55). This formula rewards Holder with a ratable portion of the bargained for profit.

Case #6. Payee negotiates a note of Maker for \$1,000 to Holder as security for payment of

Payee's debt to Holder of \$600. Maker has a defense which is good against Payee but of which Holder has no notice. Subsection (e) applies. Holder may assert rights as a holder in due course only to the extent of \$600. Payee does not get the benefit of the holder-in-due-course status of Holder. With respect to \$400 of the note, Maker may assert any rights that Maker has against Payee. A different result follows if the payee of a note negotiated it to a person who took it as a holder in due course and that person pledged the note as security for a debt. Because the defense cannot be asserted against the pledgor, the pledgee can assert rights as a holder in due course for the full amount of the note for the benefit of both the pledgor and the pledgee.

7. There is a large body of state statutory and case law restricting the use of the holder in due course doctrine in consumer transactions as well as some business transactions that raise similar issues. Subsection (g) subordinates Article 3 to that law and any other similar law that may evolve in the future. Section 3-106(d) also relates to statutory or administrative law intended to restrict use of the holder-in-due-course doctrine. See Comment 3 to Section 3-106.

CASE NOTES

ANALYSIS

Burden of proof.

Evidence.

Fact questions.

Good faith.

In general.

Indorsement.

Knowledge or notice of claim or defect.

Summary judgment.

Burden of proof.

Burden of proof rests on person claiming to be immune from certain defenses to note on ground that he is a holder in due course even if entire transaction occurred prior to effective date of the UCC, and to sustain such burden he must demonstrate that he has taken the instrument for value, in good faith and without notice of any defense against it on the part of any person. D.C. Code §§ 28:1-101 et seq., 28:3-302, 28:3-307(3). *Slaughter v. Jefferson Federal Sav. & Loan Asso.*, 361 F. Supp. 590, 1973 U.S. Dist. LEXIS 12565 (1973), reversed by 538 F.2d 397, 176 U.S. App. D.C. 49, 1976 U.S. App. LEXIS 8449, 1976 U.S. App. LEXIS 11596, 19 U.C.C. Rep. Serv. (CBC) 171, 19 U.C.C. Rep. Serv. (CBC) 534 (1976).

Evidence.

Evidence established that holder of first note, which had been given for allegedly fraudulent

painting, obtained note from holder in due course, so that there could be a recovery on note notwithstanding alleged fraud. D.C. Code 1961, § 28-408. *Blow v. Ammerman*, 350 F.2d 729, 1965 U.S. App. LEXIS 4920 (C.A.D.C. 1965).

Evidence, in maker's action to cancel promissory note and deed of trust, which consisted of unsubstantiated testimony of maker that she had spent \$2,500 in medical fees, \$300 for medicines and had lost \$500 in wages, was insufficient to substantiate trial court's awards. *Biggs v. Stewart*, 361 A.2d 159, 1976 D.C. App. LEXIS 311 (1976).

Fact questions.

Question whether holder of second note, which had been given for allegedly fraudulent painting, was holder in due course, in these circumstances so as to be entitled to recover on note was issue of fact. D.C. Code 1961, § 28-409. *Blow v. Ammerman*, 350 F.2d 729, 1965 U.S. App. LEXIS 4920 (C.A.D.C. 1965).

Good faith.

Courts deny holder in due course status to noteholder who was involved in or intimately connected with sale or transaction which generated note; having taken part in original transaction with borrower, noteholder cannot thereafter stand aloof as holder in due course and in good faith. D.C. Code §§ 28:1-201(19, 25), 28:3-302, 28:3-307(3). *Slaughter v. Jeffer-*

son Federal Sav. & Loan Asso., 538 F.2d 397, 1976 U.S. App. LEXIS 8449 (C.A.D.C. 1976).

Knowledge of collateral fraudulent transactions of negotiator of note is circumstance bearing on whether particular note was taken in bad faith. D.C. Code 1961, § 28-409. *Blow v. Ammerman*, 350 F.2d 729, 1965 U.S. App. LEXIS 4920 (C.A.D.C. 1965).

Willful ignorance of relevant known facts can be indicative of bad faith in acquiring note. D.C. Code 1961, § 28-409. *Blow v. Ammerman*, 350 F.2d 729, 1965 U.S. App. LEXIS 4920 (C.A.D.C. 1965).

Where associations, which refinanced mortgages so as to finance unconscionable home improvement contracts, knew that many of homeowners were of limited intelligence and were being refinanced out of notes with lower interest rates of monthly payments and where such associations were concerned solely with sufficiency of their security and did not inquire into bona fides and contract requirements and settlements adjustments, associations had not acted in good faith and thus were not "holders in due course" of homeowners' first trust notes and were not immune from defenses of fraud in the inducement, unconscionable dealing and usury. D.C. Code §§ 28:1-201(19, 25), 28:3-302, 28:3-302(2), 28:3-306, 28:3-307(3). *Slaughter v. Jefferson Federal Sav. & Loan Asso.*, 361 F. Supp. 590, 1973 U.S. Dist. LEXIS 12565 (1973), reversed by 538 F.2d 397, 176 U.S. App. D.C. 49, 1976 U.S. App. LEXIS 8449, 1976 U.S. App. LEXIS 11596, 19 U.C.C. Rep. Serv. (CBC) 171, 19 U.C.C. Rep. Serv. (CBC) 534 (1976).

Willful ignorance or failure by person in possession of a note to inquire may, for purposes of determining whether he is a holder in due course, negate good faith. D.C. Code §§ 28:1-101 et seq., 28:1-201(19), 28:3-302. *Slaughter v. Jefferson Federal Sav. & Loan Asso.*, 361 F. Supp. 590, 1973 U.S. Dist. LEXIS 12565 (1973), reversed by 538 F.2d 397, 176 U.S. App. D.C. 49, 1976 U.S. App. LEXIS 8449, 1976 U.S. App. LEXIS 11596, 19 U.C.C. Rep. Serv. (CBC) 171, 19 U.C.C. Rep. Serv. (CBC) 534 (1976).

Holder establishes good faith, as required for holder in due course status, by testifying that he took instrument in complete innocence and by disclosing circumstances of transfer. D.C. Code 1981, § 28:3-302(a)(2)(ii). *Big Builders v. Israel*, 709 A.2d 74, 1998 D.C. App. LEXIS 54 (1998).

Working arrangement between conditional seller of television set and assignee of purchasers' note was tainted such that it bore a "badge of fraud" and supported trial judge's ruling in suit by assignee on note that note was usurious and that assignee could not be given status of holder in due course. D.C. Code §§ 17-305(a), 17-306, 28-3303. *Universal Acceptance Corp. v.*

Marzullo, 260 A.2d 90, 1969 D.C. App. LEXIS 371 (App. 1969).

In general.

There is no rule of thumb to be automatically applied in determining whether holder of note holds it in due course; each case must rest on its own facts. D.C. Code §§ 28:1-201(19, 25), 28:3-302, 28:3-307(3). *Slaughter v. Jefferson Federal Sav. & Loan Asso.*, 538 F.2d 397, 1976 U.S. App. LEXIS 8449 (C.A.D.C. 1976).

Where homeowner's notes resulted from financing of fraudulent, unconscionable home improvement contracts, notes held by federal savings and loan associations, which were not holders in due course would be cancelled and each homeowner would be treated as having made "new loan" which was for an amount equal to true value received and which was at interest rates and for period stated in his original loan. D.C. Code §§ 28:1-101 et seq., 28:1-201(19, 25), 28:3-302, 28:3-302(2), 28:3-306, 28:3-307(3). *Slaughter v. Jefferson Federal Sav. & Loan Asso.*, 361 F. Supp. 590, 1973 U.S. Dist. LEXIS 12565 (1973), reversed by 538 F.2d 397, 176 U.S. App. D.C. 49, 1976 U.S. App. LEXIS 8449, 1976 U.S. App. LEXIS 11596, 19 U.C.C. Rep. Serv. (CBC) 171, 19 U.C.C. Rep. Serv. (CBC) 534 (1976).

Where finance company bought second trust notes, which arose from corporation's fraudulent home improvement scheme, from broker, who was not an agent of company, paid value for notes, acted in good faith without notice of any defenses to notes and bought such notes only for a short period and stopped when it learned of corporation's undesirable practices, company was a "holder in due course" and thus was free of claims of fraud in the inducement, unconscionability and usury. D.C. Code §§ 28:1-101 et seq., 28:1-201(19, 25), 28:3-302, 28:3-302(2), 28:3-306, 28:3-307(3). *Slaughter v. Jefferson Federal Sav. & Loan Asso.*, 361 F. Supp. 590, 1973 U.S. Dist. LEXIS 12565 (1973), reversed by 538 F.2d 397, 176 U.S. App. D.C. 49, 1976 U.S. App. LEXIS 8449, 1976 U.S. App. LEXIS 11596, 19 U.C.C. Rep. Serv. (CBC) 171, 19 U.C.C. Rep. Serv. (CBC) 534 (1976).

Bank could exercise right of setoff under joint tenancy certificate of deposit agreement even after depositor delivered letter to bank attempting to change ownership of account to joint tenancy with her two grandchildren instead of her son; certificate by its own terms did not mature for another three months, and rights in the certificate could not be transferred nor funds withdrawn before maturity, without bank's consent. *Isaac v. First Nat'l Bank*, 647 A.2d 1159, 1994 D.C. App. LEXIS 167 (1994).

Status of holders in due course may only be defeated by one of real defenses enunciated in the Uniform Commercial Code. D.C. Code

§ 28:3-305(2). *Biggs v. Stewart*, 361 A.2d 159, 1976 D.C. App. LEXIS 311 (1976).

Since bank, to which payee endorsed and delivered note, was a holder in due course, the bank which sued maker and payee, took note free of maker's defenses asserted against the payee, including defense of want of consideration. D.C. Code §§ 28:3-302, 28:3-305. *Millman v. State Nat'l Bank*, 323 A.2d 723, 1974 D.C. App. LEXIS 262 (1974).

Defense of usury attacks original transaction as not bona fide and denies assignee of note the status of holder in due course. D.C. Code §§ 17-305(a), 17-306, 28-3303. *Universal Acceptance Corp. v. Marzullo*, 260 A.2d 90, 1969 D.C. App. LEXIS 371 (App. 1969).

Indorsement.

Physical holder of unendorsed note drawn to order is not a "holder in due course." D.C. Code 1981, § 28:3-302. *Big Builders v. Israel*, 709 A.2d 74, 1998 D.C. App. LEXIS 54 (1998).

Knowledge or notice of claim or defect.

Findings of district court, in civil action brought against lending institutions by victims of home improvement fraud, that even though lenders lacked actual notice of fraud involved in transactions in question, such institutions had reason to know of misrepresentation and unconscionable dealing, and were thus on notice of victim's defenses to note and were not entitled to status of holders in due course, were clearly erroneous and would be reversed. D.C. Code §§ 28:1-201(19, 25), 28:3-302, 28:3-307(3). *Slaughter v. Jefferson Federal Sav. & Loan Asso.*, 538 F.2d 397, 1976 U.S. App. LEXIS 8449 (C.A.D.C. 1976).

Mortgagors sufficiently alleged that mortgagee's assignee was a holder in due course, as required under District of Columbia law for mortgagors to assert claims against assignee in connection with their refinance loan, where they alleged that assignee knew or should have known that they could not afford the loan and that there was no reasonable probability that they could pay it. *Carroll v. Fremont Inv. & Loan*, 636 F.Supp.2d 41, 2009 U.S. Dist. LEXIS 61645 (2009).

An order expunging a lis pendens meets the three criteria of the collateral order doctrine for appealability of interlocutory orders; the order conclusively resolves whether the lis pendens

should or should not be cancelled because nothing further in the suit can affect the validity of the notice, the order canceling the lis pendens does not address the merits of the underlying claim, and if the movant had to wait until final judgment on the underlying claim, the realty could be sold before the issue was resolved, thereby rendering the order unreviewable. *McAteer v. Lauterbach*, 908 A.2d 1168, 2006 D.C. App. LEXIS 542 (2006).

Purchaser of negotiable note secured by deed of trust was a holder of the note but not a holder in due course of underlying security, since purchaser had constructive knowledge of infirmities in chain of title due to pending lawsuit between original foreclosure escrow agent and purchasers in foreclosure, and lis pendens barred further alienation of title to the security interest. *First Maryland Financial Services Corp. v. District-Realty Title Ins. Corp.*, 548 A.2d 787, 1988 D.C. App. LEXIS 181 (1988).

Where knowledge which vice-chairman of board of bank had acquired of partnership difficulties and settlement between maker and payee of note, which was given as part of partnership settlement agreement and which payee endorsed to bank, was acquired in his individual capacity as a private accountant and not as an official or employee of the bank, such knowledge was not imputable to the bank for purpose of determining whether bank, which sought to recover on note, had received knowledge that note was conditional and subject to defenses, including defense of failure of consideration. D.C. Code §§ 28:3-302, 28:3-305. *Millman v. State Nat'l Bank*, 323 A.2d 723, 1974 D.C. App. LEXIS 262 (1974).

Summary judgment.

It was error to grant summary judgment in favor of holder of second note, which had been given for allegedly fraudulent painting sold to maker by transferor of holder, where issue was sufficient to raise a jury issue as to bad faith on part of holder of note. D.C. Code 1961, §§ 28-406, 28-409. *Blow v. Ammerman*, 350 F.2d 729, 1965 U.S. App. LEXIS 4920 (C.A.D.C. 1965).

Fact questions as to whether assignee of promissory note was a "holder in due course" precluded summary judgment in action to collect on note. D.C. Code 1981, § 28:3-302. *Big Builders v. Israel*, 709 A.2d 74, 1998 D.C. App. LEXIS 54 (1998).

§ 28:3-303. Value and consideration.

(a) An instrument is issued or transferred for value if:

- (1) The instrument is issued or transferred for a promise of performance, to the extent the promise has been performed;
- (2) The transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding;

(3) The instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due;

(4) The instrument is issued or transferred in exchange for a negotiable instrument; or

(5) The instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third party by the person taking the instrument.

(b) "Consideration" means any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed. If an instrument is issued for value as stated in subsection (a) of this section, the instrument is also issued for consideration.

(Dec. 30, 1963, 77 Stat. 680, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in §§ 28:1-201 and 28:3-103.

Prior Codifications. — 1981 Ed., § 28:3-303.

1973 Ed., § 28:3-303.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) is a restatement of former Section 3-303 and subsection (b) replaces former Section 3-408. The distinction between value and consideration in Article 3 is a very fine one. Whether an instrument is taken for value is relevant to the issue of whether a holder is a holder in due course. If an instrument is not issued for consideration the issuer has a defense to the obligation to pay the instrument. Consideration is defined in subsection (b) as "any consideration sufficient to support a simple contract." The definition of value in Section 1-201(44), which doesn't apply to Article 3, includes "any consideration sufficient to support a simple contract." Thus, outside Article 3, anything that is consideration is also value. A different rule applies in Article 3. Subsection (b) of Section 3-303 states that if an instrument is issued for value it is also issued for consideration.

Case # 1. X owes Y \$1,000. The debt is not represented by a note. Later X issues a note to Y for the debt. Under subsection (a)(3) X's note is issued for value. Under subsection (b) the note is also issued for consideration whether or not, under contract law, Y is deemed to have given consideration for the note.

Case # 2. X issues a check to Y in consideration of Y's promise to perform services in the future. Although the executory promise is consideration for issuance of the check it is value

only to the extent the promise is performed. Subsection (a)(1).

Case # 3. X issues a note to Y in consideration of Y's promise to perform services. If at the due date of the note Y's performance is not yet due, Y may enforce the note because it was issued for consideration. But if at the due date of the note, Y's performance is due and has not been performed, X has a defense. Subsection (b).

2. Subsection (a), which defines value, has primary importance in cases in which the issue is whether the holder of an instrument is a holder in due course and particularly to cases in which the issuer of the instrument has a defense to the instrument. Suppose Buyer and Seller signed a contract on April 1 for the sale of goods to be delivered on May 1. Payment of 50% of the price of the goods was due upon signing of the contract. On April 1 Buyer delivered to Seller a check in the amount due under the contract. The check was drawn by X to Buyer as payee and was indorsed to Seller. When the check was presented for payment to the drawee on April 2, it was dishonored because X had stopped payment. At that time Seller had not taken any action to perform the contract with Buyer. If X has a defense on the check, the defense can be asserted against Seller who is not a holder in due course because Seller did not give value for the check. Subsection (a)(1). The policy basis for subsection (a)(1) is that the

holder who gives an executory promise of performance will not suffer an out-of-pocket loss to the extent the executory promise is unperformed at the time the holder learns of dishonor of the instrument. When Seller took delivery of the check on April 1, Buyer's obligation to pay 50% of the price on that date was suspended, but when the check was dishonored on April 2 the obligation revived. Section 3-310(b). If payment for goods is due at or before delivery and the Buyer fails to make the payment, the Seller is excused from performing the promise to deliver the goods. Section 2-703. Thus, Seller is protected from an out-of-pocket loss even if the check is not enforceable. Holder-in-due-course status is not necessary to protect Seller.

3. Subsection (a)(2) equates value with the obtaining of a security interest or a nonjudicial lien in the instrument. The term "security interest" covers Article 9 cases in which an instrument is taken as collateral as well as bank collection cases in which a bank acquires a security interest under Section 4-210. The acquisition of a common-law or statutory banker's lien is also value under subsection (a)(2). An attaching creditor or other person who ac-

quires a lien by judicial proceedings does not give value for the purposes of subsection (a)(2).

4. Subsection (a)(3) follows former Section 3-303(b) in providing that the holder takes for value if the instrument is taken in payment of or as security for an antecedent claim, even though there is no extension of time or other concession, and whether or not the claim is due. Subsection (a)(3) applies to any claim against any person; there is no requirement that the claim arise out of contract. In particular the provision is intended to apply to an instrument given in payment of or as security for the debt of a third person, even though no concession is made in return.

5. Subsection (a)(4) and (5) restate former Section 3-303(c). They state generally recognized exceptions to the rule that an executory promise is not value. A negotiable instrument is value because it carries the possibility of negotiation to a holder in due course, after which the party who gives it is obliged to pay. The same reasoning applies to any irrevocable commitment to a third person, such as a letter of credit issued when an instrument is taken.

CASE NOTES

In general.

Whether bank, seeking to recover on note, took note in payment of an outstanding loan or as collateral for issuance of the loan was immaterial to determination whether bank was holder in due course since a holder who takes a

negotiable instrument as collateral for a loan takes for value and may thereby be a holder in due course. D.C. Code § 28:3-303(a). *Millman v. State Nat'l Bank*, 323 A.2d 723, 1974 D.C. App. LEXIS 262 (1974).

§ 28:3-304. Overdue instrument.

(a) An instrument payable on demand becomes overdue at the earliest of the following times:

- (1) On the day after the day demand for payment is duly made;
- (2) If the instrument is a check, 90 days after its date; or
- (3) If the instrument is not a check, when the instrument has been outstanding for a period of time after its date which is unreasonably long under the circumstances of the particular case in light of the nature of the instrument and usage of the trade.

(b) With respect to an instrument payable at a definite time the following rules apply:

(1) If the principal is payable in installments and a due date has not been accelerated, the instrument becomes overdue upon default under the instrument for nonpayment of an installment, and the instrument remains overdue until the default is cured.

(2) If the principal is not payable in installments and the due date has not been accelerated, the instrument becomes overdue on the day after the due date.

(3) If a due date with respect to principal has been accelerated, the instrument becomes overdue on the day after the accelerated due date.

(c) Unless the due date of principal has been accelerated, an instrument does not become overdue if there is default in payment of interest but no default in payment of principal.

(Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-304.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. To be a holder in due course, one must take without notice that an instrument is overdue. Section 3-302(a)(2)(iii). Section 3-304 replaces subsection (3) of former Section 3-304. For the sake of clarity it treats demand and time instruments separately. Subsection (a) applies to demand instruments. A check becomes stale after 90 days.

Under former Section 3-304(3)(c), a holder that took a demand note had notice that it was overdue if it was taken "more than a reasonable length time after its issue." In substitution for this test, subsection (a)(3) requires the trier of

fact to look at both the circumstances of the particular case and the nature of the instrument and trade usage. Whether a demand note is stale may vary a great deal depending on the facts of the particular case.

2. Subsections (b) and (c) cover time instruments. They follow the distinction made under former Article 3 between defaults in payment of principal and interest. In subsection (b) installment instruments and single payment instruments are treated separately. If an installment is late, the instrument is overdue until the default is cured.

§ 28:3-305. Defenses and claims in recoupment.

(a) Except as stated in subsection (b) of this section, the right to enforce the obligation of a party to pay an instrument is subject to the following:

(1) A defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;

(2) A defense of the obligor stated in another section of this article or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; and

(3) A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.

(b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1) of this section, but is not subject to defenses of the obligor stated in subsection (a)(2) of this section or claims in recoupment stated in subsection (a)(3) of this section against a person other than the holder.

(c) Except as stated in subsection (d) of this section, in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert

against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument (section 28:3-306) of another person, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the person entitled to enforce the instrument. An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument.

(d) In an action to enforce the obligation of an accommodation party to pay an instrument, the accommodation party may assert against the person entitled to enforce the instrument any defense or claim in recoupment under subsection (a) of this section that the accommodated party could assert against the person entitled to enforce the instrument, except the defenses of discharge in insolvency proceedings, infancy, and lack of legal capacity.

(Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in § 28:4-207.

Prior Codifications. — 1981 Ed., § 28:3-305.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) states the defenses to the obligation of a party to pay the instrument. Subsection (a)(1) states the “real defenses” that may be asserted against any person entitled to enforce the instrument.

Subsection (a)(1)(i) allows assertion of the defense of infancy against a holder in due course, even though the effect of the defense is to render the instrument voidable but not void. The policy is one of protection of the infant even at the expense of occasional loss to an innocent purchaser. No attempt is made to state when infancy is available as a defense or the conditions under which it may be asserted. In some jurisdictions it is held that an infant cannot rescind the transaction or set up the defense unless the holder is restored to the position held before the instrument was taken which, in the case of a holder in due course, is normally impossible. In other states an infant who has misrepresented age may be estopped to assert infancy. Such questions are left to other law, as an integral part of the policy of each state as to the protection of infants.

Subsection (a)(1)(ii) covers mental incompetence, guardianship, ultra vires acts or lack of corporate capacity to do business, or any other incapacity apart from infancy. Such incapacity is largely statutory. Its existence and effect is left to the law of each state. If under the state law the effect is to render the obligation of the instrument entirely null and void, the defense may be asserted against a holder in due course.

If the effect is merely to render the obligation voidable at the election of the obligor, the defense is cut off.

Duress, which is also covered by subsection (a)(ii), is a matter of degree. An instrument signed at the point of a gun is void, even in the hands of a holder in due course. One signed under threat to prosecute the son of the maker for theft may be merely voidable, so that the defense is cut off. Illegality is most frequently a matter of gambling or usury, but may arise in other forms under a variety of statutes. The statutes differ in their provisions and the interpretations given them. They are primarily a matter of local concern and local policy. All such matters are therefore left to the local law. If under that law the effect of the duress or the illegality is to make the obligation entirely null and void, the defense may be asserted against a holder in due course. Otherwise it is cut off.

Subsection (a)(1)(iii) refers to “real” or “essential” fraud, sometimes called fraud in the essence or fraud in the factum, as effective against a holder in due course. The common illustration is that of the maker who is tricked into signing a note in the belief that it is merely a receipt or some other document. The theory of the defense is that the signature on the instrument is ineffective because the signer did not intend to sign such an instrument at all. Under this provision the defense extends to an instrument signed with knowledge that it is a negotiable instrument, but without knowledge of its

essential terms. The test of the defense is that of excusable ignorance of the contents of the writing signed. The party must not only have been in ignorance, but must also have had no reasonable opportunity to obtain knowledge. In determining what is a reasonable opportunity all relevant factors are to be taken into account, including the intelligence, education, business experience, and ability to read or understand English of the signer. Also relevant is the nature of the representations that were made, whether the signer had good reason to rely on the representations or to have confidence in the person making them, the presence or absence of any third person who might read or explain the instrument to the signer, or any other possibility of obtaining independent information, and the apparent necessity, or lack of it, for acting without delay. Unless the misrepresentation meets this test, the defense is cut off by a holder in due course.

Subsection (a)(1)(iv) states specifically that the defense of discharge in insolvency proceedings is not cut off when the instrument is purchased by a holder in due course. "Insolvency proceedings" is defined in Section 1-201(22) and it includes bankruptcy whether or not the debtor is insolvent. Subsection (2)(e) of former Section 3-305 is omitted. The substance of that provision is stated in Section 3-601(b).

2. Subsection (a)(2) states other defenses that, pursuant to subsection (b), are cut off by a holder in due course. These defenses comprise those specifically stated in Article 3 and those based on common law contract principles. Article 3 defenses are nonissuance of the instrument, conditional issuance, and issuance for a special purpose (Section 3-105(b)); failure to countersign a traveler's check (Section 3-106(c)); modification of the obligation by a separate agreement (Section 3-117); payment that violates a restrictive indorsement (Section 3-206(f)); instruments issued without consideration or for which promised performance has not been given (Section 3-303(b)), and breach of warranty when a draft is accepted (Section 3-417(b)). The most prevalent common law defenses are fraud, misrepresentation or mistake in the issuance of the instrument. In most cases the holder in due course will be an immediate or remote transferee of the payee of the instrument. In most cases the holder-in-due-course doctrine is irrelevant if defenses are being asserted against the payee of the instrument, but in a small number of cases the payee of the instrument may be a holder in due course. Those cases are discussed in Comment 4 to Section 3-302.

Assume Buyer issues a note to Seller in payment of the price of goods that Seller fraudulently promises to deliver but which are never delivered. Seller negotiates the note to Holder

who has no notice of the fraud. If Holder is a holder in due course, Holder is not subject to Buyer's defense of fraud. But in some cases an original party to the instrument is a holder in due course. For example, Buyer fraudulently induces Bank to issue a cashier's check to the order of Seller. The check is delivered by Bank to Seller, who has no notice of the fraud. Seller can be a holder in due course and can take the check free of Bank's defense of fraud. This case is discussed as Case # 1 in Comment 4 to Section 3-302. Former Section 3-305 stated that a holder in due course takes free of defenses of "any party to the instrument with whom the holder has not dealt." The meaning of this language was not at all clear and if read literally could have produced the wrong result. In the hypothetical case, it could be argued that Seller "dealt" with Bank because Bank delivered the check to Seller. But it is clear that Seller should take free of Bank's defense against Buyer regardless of whether Seller took delivery of the check from Buyer or from Bank. The quoted language is not included in Section 3-305. It is not necessary. If Buyer issues an instrument to Seller and Buyer has a defense against Seller, that defense can obviously be asserted. Buyer and Seller are the only people involved. The holder-in-due-course doctrine has no relevance. The doctrine applies only to cases in which more than two parties are involved. Its essence is that the holder in due course does not have to suffer the consequences of a defense of the obligor on the instrument that arose from an occurrence with a third party.

3. Subsection (a)(3) is concerned with claims in recoupment which can be illustrated by the following example. Buyer issues a note to the order of Seller in exchange for a promise of Seller to deliver specified equipment. If Seller fails to deliver the equipment or delivers equipment that is rightfully rejected, Buyer has a defense to the note because the performance that was the consideration for the note was not rendered. Section 3-303(b). This defense is included in Section 3-305(a)(2). That defense can always be asserted against Seller. This result is the same as that reached under former Section 3-408.

But suppose Seller delivered the promised equipment and it was accepted by Buyer. The equipment, however, was defective. Buyer retained the equipment and incurred expenses with respect to its repair. In this case, Buyer does not have a defense under Section 3-303(b). Seller delivered the equipment and the equipment was accepted. Under Article 2, Buyer is obliged to pay the price of the equipment which is represented by the note. But Buyer may have a claim against Seller for breach of warranty. If Buyer has a warranty claim, the claim may be asserted against Seller as a counterclaim or as a claim in recoupment to reduce the amount

owing on the note. It is not relevant whether Seller is or is not a holder in due course of the note or whether Seller knew or had notice that Buyer had the warranty claim. It is obvious that holder-in-due-course doctrine cannot be used to allow Seller to cut off a warranty claim that Buyer has against Seller. Subsection (b) specifically covers this point by stating that a holder in due course is not subject to a "claim in recoupment" * * * against a person other than the holder."

Suppose Seller negotiates the note to Holder. If Holder had notice of Buyer's warranty claim at the time the note was negotiated to Holder, Holder is not a holder in due course (Section 3-302(a)(2)(iv)) and Buyer may assert the claim against Holder (Section 3-305(a)(3)) but only as a claim in recoupment, i.e. to reduce the amount owed on the note. If the warranty claim is \$1,000 and the unpaid note is \$10,000, Buyer owes \$9,000 to Holder. If the warranty claim is more than the unpaid amount of the note, Buyer owes nothing to Holder, but Buyer cannot recover the unpaid amount of the warranty claim from Holder. If Buyer had already partially paid the note, Buyer is not entitled to recover the amounts paid. The claim can be used only as an offset to amounts owing on the note. If Holder had no notice of Buyer's claim and otherwise qualifies as a holder in due course, Buyer may not assert the claim against Holder. Section 3-305(b).

The result under Section 3-305 is consistent with the result reached under former Article 3, but the rules for reaching the result are stated differently. Under former Article 3 Buyer could assert rights against Holder only if Holder was not a holder in due course, and Holder's status depended upon whether Holder had notice of a defense by Buyer. Courts have held that Holder had that notice if Holder had notice of Buyer's warranty claim. The rationale under former Article 3 was "failure of consideration." This rationale does not distinguish between cases in which the seller fails to perform and those in which the buyer accepts the performance of seller but makes a claim against the seller because the performance is faulty. The term "failure of consideration" is subject to varying interpretations and is not used in Article 3. The use of the term "claim in recoupment" in Section 3-305(a)(3) is a more precise statement of the nature of Buyer's right against Holder. The use of the term does not change the law because the treatment of a defense under subsection (a)(2) and a claim in recoupment under subsection (a)(3) is essentially the same.

Under former Article 3, case law was divided on the issue of the extent to which an obligor on a note could assert against a transferee who is not a holder in due course a debt or other claim that the obligor had against the original payee of the instrument. Some courts limited claims

to those that arose in the transaction that gave rise to the note. This is the approach taken in Section 3-305(a)(3). Other courts allowed the obligor on the note to use any debt or other claim, no matter how unrelated to the note, to offset the amount owed on the note. Under current judicial authority and non-UCC statutory law, there will be many cases in which a transferee of a note arising from a sale transaction will not qualify as a holder in due course. For example, applicable law may require the use of a note to which there cannot be a holder in due course. See Section 3-106(d) and Comment 3 to Section 3-106. It is reasonable to provide that the buyer should not be denied the right to assert claims arising out of the sale transaction. Subsection (a)(3) is based on the belief that it is not reasonable to require the transferee to bear the risk that wholly unrelated claims may also be asserted. The determination of whether a claim arose from the transaction that gave rise to the instrument is determined by law other than this Article and thus may vary as local law varies.

4. Subsection (c) concerns claims and defenses of a person other than the obligor on the instrument. It applies principally to cases in which an obligation is paid with the instrument of a third person. For example, Buyer buys goods from Seller and negotiates to Seller a cashier's check issued by Bank in payment of the price. Shortly after delivering the check to Seller, Buyer learns that Seller had defrauded Buyer in the sale transaction. Seller may enforce the check against Bank even though Seller is not a holder in due course. Bank has no defense to its obligation to pay the check and it may not assert defenses, claims in recoupment, or claims to the instrument of Buyer, except to the extent permitted by the "but" clause of the first sentence of subsection (c). Buyer may have a claim to the instrument under Section 3-306 based on a right to rescind the negotiation to Seller because of Seller's fraud. Section 3-202(b) and Comment 2 to Section 3-201. Bank cannot assert that claim unless Buyer is joined in the action in which Seller is trying to enforce payment of the check. In that case Bank may pay the amount of the check into court and the court will decide whether that amount belongs to Buyer or Seller. The last sentence of subsection (c) allows the issuer of an instrument such as a cashier's check to refuse payment in the rare case in which the issuer can prove that the instrument is a lost or stolen instrument and the person seeking enforcement does not have rights of a holder in due course.

5. Subsection (d) applies to instruments signed for accommodation (Section 3-419) and this subsection equates the obligation of the accommodation party to that of the accommodated party. The accommodation party can assert whatever defense or claim the accommo-

dated party had against the person enforcing the instrument. The only exceptions are discharge in bankruptcy, infancy and lack of capacity. The same rule does not apply to an indorsement by a holder of the instrument in negotiating the instrument. The indorser, as transferor, makes a warranty to the indorsee, as transferee, that no defense or claim in recoupment is good against the indorser. Section 3-416(a)(4). Thus, if the indorsee sues the indorser because of dishonor of the instrument, the indorser may not assert the defense or claim in recoupment of the maker or drawer against the indorsee.

Section 3-305(d) must be read in conjunction with Section 3-605, which provides rules (usually referred to as suretyship defenses) for determining when the obligation of an accommodation party is discharged, in whole or in part, because of some act or omission of a person entitled to enforce the instrument. To the extent a rule stated in Section 3-605 is inconsistent with Section 3-305(d), the Section 3-605 rule governs. For example, under Section 3-605(b), discharge under Section 3-604 of the accommodated party does not discharge the accommodation party. As explained in Comment 3 to Section 3-605, discharge of the accommodated party is normally part of a settlement under which the holder of a note accepts partial payment from an accommodated party

who is financially unable to pay the entire amount of the note. If the holder then brings an action against the accommodation party to recover the remaining unpaid amount of the note, the accommodation party cannot use Section 3-305(d) to nullify Section 3-605(b) by asserting the discharge of the accommodated party as a defense. On the other hand, suppose the accommodated party is a buyer of goods who issued the note to the seller who took the note for the buyer's obligation to pay for the goods. Suppose the buyer has a claim for breach of warranty with respect to the goods against the seller and the warranty claim may be asserted against the holder of the note. The warranty claim is a claim in recoupment. If the holder and the accommodated party reach a settlement under which the holder accepts payment less than the amount of the note in full satisfaction of the note and the warranty claim, the accommodation party could defend an action on the note by the holder by asserting the accord and satisfaction under Section 3-305(d). There is no conflict with Section 3-605(b) because that provision is not intended to apply to settlement of disputed claims. Another example of the use of Section 3-305(d) in cases in which Section 3-605 applies is stated in Comment 4 to Section 3-605. See PEB Commentary No. 11, dated February 10, 1994 [Uniform Laws Annotated, UCC, APP II, Comment 11].

CASE NOTES

ANALYSIS

Guarantors.

In general.

Knowledge of claim or defect.

Guarantors.

Creditor's alleged impairment of collateral did not release guarantor from liability where guaranty specifically waived "impairment of collateral" defense; waiver constituted consent by guarantor that release of principal debtor would not discharge guarantor. *Opton, Inc. v. FDIC*, 647 A.2d 1126, 1994 D.C. App. LEXIS 160 (1994).

Neither corporate principal's alleged mental incapacity at time he executed note, nor his alleged lack of corporate authority to executive note, was relevant to question of guarantor's liability; where underlying obligation was not void, but merely unenforceable against maker because of defense that was personal to maker, guarantor was not relieved of liability. *Opton, Inc. v. FDIC*, 647 A.2d 1126, 1994 D.C. App. LEXIS 160 (1994).

D'Oench, Duhme doctrine precluded loan guarantor's defense, in collection action brought by FDIC as receiver for insolvent lender, that, though he had signed guarantee,

he had not authorized its delivery to lender; FDIC was entitled to rely on unqualified guaranty found in lender's records, and postguarantee correspondence from lender indicating that it was still seeking unconditional guaranty could not impeach guaranty which was otherwise valid on its face. *Federal Deposit Insurance Act*, § 2[13](e), 12 U.S.C. § 1823(e). *Opton, Inc. v. FDIC*, 647 A.2d 1126, 1994 D.C. App. LEXIS 160 (1994).

In general.

Evidence established that holder of first note, which had been given for allegedly fraudulent painting, obtained note from holder in due course, so that there could be a recovery on note notwithstanding alleged fraud. *D.C. Code* 1961, § 28-408. *Blow v. Ammerman*, 350 F.2d 729, 1965 U.S. App. LEXIS 4920 (C.A.D.C. 1965).

Since bank, to which payee endorsed and delivered note, was a holder in due course, the bank which sued maker and payee, took note free of maker's defenses asserted against the payee, including defense of want of consideration. *D.C. Code* §§ 28:3-302, 28:3-305. *Millman v. State Nat'l Bank*, 323 A.2d 723, 1974 D.C. App. LEXIS 262 (1974).

Where depository bank gave customer provisional credit on check deposited with bank and

permitted customer to withdraw portion of credit before bank had discovered that drawers had stopped payment, bank was a holder in due course as to amount of provisional credit withdrawn and, in absence of applicable defenses, could recover from drawers. D.C. Code §§ 28:3-305(2), 28:4-201, 28:4-208, 28:4-209. *Falls Church Bank v. Wesley Heights Realty, Inc.*, 256 A.2d 915, 1969 D.C. App. LEXIS 312 (App. 1969).

Knowledge of claim or defect.

Where knowledge which vice-chairman of board of bank had acquired of partnership

difficulties and settlement between maker and payee of note, which was given as part of partnership settlement agreement and which payee endorsed to bank, was acquired in his individual capacity as a private accountant and not as an official or employee of the bank, such knowledge was not imputable to the bank for purpose of determining whether bank, which sought to recover on note, had received knowledge that note was conditional and subject to defenses, including defense of failure of consideration. D.C. Code §§ 28:3-302, 28:3-305. *Millman v. State Nat'l Bank*, 323 A.2d 723, 1974 D.C. App. LEXIS 262 (1974).

§ 28:3-306. Claims to an instrument.

A person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. A person having rights of a holder in due course takes free of the claim to the instrument.

(Dec. 30, 1963, 77 Stat. 681, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in §§ 28:3-302 and 28:3-602.

Prior Codifications. — 1981 Ed., § 28:3-306.

1973 Ed., §§ 28:3-305, 28:3-306.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

This section expands on the reference to "claims to" the instrument mentioned in former Sections 3-305 and 3-306. Claims covered by the section include not only claims to ownership but also any other claim of a property or possessory right. It includes the claim to a lien or the claim of a person in rightful possession of

an instrument who was wrongfully deprived of possession. Also included is a claim based on Section 3-202(b) for rescission of a negotiation of the instrument by the claimant. Claims to an instrument under Section 3-306 are different from claims in recoupment referred to in Section 3-305(a)(3).

CASE NOTES

ANALYSIS

Holder in due course.
In general.
Summary judgment.

Holder in due course.

Where finance company bought second trust notes, which arose from corporation's fraudulent home improvement scheme, from broker, who was not an agent of company, paid value for notes, acted in good faith without notice of any defenses to notes and bought such notes only for a short period and stopped when it learned of corporation's undesirable practices, company was a "holder in due course" and thus

was free of claims of fraud in the inducement, unconscionability and usury. D.C. Code §§ 28:1-101 et seq., 28:1-201(19, 25), 28:3-302, 28:3-302(2), 28:3-306, 28:3-307(3). *Slaughter v. Jefferson Federal Sav. & Loan Assn.*, 361 F. Supp. 590, 1973 U.S. Dist. LEXIS 12565 (1973), reversed by 538 F.2d 397, 176 U.S. App. D.C. 49, 1976 U.S. App. LEXIS 8449, 1976 U.S. App. LEXIS 11596, 19 U.C.C. Rep. Serv. (CBC) 171, 19 U.C.C. Rep. Serv. (CBC) 534 (1976).

In general.

Evidence established that holder of first note, which had been given for allegedly fraudulent painting, obtained note from holder in due

course, so that there could be a recovery on note notwithstanding alleged fraud. D.C. Code 1961, § 28-408. *Blow v. Ammerman*, 350 F.2d 729, 1965 U.S. App. LEXIS 4920 (C.A.D.C. 1965).

Where associations, which refinanced mortgages so as to finance unconscionable home improvement contracts, knew that many of homeowners were of limited intelligence and were being refinanced out of notes with lower interest rates of monthly payments and where such associations were concerned solely with sufficiency of their security and did not inquire into bona fides and contract requirements and settlements adjustments, associations had not acted in good faith and thus were not "holders in due course" of homeowners' first trust notes and were not immune from defenses of fraud in the inducement, unconscionable dealing and usury. D.C. Code §§ 28:1-201(19, 25), 28:3-302, 28:3-302(2), 28:3-306, 28:3-307(3). *Slaughter v. Jefferson Federal Sav. & Loan Asso.*, 361 F. Supp. 590, 1973 U.S. Dist. LEXIS 12565 (1973), reversed by 538 F.2d 397, 176 U.S. App. D.C.

49, 1976 U.S. App. LEXIS 8449, 1976 U.S. App. LEXIS 11596, 19 U.C.C. Rep. Serv. (CBC) 171, 19 U.C.C. Rep. Serv. (CBC) 534 (1976).

Where payee transferred nonnegotiable money orders, transferee, although not holder in due course, could establish case against payor, which had stopped payment on the money orders, by production of instruments and burden of proving want of consideration or other defense was upon payor. D.C. Code §§ 28:3-306, 28:3-307(2), 28:3-805. *Nation-Wide Check Corp. v. Banks*, 260 A.2d 367, 1969 D.C. App. LEXIS 369 (App. 1969).

Summary judgment.

It was error to grant summary judgment in favor of holder of second note, which had been given for allegedly fraudulent painting sold to maker by transferor of holder, where issue was sufficient to raise a jury issue as to bad faith on part of holder of note. D.C. Code 1961, §§ 28-406, 28-409. *Blow v. Ammerman*, 350 F.2d 729, 1965 U.S. App. LEXIS 4920 (C.A.D.C. 1965).

§ 28:3-307. Notice of breach of fiduciary duty.

(a) In this section:

(1) "Fiduciary" means an agent, trustee, partner, corporate officer, or director, or other representative owing a fiduciary duty with respect to an instrument.

(2) "Represented person" means the principal, beneficiary, partnership, corporation, or other person to whom the duty stated in paragraph (1) of this subsection is owed.

(b) If (i) an instrument is taken from a fiduciary for payment or collection or for value, (ii) the taker has knowledge of the fiduciary status of the fiduciary, and (iii) the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, the following rules apply:

(1) Notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person.

(2) In the case of an instrument payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is (i) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

(3) If an instrument is issued by the represented person or the fiduciary as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty.

(4) If an instrument is issued by the represented person or the fiduciary as such, to the taker as payee, the taker has notice of the breach of fiduciary duty

if the instrument is (i) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

(Dec. 30, 1963, 77 Stat. 680, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-307.

1973 Ed., § 28:3-304.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section states rules for determining when a person who has taken an instrument from a fiduciary has notice of a breach of fiduciary duty that occurs as a result of the transaction with the fiduciary. Former Section 3-304(2) and (4)(e) related to this issue, but those provisions were unclear in their meaning. Section 3-307 is intended to clarify the law by stating rules that comprehensively cover the issue of when the taker of an instrument has notice of breach of a fiduciary duty and thus notice of a claim to the instrument or its proceeds.

2. Subsection (a) defines the terms “fiduciary” and “represented person” and the introductory paragraph of subsection (b) describes the transaction to which the section applies. The basic scenario is one in which the fiduciary in effect embezzles money of the represented person by applying the proceeds of an instrument that belongs to the represented person to the personal use of the fiduciary. The person dealing with the fiduciary may be a depository bank that takes the instrument for collection or a bank or other person that pays value for the instrument. The section also covers a transaction in which an instrument is presented for payment to a payor bank that pays the instrument by giving value to the fiduciary. Subsections (b)(2), (3), and (4) state rules for determining when the person dealing with the fiduciary has notice of breach of fiduciary duty. Subsection (b)(1) states that notice of breach of fiduciary duty is notice of the represented person’s claim to the instrument or its proceeds.

Under Section 3-306, a person taking an instrument is subject to a claim to the instrument or its proceeds, unless the taker has rights of a holder in due course. Under Section 3-302(a)(2)(v), the taker cannot be a holder in due course if the instrument was taken with notice of a claim under Section 3-306. Section 3-307 applies to cases in which a represented person is asserting a claim because a breach of

fiduciary duty resulted in a misapplication of the proceeds of an instrument. The claim of the represented person is a claim described in Section 3-306. Section 3-307 states rules for determining when a person taking an instrument has notice of the claim which will prevent assertion of rights as a holder in due course. It also states rules for determining when a payor bank pays an instrument with notice of breach of fiduciary duty.

Section 3-307(b) applies only if the person dealing with the fiduciary “has knowledge of the fiduciary status of the fiduciary.” Notice which does not amount to knowledge is not enough to cause Section 3-307 to apply. “Knowledge” is defined in Section 1-201(25). In most cases, the “taker” referred to in Section 3-307 will be a bank or other organization. Knowledge of an organization is determined by the rules stated in Section 1-201(27). In many cases, the individual who receives and processes an instrument on behalf of the organization that is the taker of the instrument “for payment or collection or for value” is a clerk who has no knowledge of any fiduciary status of the person from whom the instrument is received. In such cases, Section 3-307 doesn’t apply because, under Section 1-201(27), knowledge of the organization is determined by the knowledge of the “individual conducting that transaction,” i.e. the clerk who receives and processes the instrument. Furthermore, paragraphs (2) and (4) each require that the person acting for the organization have knowledge of facts that indicate a breach of fiduciary duty. In the case of an instrument taken for deposit to an account, the knowledge is found in the fact that the deposit is made to an account other than that of the represented person or a fiduciary account for benefit of that person. In other cases the person acting for the organization must know that the instrument is taken in payment or as security for a personal debt of the fiduciary or for the personal benefit of the

fiduciary. For example, if the instrument is being used to buy goods or services, the person acting for the organization must know that the goods or services are for the personal benefit of the fiduciary. The requirement that the taker have knowledge rather than notice is meant to limit Section 3-307 to relatively uncommon cases in which the person who deals with the fiduciary knows all the relevant facts: the fiduciary status and that the proceeds of the instrument are being used for the personal debt or benefit of the fiduciary or are being paid to an account that is not an account of the represented person or of the fiduciary, as such. Mere notice of these facts is not enough to put the taker on notice of the breach of fiduciary duty and does not give rise to any duty of investigation by the taker.

3. Subsection (b)(2) applies to instruments payable to the represented person or the fiduciary as such. For example, a check payable to Corporation is indorsed in the name of Corporation by Doe as its President. Doe gives the check to Bank as partial repayment of a personal loan that Bank had made to Doe. The check was indorsed either in blank or to Bank. Bank collects the check and applies the proceeds to reduce the amount owed on Doe's loan. If the person acting for Bank in the transaction knows that Doe is a fiduciary and that the check is being used to pay a personal obligation of Doe, subsection (b)(2) applies. If Corporation has a claim to the proceeds of the check because the use of the check by Doe was a breach of fiduciary duty, Bank has notice of the claim and did not take the check as a holder in due course. The same result follows if Doe had indorsed the check to himself before giving it to Bank. Subsection (b)(2) follows Uniform Fiduciaries Act § 4 in providing that if the instrument is payable to the fiduciary, as such, or to the represented person, the taker has notice of a claim if the instrument is negotiated for the fiduciary's personal debt. If fiduciary funds are deposited to a personal account of the fiduciary or to an account that is not an account of the represented person or of the fiduciary, as such, there is a split of authority concerning whether the bank is on notice of a breach of fiduciary duty. Subsection (b)(2)(iii) states that the bank is given notice of breach of fiduciary duty because of the deposit. The Uniform Fiduciaries Act § 9 states that the bank is not on notice unless it has knowledge of facts that makes its receipt of the deposit an act of bad faith.

The rationale of subsection (b)(2) is that it is not normal for an instrument payable to the represented person or the fiduciary, as such, to

be used for the personal benefit of the fiduciary. It is likely that such use reflects an unlawful use of the proceeds of the instrument. If the fiduciary is entitled to compensation from the represented person for services rendered or for expenses incurred by the fiduciary the normal mode of payment is by a check drawn on the fiduciary account to the order of the fiduciary.

4. Subsection (b)(3) is based on Uniform Fiduciaries Act § 6 and applies when the instrument is drawn by the represented person or the fiduciary as such to the fiduciary personally. The term "personally" is used as it is used in the Uniform Fiduciaries Act to mean that the instrument is payable to the payee as an individual and not as a fiduciary. For example, Doe as President of Corporation writes a check on Corporation's account to the order of Doe personally. The check is then indorsed over to Bank as in Comment 3. In this case there is no notice of breach of fiduciary duty because there is nothing unusual about the transaction. Corporation may have owed Doe money for salary, reimbursement for expenses incurred for the benefit of Corporation, or for any other reason. If Doe is authorized to write checks on behalf of Corporation to pay debts of Corporation, the check is a normal way of paying a debt owed to Doe. Bank may assume that Doe may use the instrument for his personal benefit.

5. Subsection (b)(4) can be illustrated by a hypothetical case. Corporation draws a check payable to an organization, X, an officer or employee of Corporation, delivers the check to a person acting for the organization. The person signing the check on behalf of Corporation is X or another person. If the person acting for the organization in the transaction knows that X is a fiduciary, the organization is on notice of a claim by Corporation if it takes the instrument under the same circumstances stated in subsection (b)(2). If the organization is a bank and the check is taken in repayment of a personal loan of the bank to X, the case is like the case discussed in Comment 3. It is unusual for Corporation, the represented person, to pay a personal debt of Doe by issuing a check to the bank. It is more likely that the use of the check by Doe reflects an unlawful use of the proceeds of the check. The same analysis applies if the check is made payable to an organization in payment of goods or services. If the person acting for the organization knew of the fiduciary status of X and that the goods or services were for X's personal benefit, the organization is on notice of a claim by Corporation to the proceeds of the check. See the discussion in the last paragraph of Comment 2.

CASE NOTES

In general.

Findings of district court, in civil action brought against lending institutions by victims of home improvement fraud, that even though lenders lacked actual notice of fraud involved in transactions in question, such institutions had reason to know of misrepresentation and unconscionable dealing, and were thus on notice

of victim's defenses to note and were not entitled to status of holders in due course, were clearly erroneous and would be reversed. D.C. Code §§ 28:1-201(19, 25), 28:3-302, 28:3-307(3). *Slaughter v. Jefferson Federal Sav. & Loan Asso.*, 538 F.2d 397, 1976 U.S. App. LEXIS 8449 (C.A.D.C. 1976).

§ 28:3-308. Proof of signatures and status as holder in due course.

(a) In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under section 28:3-402(a).

(b) If the validity of signatures is admitted or proved and there is compliance with subsection (a) of this section, a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under section 28:3-301, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.

(Dec. 30, 1963, 77 Stat. 681, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467; Apr. 18, 1996, D.C. Law 11-110, § 27(a), 43 DCR 530.)

Section references. — This section is referred to in § 28:3-309.

Prior Codifications. — 1981 Ed., § 28:3-308.

1973 Ed., § 28:3-307.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

Legislative history of Law 11-110. — Law

11-110, the "Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-485, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 5, 1995, and January 5, 1996, respectively. Signed by the Mayor on January 26, 1996, it was assigned Act No. 11-199 and transmitted to both Houses of Congress for its review. D.C. Law 11-110 became effective on April 18, 1996.

UNIFORM COMMERCIAL CODE COMMENT

1. Section 3-308 is a modification of former Section 3-307. The first two sentences of subsection (a) are a restatement of former Section

3-307(1). The purpose of the requirement of a specific denial in the pleadings is to give the plaintiff notice of the defendant's claim of forg-

ery or lack of authority as to the particular signature, and to afford the plaintiff an opportunity to investigate and obtain evidence. If local rules of pleading permit, the denial may be on information and belief, or it may be a denial of knowledge or information sufficient to form a belief. It need not be under oath unless the local statutes or rules require verification. In the absence of such specific denial the signature stands admitted, and is not in issue. Nothing in this section is intended, however, to prevent amendment of the pleading in a proper case.

The question of the burden of establishing the signature arises only when it has been put in issue by specific denial. "Burden of establishing" is defined in Section 1-201. The burden is on the party claiming under the signature, but the signature is presumed to be authentic and authorized except as stated in the second sentence of subsection (a). "Presumed" is defined in Section 1-201 and means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized, the plaintiff is not required to prove that it is valid. The presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of, or more accessible to, the defendant. The defendant is therefore required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence. The defendant's evidence need not be sufficient to require a directed verdict, but it must be enough to support the denial by permitting a finding in the defendant's favor. Until introduction of such evidence the presumption requires a finding for the plaintiff. Once such evidence is introduced the burden of establishing the signature by a preponderance of the total evidence is on the plaintiff. The presumption does not arise if the action is to enforce the obligation of a purported signer who has died or become incompetent before the evidence is required, and so is disabled from obtaining or introducing it. "Action" is defined in Section 1-201 and includes a claim asserted against the estate of a deceased or an incompetent.

The last sentence of subsection (a) is a new provision that is necessary to take into account Section 3-402(a) that allows an undisclosed

principal to be liable on an instrument signed by an authorized representative. In that case the person enforcing the instrument must prove that the undisclosed principal is liable.

2. Subsection (b) restates former Section 3-307(2) and (3). Once signatures are proved or admitted a holder, by mere production of the instrument, proves "entitlement to enforce the instrument" because under Section 3-301 a holder is a person entitled to enforce the instrument. Any other person in possession of an instrument may recover only if that person has the rights of a holder. Section 3-301. That person must prove a transfer giving that person such rights under Section 3-203(b) or that such rights were obtained by subrogation or succession.

If a plaintiff producing the instrument proves entitlement to enforce the instrument, either as a holder or a person with rights of a holder, the plaintiff is entitled to recovery unless the defendant proves a defense or claim in recoupment. Until proof of a defense or claim in recoupment is made, the issue as to whether the plaintiff has rights of a holder in due course does not arise. In the absence of a defense or claim in recoupment, any person entitled to enforce the instrument is entitled to recover. If a defense or claim in recoupment is proved, the plaintiff may seek to cut off the defense or claim in recoupment by proving that the plaintiff is a holder in due course or that the plaintiff has rights of a holder in due course under Section 3-203(b) or by subrogation or succession. All elements of Section 3-302(a) must be proved.

Nothing in this section is intended to say that the plaintiff must necessarily prove rights as a holder in due course. The plaintiff may elect to introduce no further evidence, in which case a verdict may be directed for the plaintiff or the defendant, or the issue of the defense or claim in recoupment may be left to the trier of fact, according to the weight and sufficiency of the defendant's evidence. The plaintiff may elect to rebut the defense or claim in recoupment by proof to the contrary, in which case a verdict may be directed for either party or the issue may be for the trier of fact. Subsection (b) means only that if the plaintiff claims the rights of a holder in due course against the defense or claim in recoupment, the plaintiff has the burden of proof on that issue.

CASE NOTES

ANALYSIS

Establishment of defense.

Holder in due course.

—Burden of proof.

—Fact questions, holder in due course.

Knowledge of claim or defect.

Establishment of defense.

Section of Uniform Commercial Code providing that when signatures are admitted or established production of the instrument entitles a holder to recover on it unless the defendant establishes a defense applied to suit on notes although the transaction took place prior to the

effective date of the Code. D.C. Code § 28:3-307(2). *Toomey v. Cammack*, 345 A.2d 453, 1975 D.C. App. LEXIS 254 (1975).

Where payee transferred nonnegotiable money orders, transferee, although not holder in due course, could establish case against payor, which had stopped payment on the money orders, by production of instruments and burden of proving want of consideration or other defense was upon payor. D.C. Code §§ 28:3-306, 28:3-307(2), 28:3-805. *Nation-Wide Check Corp. v. Banks*, 260 A.2d 367, 1969 D.C. App. LEXIS 369 (App. 1969).

Defenses of failure of consideration, fraud, and usury raised by signer of note in his pleading, without introduction of some evidence, did not constitute "establishment of a defense" under statute providing that once signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense. D.C. Code § 28:3-307(2). *Calvert Credit Corp. v. Humble*, 249 A.2d 518, 1969 D.C. App. LEXIS 200 (App. 1969).

Holder in due course.

— Burden of proof.

Under Uniform Commercial Code, burden of a holder to prove himself a holder in due course applied to case in which trial occurred after Code's effective date, even though entire trans-

action occurred prior to such effective date. D.C. Code 1961, § 28:1-101. *United Sec. Corp. v. Bruton*, 213 A.2d 892, 1965 D.C. App. LEXIS 255 (App. 1965).

Under Uniform Commercial Code the burden was on holder of purchase price note, where defense of defective workmanship in article sold was shown, to prove that it was in all respects a holder in due course, and such burden was not sustained where only evidence offered by holder to establish its status as such holder was that it purchased note on date shown on endorsement. D.C. Code 1961, §§ 28:1-101, 28:3-307 and (3). *United Sec. Corp. v. Bruton*, 213 A.2d 892, 1965 D.C. App. LEXIS 255 (App. 1965).

— Fact questions, holder in due course.

Question whether holder of second note, which had been given for allegedly fraudulent painting, was holder in due course, in these circumstances so as to be entitled to recover on note was issue of fact. D.C. Code 1961, § 28-409. *Blow v. Ammerman*, 350 F.2d 729, 1965 U.S. App. LEXIS 4920 (C.A.D.C. 1965).

Knowledge of claim or defect.

Knowledge of collateral fraudulent transactions of negotiator of note is circumstance bearing on whether particular note was taken in bad faith. D.C. Code 1961, § 28-409. *Blow v. Ammerman*, 350 F.2d 729, 1965 U.S. App. LEXIS 4920 (C.A.D.C. 1965).

§ 28:3-309. Enforcement of lost, destroyed, or stolen instrument.

(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) of this section must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, section 28:3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

(Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in § 28:3-301.

Prior Codifications. — 1981 Ed., § 28:3-309.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

Section 3-309 is a modification of former Section 3-804. The rights stated are those of “a person entitled to enforce the instrument” at the time of loss rather than those of an “owner” as in former Section 3-804. Under subsection (b), judgment to enforce the instrument cannot be given unless the court finds that the defendant will be adequately protected against a claim to the instrument by a holder that may appear at some later time. The court is given discretion in determining how adequate protection is to be assured. Former Section 3-804 allowed the court to “require security indemnifying the defendant against loss.”

Under Section 3-309 adequate protection is a

flexible concept. For example, there is substantial risk that a holder in due course may make a demand for payment if the instrument was payable to bearer when it was lost or stolen. On the other hand if the instrument was payable to the person who lost the instrument and that person did not indorse the instrument, no other person could be a holder of the instrument. In some cases there is risk of loss only if there is doubt about whether the facts alleged by the person who lost the instrument are true. Thus, the type of adequate protection that is reasonable in the circumstances may depend on the degree of certainty about the facts in the case.

CASE NOTES

ANALYSIS

In general.

Waiver of defense.

In general.

Under District of Columbia’s version of Uniform Commercial Code (UCC), assignee who did not have possession of note at time it was lost was not entitled to enforce note. D.C. Code 1981, § 28:3-309. *Dennis Joslin Co., LLC v. Robinson Broadcasting Corp.*, 977 F. Supp. 491, 1997 U.S. Dist. LEXIS 14725 (1997).

Waiver of defense.

Guarantors, who signed loan guaranty which

included provision waiving any defense going to unenforceability of any obligation guaranteed, waived defense to enforcement of lost note under District of Columbia’s version of Uniform Commercial Code (UCC). D.C. Code 1981, § 28:3-309. *Dennis Joslin Co., LLC v. Robinson Broadcasting Corp.*, 977 F. Supp. 491, 1997 U.S. Dist. LEXIS 14725 (1997).

§ 28:3-310. Effect of instrument on obligation for which taken.

(a) Unless otherwise agreed, if a certified check, cashier’s check, or teller’s check is taken for an obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation. Discharge of the obligation does not affect any liability that the obligor may have as an indorser of the instrument.

(b) Unless otherwise agreed and except as provided in subsection (a) of this section, if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and the following rules apply:

(1) In the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or

certification of the check results in discharge of the obligation to the extent of the amount of the check.

(2) In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment.

(3) Except as provided in paragraph (4) of this subsection, if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation. In the case of an instrument of a third person which is negotiated to the obligee by the obligor, discharge of the obligor on the instrument also discharges the obligation.

(4) If the person entitled to enforce the instrument taken for an obligation is a person other than the obligee, the obligee may not enforce the obligation to the extent the obligation is suspended. If the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument, and to that extent the obligee's rights against the obligor are limited to enforcement of the instrument.

(c) If an instrument other than one described in subsection (a) or (b) of this section is taken for an obligation, the effect is (i) that stated in subsection (a) of this section if the instrument is one on which a bank is liable as maker or acceptor, or (ii) that stated in subsection (b) of this section in any other case.

(Dec. 30, 1963, 77 Stat. 693, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in § 28:2-511.

Prior Codifications. — 1981 Ed., § 28:3-310.

1973 Ed., § 28:3-802.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Section 3-310 is a modification of former Section 3-802. As a practical matter, application of former Section 3-802 was limited to cases in which a check or a note was given for an obligation. Subsections (a) and (b) of Section 3-310 are therefore stated in terms of checks and notes in the interests of clarity. Subsection (c) covers the rare cases in which some other instrument is given to pay an obligation.

2. Subsection (a) deals with the case in which a certified check, cashier's check or teller's check is given in payment of an obligation. In that case the obligation is discharged unless there is an agreement to the contrary. Subsection (a) drops the exception in former Section 3-802 for cases in which there is a right of recourse on the instrument against the obligor. Under former Section 3-802(1)(a) the obligation was not discharged if there was a right of recourse on the instrument against the obligor. Subsection (a) changes this result. The under-

lying obligation is discharged, but any right of recourse on the instrument is preserved.

3. Subsection (b) concerns cases in which an uncertified check or a note is taken for an obligation. The typical case is that in which a buyer pays for goods or services by giving the seller the buyer's personal check, or in which the buyer signs a note for the purchase price. Subsection (b) also applies to the uncommon cases in which a check or note of a third person is given in payment of the obligation. Subsection (b) preserves the rule under former Section 3-802(1)(b) that the buyer's obligation to pay the price is suspended, but subsection (b) spells out the effect more precisely. If the check or note is dishonored, the seller may sue on either the dishonored instrument or the contract of sale if the seller has possession of the instrument and is the person entitled to enforce it. If the right to enforce the instrument is held by somebody other than the seller, the seller can't

enforce the right to payment of the price under the sales contract because that right is represented by the instrument which is enforceable by somebody else. Thus, if the seller sold the note or the check to a holder and has not reacquired it after dishonor, the only right that survives is the right to enforce the instrument.

The last sentence of subsection (b)(3) applies to cases in which an instrument of another person is indorsed over to the obligee in payment of the obligation. For example, Buyer delivers an uncertified personal check of X payable to the order of Buyer to Seller in payment of the price of goods. Buyer indorses the check over to Seller. Buyer is liable on the check as indorser. If Seller neglects to present the check for payment or to deposit it for collection within 30 days of the indorsement, Buyer's liability as indorser is discharged. Section 3-415(e). Under the last sentence of Section 3-310(b)(3) Buyer is also discharged on the obligation to pay for the goods.

4. There was uncertainty concerning the applicability of former Section 3-802 to the case in which the check given for the obligation was stolen from the payee, the payee's signature was forged, and the forger obtained payment. The last sentence of subsection (b)(4) addresses this issue. If the payor bank pays a holder, the drawer is discharged on the underlying obligation because the check was paid. Subsection (b)(1). If the payor bank pays a person not entitled to enforce the instrument, as in the hypothetical case, the suspension of the underlying obligation continues because the check has not been paid. Section 3-602(a). The payee's cause of action is against the depository bank or payor bank in conversion under Section

3-420 or against the drawer under Section 3-309. In the latter case, the drawer's obligation under Section 3-414(b) is triggered by dishonor which occurs because the check is unpaid. Presentment for payment to the drawee is excused under Section 3-504(a)(i) and, under Section 3-502(e), dishonor occurs without presentment if the check is not paid. The payee cannot merely ignore the instrument and sue the drawer on the underlying contract. This would impose on the drawer the risk that the check when stolen was indorsed in blank or to bearer.

A similar analysis applies with respect to lost instruments that have not been paid. If a creditor takes a check of the debtor in payment of an obligation, the obligation is suspended under the introductory paragraph of subsection (b). If the creditor then loses the check, what are the creditor's rights? The creditor can request the debtor to issue a new check and in many cases, the debtor will issue a replacement check after stopping payment on the lost check. In that case both the debtor and creditor are protected. But the debtor is not obliged to issue a new check. If the debtor refuses to issue a replacement check, the last sentence of subsection (b)(4) applies. The creditor may not enforce the obligation of debtor for which the check was taken. The creditor may assert only rights on the check. The creditor can proceed under Section 3-309 to enforce the obligation of the debtor, as drawer, to pay the check.

5. Subsection (c) deals with rare cases in which other instruments are taken for obligations. If a bank is the obligor on the instrument, subsection (a) applies and the obligation is discharged. In any other case subsection (b) applies.

§ 28:3-311. Accord and satisfaction by use of instrument.

(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) Unless subsection (c) of this section applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(c) Subject to subsection (d) of this section, a claim is not discharged under subsection (b) of this section if either of the following applies:

(1) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or

accompanying communication was not received by that designated person, office, or place.

(2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (1)(i) of this subsection.

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

(Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-311.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section deals with an informal method of dispute resolution carried out by use of a negotiable instrument. In the typical case there is a dispute concerning the amount that is owed on a claim.

Case #1. The claim is for the price of goods or services sold to a consumer who asserts that he or she is not obliged to pay the full price for which the consumer was billed because of a defect or breach of warranty with respect to the goods or services.

Case #2. A claim is made on an insurance policy. The insurance company alleges that it is not liable under the policy for the amount of the claim.

In either case the person against whom the claim is asserted may attempt an accord and satisfaction of the disputed claim by tendering a check to the claimant for some amount less than the full amount claimed by the claimant. A statement will be included on the check or in a communication accompanying the check to the effect that the check is offered as full payment or full satisfaction of the claim. Frequently, there is also a statement to the effect that obtaining payment of the check is an agreement by the claimant to a settlement of the dispute for the amount tendered. Before enactment of revised Article 3, the case law was in conflict over the question of whether obtaining payment of the check had the effect of an agreement to the settlement proposed by the debtor. This issue was governed by a common law rule, but some courts hold that the common law was modified by former Section 1-207 which they interpreted as applying to full settlement checks.

2. Comment d. to Restatement of Contracts, Section 281 discusses the full satisfaction check and the applicable common law rule. In a case like Case #1, the buyer can propose a settlement of the disputed bill by a clear notation on the check indicating that the check is tendered as full satisfaction of the bill. Under the common law rule the seller, by obtaining payment of the check accepts the offer of compromise by the buyer. The result is the same if the seller adds a notation to the check indicating that the check is accepted under protest or in only partial satisfaction of the claim. Under the common law rule the seller can refuse the check or can accept it subject to the condition stated by the buyer, but the seller can't accept the check and refuse to be bound by the condition. The rule applies only to an unliquidated claim or a claim disputed in good faith by the buyer. The dispute in the courts was whether Section 1-207 changed the common law rule. The Restatement states that section "need not be read as changing this well-established rule."

3. As part of the revision of Article 3, Section 1-207 has been amended to add subsection (2) stating that Section 1-207 "does not apply to an accord and satisfaction." Because of that amendment and revised Article 3, Section 3-311 governs full satisfaction checks. Section 3-311 follows the common law rule with some minor variations to reflect modern business conditions. In cases covered by Section 3-311 there will often be an individual on one side of the dispute and a business organization on the other. This section is not designed to favor either the individual or the business organization. In Case #1 the person seeking the accord

and satisfaction is an individual. In Case #2 the person seeking the accord and satisfaction is an insurance company. Section 3-311 is based on a belief that the common law rule produces a fair result and that informal dispute resolution by full satisfaction checks should be encouraged.

4. Subsection (a) states three requirements for application of Section 3-311. "Good faith" in subsection (a)(i) is defined in Section 3-103(a)(4) as not only honesty in fact, but the observance of reasonable commercial standards of fair dealing. The meaning of "fair dealing" will depend upon the facts in the particular case. For example, suppose an insurer tenders a check in settlement of a claim for personal injury in an accident clearly covered by the insurance policy. The claimant is necessitous and the amount of the check is very small in relationship to the extent of the injury and the amount recoverable under the policy. If the trier of fact determines that the insurer was taking unfair advantage of the claimant, an accord and satisfaction would not result from payment of the check because of the absence of good faith by the insurer in making the tender. Another example of lack of good faith is found in the practice of some business debtors in routinely printing full satisfaction language on their check stocks so that all or a large part of the debts of the debtor are paid by checks bearing the full satisfaction language, whether or not there is any dispute with the creditor. Under such a practice the claimant cannot be sure whether a tender in full satisfaction is or is not being made. Use of a check on which full satisfaction language was affixed routinely pursuant to such a business practice may prevent an accord and satisfaction on the ground that the check was not tendered in good faith under subsection (a)(i).

Section 3-311 does not apply to cases in which the debt is a liquidated amount and not subject to a bona fide dispute. Subsection (a)(ii). Other law applies to cases in which a debtor is seeking discharge of such a debt by paying less than the amount owed. For the purpose of subsection (a)(iii) obtaining acceptance of a check is considered to be obtaining payment of the check.

The person seeking the accord and satisfaction must prove that the requirements of subsection (a) are met. If that person also proves that the statement required by subsection (b) was given, the claim is discharged unless subsection (c) applies. Normally the statement required by subsection (b) is written on the check. Thus, the canceled check can be used to prove the statement as well as the fact that the claimant obtained payment of the check. Subsection (b) requires a "conspicuous" statement that the instrument was tendered in full satisfaction of the claim. "Conspicuous" is defined in Section 1-201(10). The statement is conspicuous if "it is so written that a reasonable person

against whom it is to operate ought to have noticed it." If the claimant can reasonably be expected to examine the check, almost any statement on the check should be noticed and is therefore conspicuous. In cases in which the claimant is an individual the claimant will receive the check and will normally indorse it. Since the statement concerning tender in full satisfaction normally will appear above the space provided for the claimant's indorsement of the check, the claimant "ought to have noticed" the statement.

5. Subsection (c)(1) is a limitation on subsection (b) in cases in which the claimant is an organization. It is designed to protect the claimant against inadvertent accord and satisfaction. If the claimant is an organization payment of the check might be obtained without notice to the personnel of the organization concerned with the disputed claim. Some business organizations have claims against very large numbers of customers. Examples are department stores, public utilities and the like. These claims are normally paid by checks sent by customers to a designated office at which clerks employed by the claimant or a bank acting for the claimant process the checks and record the amounts paid. If the processing office is not designed to deal with communications extraneous to recording the amount of the check and the account number of the customer, payment of a full satisfaction check can easily be obtained without knowledge by the claimant of the existence of the full satisfaction statement. This is particularly true if the statement is written on the reverse side of the check in the area in which indorsements are usually written. Normally, the clerks of the claimant have no reason to look at the reverse side of checks. Indorsement by the claimant normally is done by mechanical means or there may be no indorsement at all. Section 4-205(a). Subsection (c)(1) allows the claimant to protect itself by advising customers by a conspicuous statement that communications regarding disputed debts must be sent to a particular person, office, or place. The statement must be given to the customer within a reasonable time before the tender is made. This requirement is designed to assure that the customer has reasonable notice that the full satisfaction check must be sent to a particular place. The reasonable time requirement could be satisfied by a notice on the billing statement sent to the customer. If the full satisfaction check is sent to the designated destination and the check is paid, the claim is discharged. If the claimant proves that the check was not received at the designated destination the claim is not discharged unless subsection (d) applies.

6. Subsection (c)(2) is also designed to prevent inadvertent accord and satisfaction. It can be used by a claimant other than an organiza-

tion or by a claimant as an alternative to subsection (c)(1). Some organizations may be reluctant to use subsection (c)(1) because it may result in confusion of customers that causes checks to be routinely sent to the special designated person, office, or place. Thus, much of the benefit of rapid processing of checks may be lost. An organization that chooses not to send a notice complying with subsection (c)(1)(i) may prevent an inadvertent accord and satisfaction by complying with subsection (c)(2). If the claimant discovers that it has obtained payment of a full satisfaction check, it may prevent an accord and satisfaction if, within 90 days of the payment of the check, the claimant tenders repayment of the amount of the check to the person against whom the claim is asserted.

7. Subsection (c) is subject to subsection (d). If a person against whom a claim is asserted proves that the claimant obtained payment of a check known to have been tendered in full satisfaction of the claim by "the claimant or an agent of the claimant having direct responsibility with respect to the disputed obligation," the claim is discharged even if (i) the check was not sent to the person, office, or place required by a notice complying with subsection (c)(1), or (ii) the claimant tendered repayment of the amount of the check in compliance with subsection (c)(2).

A claimant knows that a check was tendered in full satisfaction of a claim when the claimant "has actual knowledge" of that fact.

Section 1-201(25). Under Section 1-201(27), if the claimant is an organization, it has knowledge that a check was tendered in full satisfaction of the claim when that fact is

"brought to the attention of the individual conducting that transaction, and in any event when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information."

With respect to an attempted accord and satisfaction the "individual conducting that transaction" is an employee or other agent of the organization having direct responsibility with respect to the dispute. For example, if the check and communication are received by a collection agency acting for the claimant to

collect the disputed claim, obtaining payment of the check will result in an accord and satisfaction even if the claimant gave notice, pursuant to subsection (c)(1), that full satisfaction checks be sent to some other office. Similarly, if a customer asserting a claim for breach of warranty with respect to defective goods purchased in a retail outlet of a large chain store delivers the full satisfaction check to the manager of the retail outlet at which the goods were purchased, obtaining payment of the check will also result in an accord and satisfaction. On the other hand, if the check is mailed to the chief executive officer of the chain store subsection (d) would probably not be satisfied. The chief executive officer of a large corporation may have general responsibility for operations of the company, but does not normally have direct responsibility for resolving a small disputed bill to a customer. A check for a relatively small amount mailed to a high executive officer of a large organization is not likely to receive the executive's personal attention. Rather, the check would normally be routinely sent to the appropriate office for deposit and credit to the customer's account. If the check does receive the personal attention of the high executive officer and the officer is aware of the full-satisfaction language, collection of the check will result in an accord and satisfaction because subsection (d) applies. In this case the officer has assumed direct responsibility with respect to the disputed transaction.

If a full satisfaction check is sent to a lock box or other office processing checks sent to the claimant, it is irrelevant whether the clerk processing the check did or did not see the statement that the check was tendered as full satisfaction of the claim. Knowledge of the clerk is not imputed to the organization because the clerk has no responsibility with respect to an accord and satisfaction. Moreover, there is no failure of "due diligence" under Section 1-201(27) if the claimant does not require its clerks to look for full satisfaction statements on checks or accompanying communications. Nor is there any duty of the claimant to assign that duty to its clerks. Section 3-311(c) is intended to allow a claimant to avoid an inadvertent accord and satisfaction by complying with either subsection (c)(1) or (2) without burdening the check-processing operation with extraneous and wasteful additional duties.

8. In some cases the disputed claim may have been assigned to a finance company or bank as part of a financing arrangement with respect to accounts receivable. If the account debtor was notified of the assignment, the claimant is the assignee of the account receivable and the "agent of the claimant" in subsection (d) refers to an agent of the assignee.

CASE NOTES

In general.

Common law elements of accord and satisfaction, which have been codified in the Uniform Commercial Code (UCC), are (1) honest dispute over unliquidated claim, (2) tender of payment with the explicit understanding of both parties that it is in full payment, and (3) acceptance by creditor with understanding that the tender is accepted as full payment. *Curtin v. United Airlines, Inc.*, 120 F.Supp.2d 73, 2000 U.S. Dist. LEXIS 15689 (2000), affirmed by 275 F.3d 88, 348 U.S. App. D.C. 309, 2001 U.S. App. LEXIS 27286, 51 Fed. R. Serv. 3d (Callaghan) 507, 46 U.C.C. Rep. Serv. 2d (CBC) 494 (2001).

Fact that airline offered to pay less money for lost luggage than passengers thought they were due did not mean that airline's payments to passengers were partial payments on amounts owed or that the accord and satisfaction element of an honest dispute over an unliquidated claim was not met, where passengers' claims were disputed in that passengers claimed to be owed one amount and airline offered to pay a lower amount. *Curtin v. United Airlines, Inc.*, 120 F.Supp.2d 73, 2000 U.S. Dist. LEXIS 15689 (2000), affirmed by 275 F.3d 88, 348 U.S. App. D.C. 309, 2001 U.S. App. LEXIS 27286, 51 Fed. R. Serv. 3d (Callaghan) 507, 46 U.C.C. Rep. Serv. 2d (CBC) 494 (2001).

Accord and satisfaction elements that require tender of payment with explicit understanding of both parties that it was in full payment and acceptance by creditor with understanding that tender is accepted as full payment were met when airline indicated its intention that check for lost luggage would constitute full payment of passenger's claims both by sending letter to passenger telling him that and by clearly indicating that fact on back of check in space where passenger endorsed check, and passenger accepted airline's offer by cashing the check. *Curtin v. United Airlines, Inc.*, 120 F.Supp.2d 73, 2000 U.S. Dist. LEXIS 15689 (2000), affirmed by 275 F.3d 88, 348 U.S. App. D.C. 309, 2001 U.S. App. LEXIS 27286, 51 Fed. R. Serv. 3d (Callaghan) 507, 46 U.C.C. Rep. Serv. 2d (CBC) 494 (2001).

Fact that passenger, who had received check from airline for her lost luggage, indicated on check before cashing it that she did not agree that the check constituted payment in full on her claims did not mean that accord and satisfaction element that requires acceptance by creditor with understanding that the tender is accepted as full payment was not met; passen-

ger could not avoid the consequences of accepting the accord, i.e., cashing the check, by declaring that she did not assent to the condition attached by airline. *Curtin v. United Airlines, Inc.*, 120 F.Supp.2d 73, 2000 U.S. Dist. LEXIS 15689 (2000), affirmed by 275 F.3d 88, 348 U.S. App. D.C. 309, 2001 U.S. App. LEXIS 27286, 51 Fed. R. Serv. 3d (Callaghan) 507, 46 U.C.C. Rep. Serv. 2d (CBC) 494 (2001).

Statement by airline that its liability for lost luggage was limited under the Warsaw Convention, and airline's failure to disclose legal disputes over whether the Warsaw Convention's limitation of liability for lost luggage applied when airline failed to mark weight of baggage on baggage check, was neither a mistake nor a misrepresentation of a material fact that would preclude a meeting of the minds necessary to form binding offer by airline to settle passengers' claims for lost luggage, and thus, airline's failure to disclose existence of the issue did not preclude a valid accord and satisfaction defense to passengers' lost luggage claims, where airline merely stated its legal opinion as to the extent of its liability, and its position was supported by several court rulings, and passengers were free to investigate and to refuse to accept airline's settlement check if they did not agree. *Curtin v. United Airlines, Inc.*, 120 F.Supp.2d 73, 2000 U.S. Dist. LEXIS 15689 (2000), affirmed by 275 F.3d 88, 348 U.S. App. D.C. 309, 2001 U.S. App. LEXIS 27286, 51 Fed. R. Serv. 3d (Callaghan) 507, 46 U.C.C. Rep. Serv. 2d (CBC) 494 (2001).

Accord and satisfaction is an affirmative defense, with the burden of proof on the proponent. *So v. 514 10th St. Assocs., L.P.*, 834 A.2d 910, 2003 D.C. App. LEXIS 634 (2003).

When a debtor tenders a check to the creditor that contains the phrase "payment in full" or other words to that effect, the creditor's act of cashing the check constitutes both the acceptance of the accord and its satisfaction. *So v. 514 10th St. Assocs., L.P.*, 834 A.2d 910, 2003 D.C. App. LEXIS 634 (2003).

Accord and satisfaction requires both a contract, known as accord, and a performance of that contract, known as the satisfaction. *So v. 514 10th St. Assocs., L.P.*, 834 A.2d 910, 2003 D.C. App. LEXIS 634 (2003).

Accord and satisfaction is a method of discharging and terminating an existing right, and constitutes a perfect defense in an action for enforcement of the previous claim. *So v. 514 10th St. Assocs., L.P.*, 834 A.2d 910, 2003 D.C. App. LEXIS 634 (2003).

§ 28:3-312. Lost, destroyed, or stolen cashier's check, teller's check, or certified check.

(a) For the purposes of this section, the term:

(1) "Check" means a cashier's check, teller's check, or certified check.

(2) "Claimant" means a person who claims the right to receive the amount of a cashier's check, teller's check, or certified check that was lost, destroyed, or stolen.

(3) "Declaration of loss" means a written statement, made under penalty of perjury, to the effect that (i) the declarer lost possession of a check, (ii) the declarer is the drawer or payee of the check, in the case of a certified check, or the remitter or payee of the check, in the case of a cashier's check or teller's check, (iii) the loss of possession was not the result of a transfer by the declarer or a lawful seizure, and (iv) the declarer cannot reasonably obtain possession of the check because the check was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(4) "Obligated bank" means the issuer of a cashier's check or teller's check or the acceptor of a certified check.

(b) A claimant may assert a claim to the amount of a check by a communication to the obligated bank describing the check with reasonable certainty and requesting payment of the amount of the check, if (i) the claimant is the drawer or payee of a certified check or the remitter or payee of a cashier's check or teller's check, (ii) the communication contains or is accompanied by a declaration of loss of the claimant with respect to the check, (iii) the communication is received at a time and in a manner affording the bank a reasonable time to act on it before the check is paid, and (iv) the claimant provides reasonable identification if requested by the obligated bank. Delivery of a declaration of loss is a warranty of the truth of the statements made in the declaration. If a claim is asserted in compliance with this subsection, the following rules apply:

(1) The claim becomes enforceable at the later of (i) the time the claim is asserted, or (ii) the 90th day following the date of the check in the case of a cashier's check or teller's check, or the 90th day following the date of the acceptance in the case of a certified check.

(2) Until the claim becomes enforceable, it has no legal effect and the obligated bank may pay the check or, in the case of a teller's check, may permit the drawee to pay the check. Payment to a person entitled to enforce the check discharges all liability of the obligated bank with respect to the check.

(3) If the claim becomes enforceable before the check is presented for payment, the obligated bank is not obliged to pay the check.

(4) When the claim becomes enforceable, the obligated bank becomes obliged to pay the amount of the check to the claimant if payment of the check has not been made to a person entitled to enforce the check. Subject to § 28:4-302(a)(1), payment to the claimant discharges all liability of the obligated bank with respect to the check.

(c) If the obligated bank pays the amount of a check to a claimant under subsection (b)(4) of this section and the check is presented for payment by a

person having rights of a holder in due course, the claimant is obliged to (i) refund the payment to the obligated bank if the check is paid, or (ii) pay the amount of the check to the person having rights of a holder in due course if the check is dishonored.

(d) If a claimant has the right to assert a claim under subsection (b) of this section and is also a person entitled to enforce a cashier's check, teller's check, or certified check which is lost, destroyed, or stolen, the claimant may assert rights with respect to the check either under this section or § 28:3-309.

(Apr. 9, 1997, D.C. Law 11-237, § 2(b), 44 DCR 920.)

Prior Codifications. — 1981 Ed., § 28:3-312.

Legislative history of Law 11-237. — Law 11-237, the "Uniform Commercial Code Negotiable Instruments Amendment Act of 1996," was introduced in Council and assigned Bill No. 11-573, which was referred to the Committee on Consumer and Regulatory Affairs. The

Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-497 and transmitted to both Houses of Congress for its review. D.C. Law 11-237 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

1. This section applies to cases in which a cashier's check, teller's check, or certified check is lost, destroyed, or stolen. In one typical case a customer of a bank closes his or her account and takes a cashier's check or teller's check of the bank as payment of the amount of the account. The customer may be moving to a new area and the check is to be used to open a bank account in that area. In such a case the check will normally be payable to the customer. In another typical case a cashier's check or teller's check is bought from a bank for the purpose of paying some obligation of the buyer of the check. In such a case the check may be made payable to the customer and then negotiated to the creditor by indorsement. But often, the payee of the check is the creditor. In the latter case the customer is a remitter. The section covers loss of the check by either the remitter or the payee. The section also covers loss of a certified check by either the drawer or payee.

Under Section 3-309 a person seeking to enforce a lost, destroyed, or stolen cashier's check or teller's check may be required by the court to give adequate protection to the issuing bank against loss that might occur by reason of the claim by another person to enforce the check. This might require the posting of an expensive bond for the amount of the check. Moreover, Section 3-309 applies only to a person entitled to enforce the check. It does not apply to a remitter of a cashier's check or teller's check or to the drawer of a certified check. Section 3-312 applies to both. The purpose of Section 3-312 is to offer a person who loses such a check a means of getting refund of the amount of the check within a reasonable

period of time without the expense of posting a bond and with full protection of the obligated bank.

2. A claim to the amount of a lost, destroyed, or stolen cashier's check, teller's check, or certified check may be made under subsection (b) if the following requirements of that subsection are met. First, a claim may be asserted only by the drawer or payee of a certified check or the remitter or payee of a cashier's check or teller's check. An indorsee of a check is not covered because the indorsee is not an original party to the check or a remitter. Limitation to an original party or remitter gives the obligated bank the ability to determine, at the time it becomes obligated on the check, the identity of the person or persons who can assert a claim with respect to the check. The bank is not faced with having to determine the rights of some person who was not a party to the check at that time or with whom the bank had not dealt. If a cashier's check is issued to the order of the person who purchased it from the bank and that person indorses it over to a third person who loses the check, the third person may assert rights to enforce the check under Section 3-309 but has no rights under Section 3-312.

Second, the claim must be asserted by a communication to the obligated bank describing the check with reasonable certainty and requesting payment of the amount of the check. "Obligated bank" is defined in subsection (a)(4). Third, the communication must be received in time to allow the obligated bank to act on the claim before the check is paid, and the claimant must provide reasonable identification if requested. Subsections (b)(iii) and (iv). Fourth,

the communication must contain or be accompanied by a declaration of loss described in subsection (b). This declaration is an affidavit or other writing made under penalty of perjury alleging the loss, destruction, or theft of the check and stating that the declarer is a person entitled to assert a claim, i.e. the drawer or payee of a certified check or the remitter or payee of a cashier's check or teller's check.

A claimant who delivers a declaration of loss makes a warranty of the truth of the statements made in the declaration. The warranty is made to the obligated bank and anybody who has a right to enforce the check. If the declaration of loss falsely alleges loss of a cashier's check that did not in fact occur, a holder of the check who was unable to obtain payment because subsection (b)(3) and (4) caused the obligated bank to dishonor the check would have a cause of action against the declarer for breach of warranty.

The obligated bank may not impose additional requirements on the claimant to assert a claim under subsection (b). For example, the obligated bank may not require the posting of a bond or other form of security. Section 3-312(b) states the procedure for asserting claims covered by the section. Thus, procedures that may be stated in other law for stating claims to property do not apply and are displaced within the meaning of Section 1-103.

3. A claim asserted under subsection (b) does not have any legal effect, however, until the date it becomes enforceable, which cannot be earlier than 90 days after the date of a cashier's check or teller's check or 90 days after the date of acceptance of a certified check. Thus, if a lost check is presented for payment within the 90-day period, the bank may pay a person entitled to enforce the check without regard to the claim and is discharged of all liability with respect to the check. This ensures the continued utility of cashier's checks, teller's checks, and certified checks as cash equivalents. Virtually all such checks are presented for payment within 90 days.

If the claim becomes enforceable and payment has not been made to a person entitled to enforce the check, the bank becomes obligated to pay the amount of the check to the claimant. Subsection (b)(4). When the bank becomes obligated to pay the amount of the check to the claimant, the bank is relieved of its obligation to pay the check. Subsection (b)(3). Thus, any person entitled to enforce the check, including even a holder in due course, loses the right to enforce the check after a claim under subsection (b) becomes enforceable.

If the obligated bank pays the claimant under subsection (b)(4), the bank is discharged of all liability with respect to the check. The only exception is the unlikely case in which the obligated bank subsequently incurs liability

under Section 4-302(a)(1) with respect to the check. For example, Obligated Bank is the issuer of a cashier's check and, after a claim becomes enforceable, it pays the claimant under subsection (b)(4). Later the check is presented to Obligated Bank for payment over the counter. Under subsection (b)(3), Obligated Bank is not obliged to pay the check and may dishonor the check by returning it to the person who presented it for payment. But the normal rules of check collection are not affected by Section 3-312. If Obligated Bank retains the check beyond midnight of the day of presentment without settling for it, it becomes accountable for the amount of the check under Section 4-302(a)(1) even though it had no obligation to pay the check.

An obligated bank that pays the amount of a check to a claimant under subsection (b)(4) is discharged of all liability on the check so long as the assertion of the claim meets the requirements of subsection (b) discussed in Comment 2. This is important in cases of fraudulent declarations of loss. For example, if the claimant falsely alleges a loss that in fact did not occur, the bank, subject to Section 1-203, may rely on the declaration of loss. On the other hand, a claim may be asserted only by a person described in subsection (b)(i). Thus, the bank is discharged under subsection (a)(4) only if it pays such a person. Although it is highly unlikely, it is possible that more than one person could assert a claim under subsection (b) to the amount of a check. Such a case could occur if one of the claimants makes a false declaration of loss. The obligated bank is not required to determine whether a claimant who complies with subsection (b) is acting wrongfully. The bank may utilize procedures outside this Article, such as interpleader, under which the conflicting claims may be adjudicated.

Although it is unlikely that a lost check would be presented for payment after the claimant was paid by the bank under subsection (b)(4), it is possible for it to happen. Suppose the declaration of loss by the claimant fraudulently alleged a loss that in fact did not occur. If the claimant negotiated the check, presentment for payment would occur shortly after negotiation in almost all cases. Thus, a fraudulent declaration of loss is not likely to occur unless the check is negotiated after the 90-day period has already expired or shortly before expiration. In such a case the holder of the check, who may not have noticed the date of the check, is not entitled to payment from the obligated bank if the check is presented for payment after the claim becomes enforceable. Subsection (b)(3). The remedy of the holder who is denied payment in that case is an action against the claimant under subsection (c) if the holder is a holder in due course, or for breach of warranty under subsection (b). The holder

would also have common law remedies against the claimant under the law of restitution or fraud.

4. The following cases illustrate the operation of Section 3-312:

Case # 1. Obligated Bank (OB) certified a check drawn by its customer, Drawer (D), payable to Payee (P). Two days after the check was certified, D lost the check and then asserted a claim pursuant to subsection (b). The check had not been presented for payment when D's claim became enforceable 90 days after the check was certified. Under subsection (b)(4), at the time D's claim became enforceable OB became obliged to pay D the amount of the check. If the check is later presented for payment, OB may refuse to pay the check and has no obligation to anyone to pay the check. Any obligation owed by D to P, for which the check was intended as payment, is unaffected because the check was never delivered to P.

Case # 2. Obligated Bank (OB) issued a teller's check to Remitter (R) payable to Payee (P). R delivered the check to P in payment of an obligation. P lost the check and then asserted a claim pursuant to subsection (b). To carry out P's order, OB issued an order pursuant to Section 4-403(a) to the drawee of the teller's check to stop payment of the check effective on the 90th day after the date of the teller's check. The check was not presented for payment. On the 90th day after the date of the teller's check P's claim becomes enforceable and OB becomes obliged to pay P the amount of the check. As in Case # 1, OB has no further liability with respect to the check to anyone. When R delivered the check to P, R's underlying obligation to P was discharged under Section 3-310. Thus, R suffered no loss. Since P received the amount of the check, P also suffered no loss except with respect to the delay in receiving the amount of the check.

Case # 3. Obligated Bank (OB) issued a cashier's check to its customer, Payee (P). Two days after issue, the check was stolen from P who then asserted a claim pursuant to subsection (b). Ten days after issue, the check was deposited by X in an account in Depository Bank (DB). X had found the check and forged the indorsement of P. DB promptly presented the check to OB and obtained payment on behalf of X. On the 90th day after the date of the check P's claim becomes enforceable and P is entitled to receive the amount of the check from OB. Subsection (b)(4). Although the check was presented for payment before P's claim became enforceable, OB is not discharged. Because of the forged indorsement X was not a holder and neither was OB. Thus, neither is a person entitled to enforce the check (Section 3-301) and OB is not discharged under Section 3-602(a). Thus, under subsection (b)(4), because OB did not pay a person entitled to enforce the

check, OB must pay P. OB's remedy is against DB for breach of warranty under Section 4-208(a)(1). As an alternative to the remedy under Section 3-312, P could recover from DB for conversion under Section 3-420(a).

Case # 4. Obligated Bank (OB) issued a cashier's check to its customer, Payee (P). P made an unrestricted blank indorsement of the check and mailed the check to P's bank for deposit to P's account. The check was never received by P's bank. When P discovered the loss, P asserted a claim pursuant to subsection (b). X found the check and deposited it in X's account in Depository Bank (DB) after indorsing the check. DB presented the check for payment before the end of the 90-day period after its date. OB paid the check. Because of the unrestricted blank indorsement by P, X became a holder of the check. DB also became a holder. Since the check was paid before P's claim became enforceable and payment was made to a person entitled to enforce the check, OB is discharged of all liability with respect to the check. Subsection (b)(2). Thus, P is not entitled to payment from OB. Subsection (b)(4) doesn't apply.

Case # 5. Obligated Bank (OB) issued a cashier's check to its customer, Payee (P). P made an unrestricted blank indorsement of the check and mailed the check to P's bank for deposit to P's account. The check was never received by P's bank. When P discovered the loss, P asserted a claim pursuant to subsection (b). At the end of the 90-day period after the date of the check, OB paid the amount of the check to P under subsection (b)(4). X then found the check and deposited it to X's account in Depository Bank (DB). DB presented the check to OB for payment. OB is not obliged to pay the check. Subsection (b)(4). If OB dishonors the check, DB's remedy is to charge back X's account. Section 4-214(a). Although P, as an indorser, would normally have liability to DB under Section 3-415(a) because the check was dishonored, P is released from that liability under Section 3-415(e) because collection of the check was initiated more than 30 days after the indorsement. DB has a remedy only against X. A depository bank that takes a cashier's check that cannot be presented for payment before expiration of the 90-day period after its date is on notice that the check might not be paid because of the possibility of a claim asserted under subsection (b) which would excuse the issuer of the check from paying the check. Thus, the depository bank cannot safely release funds with respect to the check until it has assurance that the check has been paid. DB cannot be a holder in due course of the check because it took the check when the check was overdue. Section 3-304(a)(2). Thus, DB has no action against P under subsection (c).

Case # 6. Obligated Bank (OB) issued a cashier's check payable to bearer and delivered it to its customer, Remitter (R). R held the check for 90 days and then wrongfully asserted a claim to the amount of the check under subsection (b). The declaration of loss fraudulently stated that the check was lost. R received payment from OB under subsection (b)(4). R then negotiated the check to X for value. X presented the check to OB for payment. Al-

though OB, under subsection (b)(2), was not obliged to pay the check, OB paid X by mistake. OB's teller did not notice that the check was more than 90 days old and was not aware that OB was not obliged to pay the check. If X took the check in good faith, OB may not recover from X. Section 3-418(c). OB's remedy is to recover from R for fraud or for breach of warranty in making a false declaration of loss. Subsection (b).

Part 4. Liability of Parties.

§ 28:3-401. Signature.

(a) A person is not liable on an instrument unless (i) the person signed the instrument, or (ii) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under section 28:3-402.

(b) A signature may be made (i) manually or by means of a device or machine, and (ii) by the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing.

(Dec. 30, 1963, 77 Stat. 682, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in § 28:3-102.

Prior Codifications. — 1981 Ed., § 28:3-401.

1973 Ed., § 28:3-401.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Obligation on an instrument depends on a signature that is binding on the obligor. The signature may be made by the obligor personally or by an agent authorized to act for the obligor. Signature by agents is covered by Section 3-402. It is not necessary that the name of the obligor appear on the instrument, so long as there is a signature that binds the obligor. Signature includes an indorsement.

2. A signature may be handwritten, typed, printed or made in any other manner. It need not be subscribed, and may appear in the body of the instrument, as in the case of "I, John Doe, promise to pay * * *" without any other signa-

ture. It may be made by mark, or even by thumb-print. It may be made in any name, including any trade name or assumed name, however false and fictitious, which is adopted for the purpose. Parol evidence is admissible to identify the signer, and when the signer is identified the signature is effective. Indorsement in a name other than that of the indorser is governed by Section 3-204(d).

This section is not intended to affect any other law requiring a signature by mark to be witnessed, or any signature to be otherwise authenticated, or requiring any form of proof.

CASE NOTES

ANALYSIS

In general.

Limitation of actions.

Payment of forged or altered paper.

In general.

Even if purchasers assumed full responsibility for payment of note secured by deed of trust and even if initial and subsequent holders of note were aware of that assumption by receive-

ing payment on the note from purchasers, such awareness was insufficient to establish mutual agreement between holder, maker-vendor and purchasers to substitute purchasers as new principal obligors on the obligation. *Yasuna v. Miller*, 399 A.2d 68, 1979 D.C. App. LEXIS 309 (1979).

After foreclosure was had on first deed of trust and proceeds of sale left nothing for payment of second deed of trust, bona fide assignees of rights of bona fide assignee of rights under such second deed of trust which was evidenced by a note could sue purchasers directly on their contract to assume such second deed of trust, though note did not contain purchasers' signatures and thus they could not be held liable on such instrument itself. D.C. Code § 28:3-401. *City Mortg. Inv. Club v. Beh*, 334 A.2d 183, 1975 D.C. App. LEXIS 344 (1975).

Limitation of actions.

Bank could shorten the one-year Uniform Commercial Code (U.C.C.) statute of repose period for reporting unauthorized checks or

withdrawals to 60-days through contract with bank customer. *Peters v. Riggs Nat'l Bank, N.A.*, 942 A.2d 1163, 2008 D.C. App. LEXIS 85 (2008).

Payment of forged or altered paper.

Trial court's finding that drawee bank failed to comply with commercially reasonable procedures when it failed to detect forgeries on drawer's checks was not clearly erroneous, and thus, bank was liable to drawer; forged signature was not spelled the same as authorized signature on signature card. D.C. Code 1981, §§ 28:3-401(1), 28:3-404(1), 28:3-406, 28:4-406(3). *American Sec. Bank, N.A. v. American Motorists Ins. Co.*, 538 A.2d 736, 1988 D.C. App. LEXIS 57 (1988).

Drawer's negligence that contributes to forgery negates drawee bank's liability, but only if drawee bank meets its burden of proving by a preponderance of the evidence that it complied with reasonable commercial standards when it cashed check. D.C. Code 1981, §§ 28:3-401(1), 28:3-404(1), 28:3-406. *American Sec. Bank, N.A. v. American Motorists Ins. Co.*, 538 A.2d 736, 1988 D.C. App. LEXIS 57 (1988).

§ 28:3-402. Signature by representative.

(a) If a person acting, or purporting to act, as a representative signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent the represented person would be bound if the signature were on a simple contract. If the represented person is bound, the signature of the representative is the "authorized signature of the represented person" and the represented person is liable on the instrument, whether or not identified in the instrument.

(b) If a representative signs the name of the representative to an instrument and the signature is an authorized signature of the represented person, the following rules apply:

(1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument.

(2) Subject to subsection (c) of this section, if (i) the form of the signature does not show unambiguously that the signature is made in a representative capacity or (ii) the represented person is not identified in the instrument, the representative is liable on the instrument to a holder in due course that took the instrument without notice that the representative was not intended to be liable on the instrument. With respect to any other person, the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument.

(c) If a representative signs the name of the representative as drawer of a check without indication of the representative status and the check is payable from an account of the represented person who is identified on the check, the

signer is not liable on the check if the signature is an authorized signature of the represented person.

(Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-402.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) states when the represented person is bound on an instrument if the instrument is signed by a representative. If under the law of agency the represented person would be bound by the act of the representative in signing either the name of the represented person or that of the representative, the signature is the authorized signature of the represented person. Former Section 3-401(1) stated that “no person is liable on an instrument unless his signature appears thereon.” This was interpreted as meaning that an undisclosed principal is not liable on an instrument. This interpretation provided an exception to ordinary agency law that binds an undisclosed principal on a simple contract.

It is questionable whether this exception was justified by the language of former Article 3 and there is no apparent policy justification for it. The exception is rejected by subsection (a) which returns to ordinary rules of agency. If P, the principal, authorized A, the agent, to borrow money on P’s behalf and A signed A’s name to a note without disclosing that the signature was on behalf of P, A is liable on the instrument. But if the person entitled to enforce the note can also prove that P authorized A to sign on P’s behalf, why shouldn’t P also be liable on the instrument? To recognize the liability of P takes nothing away from the utility of negotiable instruments. Furthermore, imposing liability on P has the merit of making it impossible to have an instrument on which nobody is liable even though it was authorized by P. That result could occur under former Section 3-401(1) if an authorized agent signed “as agent” but the note did not identify the principal. If the dispute was between the agent and the payee of the note, the agent could escape liability on the note by proving that the agent and the payee did not intend that the agent be liable on the note when the note was issued. Former Section 3-403(2)(b). Under the prevailing interpretation of former Section 3-401(1), the principal was not liable on the note under former Section 3-401(1) because the principal’s name did not appear on the note. Thus, nobody was liable on the note even though all parties knew that the note was signed by the agent on behalf of the principal. Under Section 3-402(a) the principal would be liable on the note.

2. Subsection (b) concerns the question of when an agent who signs an instrument on behalf of a principal is bound on the instrument. The approach followed by former Section 3-403 was to specify the form of signature that imposed or avoided liability. This approach was unsatisfactory. There are many ways in which there can be ambiguity about a signature. It is better to state a general rule. Subsection (b)(1) states that if the form of the signature unambiguously shows that it is made on behalf of an identified represented person (for example, “P, by A, Treasurer”) the agent is not liable. This is a workable standard for a court to apply. Subsection (b)(2) partly changes former Section 3-403(2). Subsection (b)(2) relates to cases in which the agent signs on behalf of a principal but the form of the signature does not fall within subsection (b)(1). The following cases are illustrative. In each case John Doe is the authorized agent of Richard Roe and John Doe signs a note on behalf of Richard Roe. In each case the intention of the original parties to the instrument is that Roe is to be liable on the instrument but Doe is not to be liable.

Case #1. Doe signs “John Doe” without indicating in the note that Doe is signing as agent. The note does not identify Richard Roe as the represented person.

Case #2. Doe signs “John Doe, Agent” but the note does not identify Richard Roe as the represented person.

Case #3. The name “Richard Roe” is written on the note and immediately below that name Doe signs “John Doe” without indicating that Doe signed as agent.

In each case Doe is liable on the instrument to a holder in due course without notice that Doe was not intended to be liable. In none of the cases does Doe’s signature unambiguously show that Doe was signing as agent for an identified principal. A holder in due course should be able to resolve any ambiguity against Doe.

But the situation is different if a holder in due course is not involved. In each case Roe is liable on the note. Subsection (a). If the original parties to the note did not intend that Doe also be liable, imposing liability on Doe is a windfall to the person enforcing the note. Under subsec-

tion (b)(2) Doe is prima facie liable because his signature appears on the note and the form of the signature does not unambiguously refute personal liability. But Doe can escape liability by proving that the original parties did not intend that he be liable on the note. This is a change from former Section 3-403(2)(a).

A number of cases under former Article 3 involved situations in which an agent signed the agent's name to a note, without qualification and without naming the person represented, intending to bind the principal but not the agent. The agent attempted to prove that the other party had the same intention. Some of these cases involved mistake, and in some there was evidence that the agent may have been deceived into signing in that manner. In some of the cases the court refused to allow proof of the intention of the parties and imposed liability on the agent based on former Section 3-403(2)(a) even though both parties to the instrument may have intended that the agent not be liable. Subsection (b)(2) changes the result of those cases, and is consistent with

Section 3-117 which allows oral or written agreements to modify or nullify apparent obligations on the instrument.

Former Section 3-403 spoke of the represented person being "named" in the instrument. Section 3-402 speaks of the represented person being "identified" in the instrument. This change in terminology is intended to reject decisions under former Section 3-403(2) requiring that the instrument state the legal name of the represented person.

3. Subsection (c) is directed at the check cases. It states that if the check identifies the represented person the agent who signs on the signature line does not have to indicate agency status. Virtually all checks used today are in personalized form which identify the person on whose account the check is drawn. In this case, nobody is deceived into thinking that the person signing the check is meant to be liable. This subsection is meant to overrule cases decided under former Article 3 such as *Griffin v. Ellinger*, 538 S.W.2d 97 (Texas 1976).

CASE NOTES

In general.

Statute dealing with liability of an authorized representative who signs his own name to a negotiable instrument did not apply to unlimited guaranty signed by president of corporation, where neither the guaranty nor a subsequently made promissory note were made payable to order or to bearer and where the guaranty contained a promise to pay "any and all liabilities" of corporation to bank. D.C. Code 1981, §§ 28:3-102(e)(1), 28:3-104(1)(b, d), 28:3-403. *King v. Industrial Bank of Washington*, 474 A.2d 151, 1984 D.C. App. LEXIS 368 (1984).

Designation of the signer as an agent and the naming of the principal are essential to avoidance of personal liability of the signer on negotiable and nonnegotiable contracts alike. D.C. Code 1981, § 28:3-403. *King v. Industrial Bank of Washington*, 474 A.2d 151, 1984 D.C. App. LEXIS 368 (1984).

Signer of promissory note was not individually liable on the note for failure to make payments where it was evident from face of the note that he signed his initials in capacity as a witness. D.C. Code §§ 28:3-402, 28:3-402 comment; U.C.C. § 3-402. *Chidakel v. Blonder*, 431 A.2d 594, 1981 D.C. App. LEXIS 302 (1981).

§ 28:3-403. Unauthorized signature.

(a) Unless otherwise provided in this article or Article 4, an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value. An unauthorized signature may be ratified for all purposes of this article.

(b) If the signature of more than one person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one of the required signatures is lacking.

(c) The civil or criminal liability of a person who makes an unauthorized signature is not affected by any provision of this article which makes the unauthorized signature effective for the purposes of this article.

(Dec. 30, 1963, 77 Stat. 682, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-403.

1973 Ed., § 28:3-404.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. “Unauthorized” signature is defined in Section 1-201(43) as one that includes a forgery as well as a signature made by one exceeding actual or apparent authority. Former Section 3-404(1) stated that an unauthorized signature was inoperative as the signature of the person whose name was signed unless that person “is precluded from denying it.” Under former Section 3-406 if negligence by the person whose name was signed contributed to an unauthorized signature, that person “is precluded from asserting the * * * lack of authority.” Both of these sections were applied to cases in which a forged signature appeared on an instrument and the person asserting rights on the instrument alleged that the negligence of the purported signer contributed to the forgery. Since the standards for liability between the two sections differ, the overlap between the sections caused confusion. Section 3-403(a) deals with the problem by removing the preclusion language that appeared in former Section 3-404.

2. The except clause of the first sentence of subsection (a) states the generally accepted rule that the unauthorized signature, while it is wholly inoperative as that of the person whose name is signed, is effective to impose liability upon the signer or to transfer any rights that the signer may have in the instrument. The signer’s liability is not in damages for breach of warranty of authority, but is full liability on the instrument in the capacity in which the signer signed. It is, however, limited to parties who take or pay the instrument in good faith; and one who knows that the signature is unauthorized cannot recover from the signer on the instrument.

3. The last sentence of subsection (a) allows an unauthorized signature to be ratified. Ratification is a retroactive adoption of the unauthorized signature by the person whose name is signed and may be found from conduct as well as from express statements. For example, it may be found from the retention of benefits received in the transaction with knowledge of the unauthorized signature. Although the forger is not an agent, ratification is governed by the rules and principles applicable to ratification of unauthorized acts of an agent.

Ratification is effective for all purposes of this Article. The unauthorized signature be-

comes valid so far as its effect as a signature is concerned. Although the ratification may relieve the signer of liability on the instrument, it does not of itself relieve the signer of liability to the person whose name is signed. It does not in any way affect the criminal law. No policy of the criminal law prevents a person whose name is forged to assume liability to others on the instrument by ratifying the forgery, but the ratification cannot affect the rights of the state. While the ratification may be taken into account with other relevant facts in determining punishment, it does not relieve the signer of criminal liability.

4. Subsection (b) clarifies the meaning of “unauthorized” in cases in which an instrument contains less than all of the signatures that are required as authority to pay a check. Judicial authority was split on the issue whether the one-year notice period under former Section 4-406(4) (now Section 4-406(f)) barred a customer’s suit against a payor bank that paid a check containing less than all of the signatures required by the customer to authorize payment of the check. Some cases took the view that if a customer required that a check contain the signatures of both A and B to authorize payment and only A signed, there was no unauthorized signature within the meaning of that term in former Section 4-406(4) because A’s signature was neither unauthorized nor forged. The other cases correctly pointed out that it was the customer’s signature at issue and not that of A; hence, the customer’s signature was unauthorized if all signatures required to authorize payment of the check were not on the check. Subsection (b) follows the latter line of cases. The same analysis applies if A forged the signature of B. Because the forgery is not effective as a signature of B, the required signature of B is lacking.

Subsection (b) refers to “the authorized signature of an organization.” The definition of “organization” in Section 1-201(28) is very broad. It covers not only commercial entities but also “two or more persons having a joint or common interest.”

Hence subsection (b) would apply when a husband and wife are both required to sign an instrument.

CASE NOTES

Parol evidence.

Parol evidence was not admissible to explain circumstances under which person signed promissory note under that of corporation which personally promised to pay the note only

if signer were officer, employee or agent of the corporation at the time of trial. D.C. Code § 28:3-403(2, 3). *Chidakel v. Blonder*, 431 A.2d 594, 1981 D.C. App. LEXIS 302 (1981).

§ 28:3-404. Impostors; fictitious payees.

(a) If an impostor, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the payee, an indorsement of the instrument by any person in the name of the payee is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(b) If (i) a person whose intent determines to whom an instrument is payable (section 28:3-110(a) or (b)) does not intend the person identified as payee to have any interest in the instrument, or (ii) the person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special indorsement:

(1) Any person in possession of the instrument is its holder.

(2) An indorsement by any person in the name of the payee stated in the instrument is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(c) Under subsection (a) or (b) of this section, an indorsement is made in the name of a payee if (i) it is made in a name substantially similar to that of the payee or (ii) the instrument, whether or not indorsed, is deposited in a depository bank to an account in a name substantially similar to that of the payee.

(d) With respect to an instrument to which subsection (a) or (b) of this section applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

(Dec. 30, 1963, 77 Stat. 683, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467; Apr. 18, 1996, D.C. Law 11-110, § 27(b), 43 DCR 530.)

Section references. — This section is referred to in §§ 28:3-417 and 28:4-208.

Prior Codifications. — 1981 Ed., § 28:3-404.

1973 Ed., § 28:3-405.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see His-

torical and Statutory Notes following § 28:3-101.

Legislative history of Law 11-110. — For legislative history of D.C. Law 11-110, see Historical and Statutory Notes following § 28:3-308.

UNIFORM COMMERCIAL CODE COMMENT

1. Under former Article 3, the impostor cases were governed by former Section 3-405(1)(a) and the fictitious payee cases were governed by Section 3-405(1)(b). Section 3-404 replaces former Section 3-405(1)(a) and (b) and modifies the previous law in some respects. Former Section 3-405 was read by some courts to require that the indorsement be in the exact name of the named payee. Revised Article 3 rejects this result. Section 3-404(c) requires only that the indorsement be made in a name "substantially similar" to that of the payee. Subsection (c) also recognizes the fact that checks may be deposited without indorsement. Section 4-205(a).

Subsection (a) changes the former law in a case in which the impostor is impersonating an agent. Under former Section 3-405(1)(a), if Impostor impersonated Smith and induced the drawer to draw a check to the order of Smith, Impostor could negotiate the check. If Impostor impersonated Smith, the president of Smith Corporation, and the check was payable to the order of Smith Corporation, the section did not apply. See the last paragraph of Comment 2 to former Section 3-405. In revised Article 3, Section 3-404(a) gives Impostor the power to negotiate the check in both cases.

2. Subsection (b) is based in part on former Section 3-405(1)(b) and in part on N.I.L. s 9(3). It covers cases in which an instrument is payable to a fictitious or nonexistent person and to cases in which the payee is a real person but the drawer or maker does not intend the payee to have any interest in the instrument. Subsection (b) applies to any instrument, but its primary importance is with respect to checks of corporations and other organizations. It also applies to forged check cases. The following cases illustrate subsection (b):

Case #1. Treasurer is authorized to draw checks in behalf of Corporation. Treasurer fraudulently draws a check of Corporation payable to Supplier Co., a non-existent company. Subsection (b) applies because Supplier Co. is a fictitious person and because Treasurer did not intend Supplier Co. to have any interest in the check. Under subsection (b)(1) Treasurer, as the person in possession of the check, becomes the holder of the check. Treasurer indorses the check in the name "Supplier Co." and deposits it in Depositary Bank. Under subsection (b)(2) and (c)(i), the indorsement is effective to make Depositary Bank the holder and therefore a person entitled to enforce the instrument. Section 3-301.

Case #2. Same facts as Case #1 except that Supplier Co. is an actual company that does business with Corporation. If Treasurer intended to steal the check when the check was

drawn, the result in Case #2 is the same as the result in Case #1. Subsection (b) applies because Treasurer did not intend Supplier Co. to have any interest in the check. It does not make any difference whether Supplier Co. was or was not a creditor of Corporation when the check was drawn. If Treasurer did not decide to steal the check until after the check was drawn, the case is covered by Section 3-405 rather than Section 3-404(b), but the result is the same. See Case #6 in Comment 3 to Section 3-405.

Case #3. Checks of Corporation must be signed by two officers. President and Treasurer both sign a check of Corporation payable to Supplier Co., a company that does business with Corporation from time to time but to which Corporation does not owe any money. Treasurer knows that no money is owed to Supplier Co. and does not intend that Supplier Co. have any interest in the check.

President believes that money is owed to Supplier Co. Treasurer obtains possession of the check after it is signed. Subsection (b) applies because Treasurer is "a person whose intent determines to whom an instrument is payable" and Treasurer does not intend Supplier Co. to have any interest in the check. Treasurer becomes the holder of the check and may negotiate it by indorsing it in the name "Supplier Co."

Case #4. Checks of Corporation are signed by a check-writing machine. Names of payees of checks produced by the machine are determined by information entered into the computer that operates the machine. Thief, a person who is not an employee or other agent of Corporation, obtains access to the computer and causes the check-writing machine to produce a check payable to Supplier Co., a non-existent company. Subsection (b)(ii) applies. Thief then obtains possession of the check. At that point Thief becomes the holder of the check because Thief is the person in possession of the instrument. Subsection (b)(1). Under Section 3-301 Thief, as holder, is the "person entitled to enforce the instrument" even though Thief does not have title to the check and is in wrongful possession of it. Thief indorses the check in the name "Supplier Co." and deposits it in an account in Depositary Bank which Thief opened in the name "Supplier Co." Depositary Bank takes the check in good faith and credits the "Supplier Co." account. Under subsection (b)(2) and (c)(i), the indorsement is effective. Depositary Bank becomes the holder and the person entitled to enforce the check. The check is presented to the drawee bank for payment and payment is made. Thief then withdraws the credit to the account. Although the check was issued without authority given by Corporation,

the drawee bank is entitled to pay the check and charge Corporation's account if there was an agreement with Corporation allowing the bank to debit Corporation's account for payment of checks produced by the check-writing machine whether or not authorized. The indorsement is also effective if Supplier Co. is a real person. In that case subsection (b)(i) applies. Under Section 3-110(b) Thief is the person whose intent determines to whom the check is payable, and Thief did not intend Supplier Co. to have any interest in the check. When the drawee bank pays the check, there is no breach of warranty under Section 3-417(a)(1) or 4-208(a)(1) because Depository Bank was a person entitled to enforce the check when it was forwarded for payment.

Case #5. Thief, who is not an employee or agent of Corporation, steals check forms of Corporation. John Doe is president of Corporation and is authorized to sign checks on behalf of Corporation as drawer. Thief draws a check in the name of Corporation as drawer by forging the signature of Doe. Thief makes the check payable to the order of Supplier Co. with the intention of stealing it. Whether Supplier Co. is a fictitious person or a real person, Thief becomes the holder of the check and the person entitled to enforce it. The analysis is the same as that in Case #4. Thief deposits the check in an account in Depository Bank which Thief opened in the name "Supplier Co." Thief either indorses the check in a name other than "Supplier Co." or does not indorse the check at all. Under Section 4-205(a) a depository bank may become holder of a check deposited to the account of a customer if the customer was a holder, whether or not the customer indorses. Subsection (c)(ii) treats deposit to an account in a name substantially similar to that of the payee as the equivalent of indorsement in the name of the payee. Thus, the deposit is an effective indorsement of the check. Depository Bank becomes the holder of the check and the person entitled to enforce the check. If the check is paid by the drawee bank, there is no breach of warranty under Section 3-417(a)(1) or 4-208(a)(1) because Depository Bank was a person entitled to enforce the check when it was forwarded for payment and, unless Depository Bank knew about the forgery of Doe's signature, there is no breach of warranty under Section 3-417(a)(3) or 4-208(a)(3).

Because the check was a forged check the drawee bank is not entitled to charge Corporation's account unless Section 3-406 or Section 4-406 applies.

3. In cases governed by subsection (a) the dispute will normally be between the drawer of the check that was obtained by the impostor and the drawee bank that paid it. The drawer is precluded from obtaining recredit of the drawer's account by arguing that the check was paid

on a forged indorsement so long as the drawee bank acted in good faith in paying the check. Cases governed by subsection (b) are illustrated by Cases #1 through #5 in Comment 2. In Cases #1, #2, and #3 there is no forgery of the check, thus the drawer of the check takes the loss if there is no lack of good faith by the banks involved. Cases #4 and #5 are forged check cases. Depository Bank is entitled to retain the proceeds of the check if it didn't know about the forgery. Under Section 3-418 the drawee bank is not entitled to recover from Depository Bank on the basis of payment by mistake because Depository Bank took the check in good faith and gave value for the check when the credit given for the check was withdrawn. And there is no breach of warranty under Section 3-417(a)(1) or (3) or 4-208(a)(1) or (3). Unless Section 3-406 applies the loss is taken by the drawee bank if a forged check is paid, and that is the result in Case #5. In Case #4 the loss is taken by Corporation, the drawer, because an agreement between Corporation and the drawee bank allowed the bank to debit Corporation's account despite the unauthorized use of the check-writing machine.

If a check payable to an impostor, fictitious payee, or payee not intended to have an interest in the check is paid, the effect of subsections (a) and (b) is to place the loss on the drawer of the check rather than on the drawee or the Depository Bank that took the check for collection. Cases governed by subsection (a) always involve fraud, and fraud is almost always involved in cases governed by subsection (b). The drawer is in the best position to avoid the fraud and thus should take the loss. This is true in Case #1, Case #2, and Case #3. But in some cases the person taking the check might have detected the fraud and thus have prevented the loss by the exercise of ordinary care. In those cases, if that person failed to exercise ordinary care, it is reasonable that that person bear loss to the extent the failure contributed to the loss. Subsection (d) is intended to reach that result. It allows the person who suffers loss as a result of payment of the check to recover from the person who failed to exercise ordinary care. In Case #1, Case #2, and Case #3, the person suffering the loss is Corporation, the drawer of the check. In each case the most likely defendant is the depository bank that took the check and failed to exercise ordinary care. In those cases, the drawer has a cause of action against the offending bank to recover a portion of the loss. The amount of loss to be allocated to each party is left to the trier of fact. Ordinary care is defined in Section 3-103(a)(7). An example of the type of conduct by a depository bank that could give rise to recovery under subsection (d) is discussed in Comment 4 to Section 3-405. That comment addresses the last sentence of

Section 3-405(b) which is similar to Section 3-404(d).

In Case #1, Case #2, and Case #3, there was no forgery of the drawer's signature. But cases involving checks payable to a fictitious payee or a payee not intended to have an interest in the check are often forged check cases as well. Examples are Case #4 and Case #5. Normally, the loss in forged check cases is on the drawee bank that paid the check. Case #5 is an example. In Case #4 the risk with respect to the forgery is shifted to the drawer because of the agreement between the drawer and the drawee bank. The doctrine that prevents a drawee bank from recovering payment with respect to a forged check if the payment was made to a person who took the check for value and in good faith is incorporated into Section 3-418 and Sections 3-417(a)(3) and 4-208(a)(3). This doctrine is based on the assumption that the

depository bank normally has no way of detecting the forgery because the drawer is not that bank's customer. On the other hand, the drawee bank, at least in some cases, may be able to detect the forgery by comparing the signature on the check with the specimen signature that the drawee has on file. But in some forged check cases the depository bank is in a position to detect the fraud. Those cases typically involve a check payable to a fictitious payee or a payee not intended to have an interest in the check. Subsection (d) applies to those cases. If the depository bank failed to exercise ordinary care and the failure substantially contributed to the loss, the drawer in Case #4 or the drawee bank in Case #5 has a cause of action against the depository bank under subsection (d). Comment 4 to Section 3-405 can be used as a guide to the type of conduct that could give rise to recovery under Section 3-404(d).

CASE NOTES

Forged or altered instruments.

Evidence was insufficient to establish that course of dealing between bank and bank's customer before time that bank paid on fraudulent checks drawn against customer's account reflected parties' agreement to shift from bank to customer the risk of loss caused by forgeries; none of facsimile signature resolutions executed by customer concerned account in which fraud occurred, and even considered in aggregate, resolutions were too few, and too closely clustered and far removed in time, to put customer on notice that bank had general policy concerning facsimile signatures that would govern account in which fraud occurred. D.C. Code 1981, §§ 28:1-205(1), 28:3-404(1). *National Union Fire Ins. Co. v. Riggs Nat'l Bank*, 93 F.3d 885, 1996 U.S. App. LEXIS 21971 (C.A.D.C. 1996).

Trial court's finding that drawee bank failed to comply with commercially reasonable proce-

dures when it failed to detect forgeries on drawer's checks was not clearly erroneous, and thus, bank was liable to drawer; forged signature was not spelled the same as authorized signature on signature card. D.C. Code 1981, §§ 28:3-401(1), 28:3-404(1), 28:3-406, 28:4-406(3). *American Sec. Bank, N.A. v. American Motorists Ins. Co.*, 538 A.2d 736, 1988 D.C. App. LEXIS 57 (1988).

In depositor's action against bank for reimbursement for bank's payment of allegedly forged checks, fact that checks charged to depositor's checking account were not reflected in depositor's own records, which checks were not produced in evidence, did not provide a basis upon which jury could reasonably have inferred or found that missing checks were drawn by a forger and were, therefore, improperly charged to depositor's account. D.C. Code § 28:3-404(1). *Myrick v. National Sav. & Trust Co.*, 268 A.2d 526, 1970 D.C. App. LEXIS 322 (App. 1970).

§ 28:3-405. Employer's responsibility for fraudulent indorsement by employee.

(a) In this section, the term:

(1) "Employee" includes an independent contractor and employee of an independent contractor retained by the employer.

(2) "Fraudulent indorsement" means (i) in the case of an instrument payable to the employer, a forged indorsement purporting to be that of the employer, or (ii) in the case of an instrument with respect to which the employer is the issuer, a forged indorsement purporting to be that of the person identified as payee.

(3) "Responsibility" with respect to instruments means authority (i) to sign or indorse instruments on behalf of the employer, (ii) to process instru-

ments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition, (iii) to prepare or process instruments for issue in the name of the employer, (iv) to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer, (v) to control the disposition of instruments to be issued in the name of the employer, or (vi) to act otherwise with respect to instruments in a responsible capacity. The term “responsibility” does not include authority that merely allows an employee to have access to instruments or blank or incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail, or similar access.

(b) For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

(c) Under subsection (b) of this section, an indorsement is made in the name of the person to whom an instrument is payable if (i) it is made in a name substantially similar to the name of that person or (ii) the instrument, whether or not indorsed, is deposited in a depository bank to an account in a name substantially similar to the name of that person.

(Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-405.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Section 3-405 is addressed to fraudulent indorsements made by an employee with respect to instruments with respect to which the employer has given responsibility to the employee. It covers two categories of fraudulent indorsements: indorsements made in the name of the employer to instruments payable to the employer and indorsements made in the name of payees of instruments issued by the employer. This section applies to instruments generally but normally the instrument will be a check. Section 3-405 adopts the principle that the risk of loss for fraudulent indorsements by employees who are entrusted with responsibility with respect to checks should fall on the employer rather than the bank that takes the check or pays it, if the bank was not negligent

in the transaction. Section 3-405 is based on the belief that the employer is in a far better position to avoid the loss by care in choosing employees, in supervising them, and in adopting other measures to prevent forged indorsements on instruments payable to the employer or fraud in the issuance of instruments in the name of the employer. If the bank failed to exercise ordinary care, subsection (b) allows the employer to shift loss to the bank to the extent the bank's failure to exercise ordinary care contributed to the loss. “Ordinary care” is defined in Section 3-103(a)(7). The provision applies regardless of whether the employer is negligent.

The first category of cases governed by Section 3-405 are those involving indorsements

made in the name of payees of instruments issued by the employer. In this category, Section 3-405 includes cases that were covered by former Section 3-405(1)(c). The scope of Section 3-405 in revised Article 3 is, however, somewhat wider. It covers some cases not covered by former Section 3-405(1)(c) in which the entrusted employee makes a forged indorsement to a check drawn by the employer. An example is Case #6 in Comment 3. Moreover, a larger group of employees is included in revised Section 3-405. The key provision is the definition of "responsibility" in subsection (a)(1) which identifies the kind of responsibility delegated to an employee which will cause the employer to take responsibility for the fraudulent acts of that employee. An employer can insure this risk by employee fidelity bonds.

The second category of cases governed by Section 3-405—fraudulent indorsements of the name of the employer to instruments payable to the employer—were covered in former Article 3 by Section 3-406. Under former Section 3-406, the employer took the loss only if negligence of the employer could be proved. Under revised Article 3, Section 3-406 need not be used with respect to forgeries of the employer's indorsement. Section 3-405 imposes the loss on the employer without proof of negligence.

2. With respect to cases governed by former Section 3-405(1)(c), Section 3-405 is more favorable to employers in one respect. The bank was entitled to the preclusion provided by former Section 3-405(1)(c) if it took the check in good faith. The fact that the bank acted negligently did not shift the loss to the bank so long as the bank acted in good faith. Under revised Section 3-405 the loss may be recovered from the bank to the extent the failure of the bank to exercise ordinary care contributed to the loss.

3. Section 3-404(b) and Section 3-405 both apply to cases of employee fraud. Section 3-404(b) is not limited to cases of employee fraud, but most of the cases to which it applies will be cases of employee fraud. The following cases illustrate the application of Section 3-405. In each case it is assumed that the bank that took the check acted in good faith and was not negligent.

Case #1. Janitor, an employee of Employer, steals a check for a very large amount payable to Employer after finding it on a desk in one of Employer's offices. Janitor forges Employer's indorsement on the check and obtains payment. Since Janitor was not entrusted with "responsibility" with respect to the check, Section 3-405 does not apply. Section 3-406 might apply to this case. The issue would be whether Employer was negligent in safeguarding the check. If not, Employer could assert that the indorsement was forged and bring an action for conversion against the depository or payor bank under Section 3-420.

Case #2. X is Treasurer of Corporation and is authorized to write checks on behalf of Corporation by signing X's name as Treasurer. X draws a check in the name of Corporation and signs X's name as Treasurer. The check is made payable to X. X then indorses the check and obtains payment. Assume that Corporation did not owe any money to X and did not authorize X to write the check. Although the writing of the check was not authorized, Corporation is bound as drawer of the check because X had authority to sign checks on behalf of Corporation. This result follows from agency law and Section 3-402(a). Section 3-405 does not apply in this case because there is no forged indorsement. X was payee of the check so the indorsement is valid. Section 3-110(a).

Case #3. The duties of Employee, a bookkeeper, include posting the amounts of checks payable to Employer to the accounts of the drawers of the checks. Employee steals a check payable to Employer which was entrusted to Employee and forges Employer's indorsement. The check is deposited by Employee to an account in Depository Bank which Employee opened in the same name as Employer, and the check is honored by the drawee bank. The indorsement is effective as Employer's indorsement because Employee's duties include processing checks for bookkeeping purposes. Thus, Employee is entrusted with "responsibility" with respect to the check. Neither Depository Bank nor the drawee bank is liable to Employer for conversion of the check. The same result follows if Employee deposited the check in the account in Depository Bank without indorsement. Section 4-205(a). Under subsection (c) deposit in a depository bank in an account in a name substantially similar to that of Employer is the equivalent of an indorsement in the name of Employer.

Case #4. Employee's duties include stamping Employer's unrestricted blank indorsement on checks received by Employer and depositing them in Employer's bank account. After stamping Employer's unrestricted blank indorsement on a check, Employee steals the check and deposits it in Employee's personal bank account. Section 3-405 doesn't apply because there is no forged indorsement. Employee is authorized by Employer to indorse Employer's checks. The fraud by Employee is not the indorsement but rather the theft of the indorsed check. Whether Employer has a cause of action against the bank in which the check was deposited is determined by whether the bank had notice of the breach of fiduciary duty by Employee. The issue is determined under Section 3-307.

Case #5. The computer that controls Employer's check-writing machine was programmed to cause a check to be issued to Supplier Co. to which money was owed by Employer. The ad-

dress of Supplier Co. was included in the information in the computer. Employee is an accounts payable clerk whose duties include entering information into the computer. Employee fraudulently changed the address of Supplier Co. in the computer data bank to an address of Employee. The check was subsequently produced by the check-writing machine and mailed to the address that Employee had entered into the computer. Employee obtained possession of the check, indorsed it in the name of Supplier Co., and deposited it to an account in Depository Bank which Employee opened in the name "Supplier Co." The check was honored by the drawee bank. The indorsement is effective under Section 3-405(b) because Employee's duties allowed Employee to supply information determining the address of the payee of the check. An employee that is entrusted with duties that enable the employee to determine the address to which a check is to be sent controls the disposition of the check and facilitates forgery of the indorsement. The employer is held responsible. The drawee may debit the account of Employer for the amount of the check. There is no breach of warranty by Depository Bank under Section 3-417(a)(1) or 4-208(a)(1).

Case #6. Treasurer is authorized to draw checks in behalf of Corporation. Treasurer draws a check of Corporation payable to Supplier Co., a company that sold goods to Corporation. The check was issued to pay the price of these goods. At the time the check was signed Treasurer had no intention of stealing the check. Later, Treasurer stole the check, indorsed it in the name "Supplier Co." and obtained payment by depositing it to an account in Depository Bank which Treasurer opened in the name "Supplier Co." The indorsement is effective under Section 3-405(b). Section 3-404(b) does not apply to this case.

Case #7. Checks of Corporation are signed by Treasurer in behalf of Corporation as drawer. Clerk's duties include the preparation of checks for issue by Corporation. Clerk prepares a check payable to the order of Supplier Co. for Treasurer's signature. Clerk fraudulently informs Treasurer that the check is needed to pay a debt owed to Supplier Co., a company that does business with Corporation. No money is owed to Supplier Co. and Clerk intends to steal the check. Treasurer signs it and returns it to Clerk for mailing. Clerk does not indorse the check but deposits it to an account in Depository Bank which Clerk opened in the name "Supplier Co." The check is honored by the drawee bank. Section 3-404(b)(i) does not apply to this case because Clerk, under Section 3-110(a), is not the person whose intent deter-

mines to whom the check is payable. But Section 3-405 does apply and it treats the deposit by Clerk as an effective indorsement by Clerk because Clerk was entrusted with responsibility with respect to the check. If Supplier Co. is a fictitious person Section 3-404(b)(ii) applies. But the result is the same. Clerk's deposit is treated as an effective indorsement of the check whether Supplier Co. is a fictitious or a real person or whether money was or was not owing to Supplier Co. The drawee bank may debit the account of Corporation for the amount of the check and there is no breach of warranty by Depository Bank under Section 3-417(1)(a).

4. The last sentence of subsection (b) is similar to subsection (d) of Section 3-404 which is discussed in Comment 3 to Section 3-404. In Case #5, Case #6, or Case #7 the depository bank may have failed to exercise ordinary care when it allowed the employee to open an account in the name "Supplier Co.," to deposit checks payable to "Supplier Co." in that account, or to withdraw funds from that account that were proceeds of checks payable to Supplier Co. Failure to exercise ordinary care is to be determined in the context of all the facts relating to the bank's conduct with respect to the bank's collection of the check. If the trier of fact finds that there was such a failure and that the failure substantially contributed to loss, it could find the depository bank liable to the extent the failure contributed to the loss. The last sentence of subsection (b) can be illustrated by an example. Suppose in Case #5 that the check is not payable to an obscure "Supplier Co." but rather to a well-known national corporation. In addition, the check is for a very large amount of money. Before depositing the check, Employee opens an account in Depository Bank in the name of the corporation and states to the person conducting the transaction for the bank that Employee is manager of a new office being opened by the corporation. Depository Bank opens the account without requiring Employee to produce any resolutions of the corporation's board of directors or other evidence of authorization of Employee to act for the corporation. A few days later, the check is deposited, the account is credited, and the check is presented for payment. After Depository Bank receives payment, it allows Employee to withdraw the credit by a wire transfer to an account in a bank in a foreign country. The trier of fact could find that Depository Bank did not exercise ordinary care and that the failure to exercise ordinary care contributed to the loss suffered by Employer. The trier of fact could allow recovery by Employer from Depository Bank for all or part of the loss suffered by Employer.

CASE NOTES

Summary judgment.

Fact issue existed as to whether bank where union local maintained checking account had exercised ordinary care with respect to that account, precluding summary judgment for bank, on contributory negligence grounds, in union's negligence action arising from scheme by former employees of local to embezzle union

funds using account; union proffered expert testimony that bank had failed to exercise ordinary care regarding honoring of checks written on account. *AFT v. Bullock*, 539 F.Supp.2d 161, 2008 U.S. Dist. LEXIS 20019 (2008), vacated by 605 F. Supp. 2d 251, 2009 U.S. Dist. LEXIS 45791, 68 U.C.C. Rep. Serv. 2d (CBC) 424 (D.D.C. 2009).

§ 28:3-406. Negligence contributing to forged signature or alteration of instrument.

(a) A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection.

(b) Under subsection (a) of this section, if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss.

(c) Under subsection (a) of this section, the burden of proving failure to exercise ordinary care is on the person asserting the preclusion. Under subsection (b) of this section, the burden of proving failure to exercise ordinary care is on the person precluded.

(Dec. 30, 1963, 77 Stat. 683, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467; Apr. 9, 1997, D.C. Law 11-255, § 27(ss), 44 DCR 1271.)

Section references. — This section is referred to in §§ 28:3-417 and 28:4-208.

Prior Codifications. — 1981 Ed., § 28:3-406.

1973 Ed., § 28:3-406.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

Legislative history of Law 11-255. — Law

11-255, the "Second Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-905, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 7, 1996, and December 3, 1996, respectively. Signed by the Mayor on December 24, 1996, it was assigned Act No. 11-519 and transmitted to both Houses of Congress for its review. D.C. Law 11-255 became effective on April 9, 1997.

UNIFORM COMMERCIAL CODE COMMENT

1. Section 3-406(a) is based on former Section 3-406. With respect to alteration, Section 3-406 adopts the doctrine of *Young v. Grote*, 4 Bing. 253 (1827), which held that a drawer who so negligently draws an instrument as to facilitate its material alteration is liable to a drawee who pays the altered instrument in good faith. Under Section 3-406 the doctrine is expanded to

apply not only to drafts but to all instruments. It includes in the protected class any "person who, in good faith, pays the instrument or takes it for value or for collection." Section 3-406 rejects decisions holding that the maker of a note owes no duty of care to the holder because at the time the instrument is issued there is no contract between them. By issuing the instru-

ment and “setting it afloat upon a sea of strangers” the maker or drawer voluntarily enters into a relation with later holders which justifies imposition of a duty of care. In this respect an instrument so negligently drawn as to facilitate alteration does not differ in principle from an instrument containing blanks which may be filled. Under Section 3-407 a person paying an altered instrument or taking it for value, in good faith and without notice of the alteration may enforce rights with respect to the instrument according to its original terms. If negligence of the obligor substantially contributes to an alteration, this section gives the holder or the payor the alternative right to treat the altered instrument as though it had been issued in the altered form.

No attempt is made to define particular conduct that will constitute “failure to exercise ordinary care [that] substantially contributes to an alteration.” Rather, “ordinary care” is defined in Section 3-103(a)(7) in general terms. The question is left to the court or the jury for decision in the light of the circumstances in the particular case including reasonable commercial standards that may apply.

Section 3-406 does not make the negligent party liable in tort for damages resulting from the alteration. If the negligent party is estopped from asserting the alteration the person taking the instrument is fully protected because the taker can treat the instrument as having been issued in the altered form.

2. Section 3-406 applies equally to a failure to exercise ordinary care that substantially contributes to the making of a forged signature on an instrument. Section 3-406 refers to “forged signature” rather than “unauthorized signature” that appeared in former Section 3-406 because it more accurately describes the scope of the provision. Unauthorized signature is a broader concept that includes not only forgery but also the signature of an agent which does not bind the principal under the law of agency. The agency cases are resolved independently under agency law. Section 3-406 is not necessary in those cases.

The “substantially contributes” test of former Section 3-406 is continued in this section in preference to a “direct and proximate cause” test. The “substantially contributes” test is meant to be less stringent than a “direct and proximate cause” test. Under the less stringent test the preclusion should be easier to establish. Conduct “substantially contributes” to a material alteration or forged signature if it is a contributing cause of the alteration or signature and a substantial factor in bringing it about. The analysis of “substantially contributes” in former Section 3-406 by the court in *Thompson Maple Products v. Citizens National Bank of Corry*, 234 A.2d 32 (Pa.Super.Ct.1967), states what is intended by the use of the same

words in revised Section 3-406(b). Since Section 3-404(d) and Section 3-405(b) also use the words “substantially contributes” the analysis of these words also applies to those provisions.

3. The following cases illustrate the kind of conduct that can be the basis of a preclusion under Section 3-406(a):

Case #1. Employer signs checks drawn on Employer’s account by use of a rubber stamp of Employer’s signature. Employer keeps the rubber stamp along with Employer’s personalized blank check forms in an unlocked desk drawer. An unauthorized person fraudulently uses the check forms to write checks on Employer’s account. The checks are signed by use of the rubber stamp. If Employer demands that Employer’s account in the drawee bank be recredited because the forged check was not properly payable, the drawee bank may defend by asserting that Employer is precluded from asserting the forgery. The trier of fact could find that Employer failed to exercise ordinary care to safeguard the rubber stamp and the check forms and that the failure substantially contributed to the forgery of Employer’s signature by the unauthorized use of the rubber stamp.

Case #2. An insurance company draws a check to the order of Sarah Smith in payment of a claim of a policyholder, Sarah Smith, who lives in Alabama. The insurance company also has a policyholder with the same name who lives in Illinois. By mistake, the insurance company mails the check to the Illinois Sarah Smith who indorses the check and obtains payment. Because the payee of the check is the Alabama Sarah Smith, the indorsement by the Illinois Sarah Smith is a forged indorsement. Section 3-110(a). The trier of fact could find that the insurance company failed to exercise ordinary care when it mailed the check to the wrong person and that the failure substantially contributed to the making of the forged indorsement. In that event the insurance company could be precluded from asserting the forged indorsement against the drawee bank that honored the check.

Case #3. A company writes a check for \$10. The figure “10” and the word “ten” are typewritten in the appropriate spaces on the check form. A large blank space is left after the figure and the word. The payee of the check, using a typewriter with a typeface similar to that used on the check, writes the word “thousand” after the word “ten” and a comma and three zeros after the figure “10”. The drawee bank in good faith pays \$10,000 when the check is presented for payment and debits the account of the drawer in that amount. The trier of fact could find that the drawer failed to exercise ordinary care in writing the check and that the failure substantially contributed to the alteration. In that case the drawer is precluded from assert-

ing the alteration against the drawee if the check was paid in good faith.

4. Subsection (b) differs from former Section 3-406 in that it adopts a concept of comparative negligence. If the person precluded under subsection (a) proves that the person asserting the preclusion failed to exercise ordinary care and that failure substantially contributed to the loss, the loss may be allocated between the two parties on a comparative negligence basis. In the case of a forged indorsement the litigation is usually between the payee of the check and the depository bank that took the check for collection. An example is a case like Case #1 of Comment 3 to Section 3-405. If the trier of fact finds that Employer failed to exercise ordinary care in safeguarding the check and that the failure substantially contributed to the making of the forged indorsement, subsection (a) of Section 3-406 applies. If Employer brings an action for conversion against the depository

bank that took the checks from the forger, the depository bank could assert the preclusion under subsection (a). But suppose the forger opened an account in the depository bank in a name identical to that of Employer, the payee of the check, and then deposited the check in the account. Subsection (b) may apply. There may be an issue whether the depository bank should have been alerted to possible fraud when a new account was opened for a corporation shortly before a very large check payable to a payee with the same name is deposited. Circumstances surrounding the opening of the account may have suggested that the corporation to which the check was payable may not be the same as the corporation for which the account was opened. If the trier of fact finds that collecting the check under these circumstances was a failure to exercise ordinary care, it could allocate the loss between the depository bank and Employer, the payee.

CASE NOTES

ANALYSIS

Burden of proof.
Equitable estoppel.
Fact questions.
In general.

Burden of proof.

In conversion action by employer against savings and loan association at which employer's embezzling bookkeeper had savings account, trial court improperly placed on employer burden of proving association's bad faith in its handling of checks presented for payment by bookkeeper. U.C.C. § 3-406. *American Machine Tool Distributors Asso. v. National Permanent Federal Sav. & Loan Asso.*, 464 A.2d 907, 1983 D.C. App. LEXIS 426 (1983).

Equitable estoppel.

Ordinarily, unauthorized signature on check will not bind person whose name is signed, but that person is estopped from denying signature when his negligence permitted making of unauthorized signature and payor has paid instrument in good faith and pursuant to reasonable commercial standards of its business. U.C.C. §§ 3-404(1), 3-404 comment, 3-406; D.C. Code 1981, §§ 28:3-404(1), 28:3-406. *American Machine Tool Distributors Asso. v. National Permanent Federal Sav. & Loan Asso.*, 464 A.2d 907, 1983 D.C. App. LEXIS 426 (1983).

Fact questions.

Jury question was presented as to whether drawee bank adhered to reasonable commercial standards and whether payee was negligent with respect to checks paid on missing or forged endorsements, so as to constitute a defense to

conversion claim under District of Columbia law. D.C. Code 1981, §§ 28:3-406, 28:3-419(1)(c). *Kuwait Airways Corp. v. American Sec. Bank, N.A.*, 890 F.2d 456, 1989 U.S. App. LEXIS 17944 (C.A.D.C. 1989).

In general.

The scope of the defense under District of Columbia Uniform Commercial Code (U.C.C.) section relating to negligent contribution to alteration or unauthorized signature is coextensive with the scope of the substantive wrong of conversion of an instrument by paying it on a forged endorsement, and thus the former section provides a defense to conversion claims under the latter section, including cases where payee's endorsement is missing. D.C. Code 1981, §§ 28:3-406, 28:3-419(1)(c), (2); U.C.C. §§ 3-406, 3-419, 3-419(1)(c). *Kuwait Airways Corp. v. American Sec. Bank, N.A.*, 890 F.2d 456, 1989 U.S. App. LEXIS 17944 (C.A.D.C. 1989).

While no one act was dispositive, negligent acts of drawee bank, viewed as a whole, substantially contributed to unauthorized signature of payee of cashier's check and, thus, precluded drawee bank from asserting its breach of presentment warranty of good title claim against presenting bank, where check was made payable to individual broker rather than brokerage firm, "signature guaranteed" stamp was accessible to nonauthorized employees who also had access to the checks, and drawee bank had experienced prior similar incident that had not been cleared up and involved check written to same payee and prepared by same employee. D.C. Code 1981, § 28:3-406. *Fidelity Bank v. United Nat'l Bank,*

630 F. Supp. 16, 1985 U.S. Dist. LEXIS 18049 (1985).

Trial court's finding that drawee bank failed to comply with commercially reasonable procedures when it failed to detect forgeries on drawer's checks was not clearly erroneous, and thus, bank was liable to drawer; forged signature was not spelled the same as authorized signature on signature card. D.C. Code 1981, §§ 28:3-401(1), 28:3-404(1), 28:3-406, 28:4-406(3). *American Sec. Bank, N.A. v. American Motorists Ins. Co.*, 538 A.2d 736, 1988 D.C. App. LEXIS 57 (1988).

Drawer's negligence that contributes to forgery negates drawee bank's liability, but only if drawee bank meets its burden of proving by a preponderance of the evidence that it complied with reasonable commercial standards when it cashed check. D.C. Code 1981, §§ 28:3-401(1), 28:3-404(1), 28:3-406. *American Sec. Bank, N.A. v. American Motorists Ins. Co.*, 538 A.2d 736, 1988 D.C. App. LEXIS 57 (1988).

Drawee bank was liable for handling forged checks, even if drawer was negligent in failing to earlier examine its bank statements and to report forgeries to bank, given drawee bank's lack of ordinary care in handling forged checks. D.C. Code 1981, §§ 28:3-406, 28:4-406, 28:4-

406(3). *American Sec. Bank, N.A. v. American Motorists Ins. Co.*, 538 A.2d 736, 1988 D.C. App. LEXIS 57 (1988).

In general, reasonable commercial standards permitted acceptance for deposit checks endorsed by rubber stamp, but this practice was not shown to be reasonable where savings and loan association accepted checks for deposit in corporate employer's embezzling bookkeeper's individual savings account, and not in account of named payee, employer, and employer had no account at association. U.C.C. § 3-406. *American Machine Tool Distributors Asso. v. National Permanent Federal Sav. & Loan Asso.*, 464 A.2d 907, 1983 D.C. App. LEXIS 426 (1983).

Depositor was negligent as a matter of law in failing to inquire of bank as to her lack of receipt of monthly statements and cancelled checks, especially after bank informed depositor that bank's record showed she had no money in her account, and this negligence substantially contributed to the making of an unauthorized signature and depositor was precluded from asserting lack of bank's authority to pay allegedly forged checks. D.C. Code § 28:3-406. *Myrick v. National Sav. & Trust Co.*, 268 A.2d 526, 1970 D.C. App. LEXIS 322 (App. 1970).

§ 28:3-407. Alteration.

(a) "Alteration" means (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or (ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party.

(b) Except as provided in subsection (c) of this section, an alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms.

(c) A payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights with respect to the instrument (i) according to its original terms, or (ii) in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed.

(Dec. 30, 1963, 77 Stat. 683, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in §§ 28:3-102, 28:3-103, 28:3-115, 28:3-412, 28:3-413, 28:3-414, 28:3-415, 28:4-104, and 28:4-207.

Prior Codifications. — 1981 Ed., § 28:3-407.

1973 Ed., § 28:3-407.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This provision restates former Section 3-407. Former Section 3-407 defined a “material” alteration as any alteration that changes the contract of the parties in any respect. Revised Section 3-407 refers to such a change as an alteration. As under subsection (2) of former Section 3-407, discharged because of alteration occurs only in the case of an alteration fraudulently made. There is no discharge if a blank is filled in the honest belief that it is authorized or if a change is made with a benevolent motive such as a desire to give the obligor the benefit of a lower interest rate. Changes favorable to the obligor are unlikely to be made with any fraudulent intent, but if such an intent is found the alteration may operate as a discharge.

Discharge is a personal defense of the party whose obligation is modified and anyone whose obligation is not affected is not discharged. But if an alteration discharges a party there is also discharge of any party having a right of recourse against the discharged party because the obligation of the party with the right of recourse is affected by the alteration. Assent to

the alteration given before or after it is made will prevent the party from asserting the discharge. The phrase “or is precluded from asserting the alteration” in subsection (b) recognizes the possibility of an estoppel or other ground barring the defense which does not rest on assent.

2. Under subsection (c) a person paying a fraudulently altered instrument or taking it for value, in good faith and without notice of the alteration, is not affected by a discharge under subsection (b). The person paying or taking the instrument may assert rights with respect to the instrument according to its original terms or, in the case of an incomplete instrument that is altered by unauthorized completion, according to its terms as completed. If blanks are filled or an incomplete instrument is otherwise completed, subsection (c) places the loss upon the party who left the instrument incomplete by permitting enforcement in its completed form. This result is intended even though the instrument was stolen from the issuer and completed after the theft.

§ 28:3-408. Drawee not liable on unaccepted draft.

A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it.

(Dec. 30, 1963, 77 Stat. 683, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-408.

1973 Ed., § 28:3-409.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section is a restatement of former Section 3-409(1). Subsection (2) of former Section 3-409 is deleted as misleading and superfluous. Comment 3 says of subsection (2): “It is intended to make it clear that this section does not in any way affect any liability which may arise apart from the instrument.” In reality subsection (2) did not make anything clear and was a source of confusion. If all it meant was

that a bank that has not certified a check may engage in other conduct that might make it liable to a holder, it stated the obvious and was superfluous. Section 1-103 is adequate to cover those cases.

2. Liability with respect to drafts may arise under other law. For example, Section 4-302 imposes liability on a payor bank for late return of an item.

§ 28:3-409. Acceptance of draft; certified check.

(a) “Acceptance” means the drawee’s signed agreement to pay a draft as presented. It must be written on the draft and may consist of the drawee’s signature alone. Acceptance may be made at any time and becomes effective

when notification pursuant to instructions is given or the accepted draft is delivered for the purpose of giving rights on the acceptance to any person.

(b) A draft may be accepted although it has not been signed by the drawer, is otherwise incomplete, is overdue, or has been dishonored.

(c) If a draft is payable at a fixed period after sight and the acceptor fails to date the acceptance, the holder may complete the acceptance by supplying a date in good faith.

(d) "Certified check" means a check accepted by the bank on which it is drawn. Acceptance may be made as stated in subsection (a) of this section, or by a writing on the check which indicates that the check is certified. The drawee of a check has no obligation to certify the check, and refusal to certify is not dishonor of the check.

(Dec. 30, 1963, 77 Stat. 684, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-409.

1973 Ed., § 28:3-410.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. The first three subsections of Section 3-409 are a restatement of former Section 3-410. Subsection (d) adds a definition of certified check which is a type of accepted draft.

2. Subsection (a) states the generally recognized rule that the mere signature of the drawee on the instrument is a sufficient acceptance. Customarily the signature is written vertically across the face of the instrument, but since the drawee has no reason to sign for any other purpose a signature in any other place, even on the back of the instrument, is sufficient. It need not be accompanied by such words as "Accepted," "Certified," or "Good." It must not, however, bear any words indicating an intent to refuse to honor the draft. The last sentence of subsection (a) states the generally recognized rule that an acceptance written on the draft takes effect when the drawee notifies the holder or gives notice according to instructions.

3. The purpose of subsection (c) is to provide a definite date of payment if none appears on the instrument. An undated acceptance of a draft payable "thirty days after sight" is incomplete. Unless the acceptor writes in a different date the holder is authorized to complete the acceptance according to the terms of the draft by supplying a date of acceptance. Any date supplied by the holder is effective if made in good faith.

4. The last sentence of subsection (d) states the generally recognized rule that in the absence of agreement a bank is under no obligation to certify a check. A check is a demand instrument calling for payment rather than acceptance. The bank may be liable for breach of any agreement with the drawer, the holder, or any other person by which it undertakes to certify. Its liability is not on the instrument, since the drawee is not so liable until acceptance. Section 3-408. Any liability is for breach of the separate agreement.

§ 28:3-410. Acceptance varying draft.

(a) If the terms of a drawee's acceptance vary from the terms of the draft as presented, the holder may refuse the acceptance and treat the draft as dishonored. In that case, the drawee may cancel the acceptance.

(b) The terms of a draft are not varied by an acceptance to pay at a particular bank or place in the United States, unless the acceptance states that the draft is to be paid only at that bank or place.

(c) If the holder assents to an acceptance varying the terms of a draft, the

obligation of each drawer and endorser that does not expressly assent to the acceptance is discharged.

(Dec. 30, 1963, 77 Stat. 684, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-410.

1973 Ed., § 28:3-412.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section is a restatement of former Section 3-412. It applies to conditional acceptances, acceptances for part of the amount, acceptances to pay at a different time from that required by the draft, or to the acceptance of less than all of the drawees. It applies to any other engagement changing the essential terms of the draft. If the drawee makes a varied acceptance the holder may either reject it or assent to it. The holder may reject by insisting on acceptance of the draft as presented. Refusal by the drawee to accept the draft as presented is dishonor. In that event the drawee is not bound by the varied acceptance and is entitled to have it canceled.

If the holder assents to the varied acceptance, the drawee's obligation as acceptor is according to the terms of the varied acceptance.

Under subsection (c) the effect of the holder's assent is to discharge any drawer or indorser who does not also assent. The assent of the drawer or indorser must be affirmatively expressed. Mere failure to object within a reasonable time is not assent which will prevent the discharge.

2. Under subsection (b) an acceptance does not vary from the terms of the draft if it provides for payment at any particular bank or place in the United States unless the acceptance states that the draft is to be paid only at such bank or place.

Section 3-501(b)(1) states that if an instrument is payable at a bank in the United States presentment must be made at the place of payment (Section 3-111) which in this case is at the designated bank.

§ 28:3-411. Refusal to pay cashier's checks, teller's checks, and certified checks.

(a) In this section, "obligated bank" means the acceptor of a certified check or the issuer of a cashier's check or teller's check bought from the issuer.

(b) If the obligated bank wrongfully (i) refuses to pay a cashier's check or certified check, (ii) stops payment of a teller's check, or (iii) refuses to pay a dishonored teller's check, the person asserting the right to enforce the check is entitled to compensation for expenses and loss of interest resulting from the nonpayment and may recover consequential damages if the obligated bank refuses to pay after receiving notice of particular circumstances giving rise to the damages.

(c) Expenses or consequential damages under subsection (b) of this section are not recoverable if the refusal of the obligated bank to pay occurs because (i) the bank suspends payments, (ii) the obligated bank asserts a claim or defense of the bank that it has reasonable grounds to believe is available against the person entitled to enforce the instrument, (iii) the obligated bank has a reasonable doubt whether the person demanding payment is the person entitled to enforce the instrument, or (iv) payment is prohibited by law.

(Dec. 30, 1963, 77 Stat. 684, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in § 28:3-102.

Prior Codifications. — 1981 Ed., § 28:3-411.
1973 Ed., § 28:3-411.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. In some cases a creditor may require that the debt be paid by an obligation of a bank. The debtor may comply by obtaining certification of the debtor's check, but more frequently the debtor buys from a bank a cashier's check or teller's check payable to the creditor. The check is taken by the creditor as a cash equivalent on the assumption that the bank will pay the check. Sometimes, the debtor wants to retract payment by inducing the obligated bank not to pay. The typical case involves a dispute between the parties to the transaction in which the check is given in payment. In the case of a certified check or cashier's check, the bank can safely pay the holder of the check despite notice that there may be an adverse claim to the check (Section 3-602). It is also clear that the bank that sells a teller's check has no duty to order the bank on which it is drawn not to pay it. A debtor using any of these types of checks has no right to stop payment. Nevertheless, some banks will refuse payment as an accommodation to a customer. Section 3-411 is designed to discourage this practice.

2. The term "obligated bank" refers to the issuer of the cashier's check or teller's check and the acceptor of the certified check. If the obligated bank wrongfully refuses to pay, it is liable to pay for expenses and loss of interest resulting from the refusal to pay. There is no express provision for attorney's fees, but attorney's fees are not meant to be necessarily excluded. They could be granted because they fit within the language "expenses *** resulting from the nonpayment." In addition the bank

may be liable to pay consequential damages if it has notice of the particular circumstances giving rise to the damages.

3. Subsection (c) provides that expenses or consequential damages are not recoverable if the refusal to pay is because of the reasons stated. The purpose is to limit that recovery to cases in which the bank refuses to pay even though its obligation to pay is clear and it is able to pay. Subsection (b) applies only if the refusal to honor the check is wrongful. If the bank is not obliged to pay there is no recovery. The bank may assert any claim or defense that it has, but normally the bank would not have a claim or defense. In the usual case it is a remitter that is asserting a claim to the check on the basis of a rescission of negotiation to the payee under Section 3-202. See Comment 2 to Section 3-201. The bank can assert that claim if there is compliance with Section 3-305(c), but the bank is not protected from damages under subsection (b) if the claim of the remitter is not upheld. In that case, the bank is insulated from damages only if payment is enjoined under Section 3-602(b)(1). Subsection (c)(iii) refers to cases in which the bank may have a reasonable doubt about the identity of the person demanding payment. For example, a cashier's check is payable to "Supplier Co." The person in possession of the check presents it for payment over the counter and claims to be an officer of Supplier Co. The bank may refuse payment until it has been given adequate proof that the presentment in fact is being made for Supplier Co., the person entitled to enforce the check.

§ 28:3-412. Obligation of issuer of note or cashier's check.

The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the instrument (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the issuer signed an incomplete instrument, according to its terms when completed, to the extent stated in sections 28:3-115 and 28:3-407. The obligation is owed to a person entitled to enforce the instrument or to an indorser who paid the instrument under section 28:3-415.

(Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-412.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. The obligations of the maker, acceptor, drawer, and indorser are stated in four separate sections. Section 3-412 states the obligation of the maker of a note and is consistent with former Section 3-413(1). Section 3-412 also applies to the issuer of a cashier's check or other draft drawn on the drawer. Under former Section 3-118(a), since a cashier's check or other draft drawn on the drawer was "effective as a note," the drawer was liable under former Section 3-413(1) as a maker. Under Sections 3-103(a)(6) and 3-104(f) a cashier's check or other draft drawn on the drawer is treated as a draft to reflect common commercial usage, but

the liability of the drawer is stated by Section 3-412 as being the same as that of the maker of a note rather than that of the drawer of a draft. Thus, Section 3-412 does not in substance change former law.

2. Under Section 3-105(b) nonissuance of either a complete or incomplete instrument is a defense by a maker or drawer against a person that is not a holder in due course.

3. The obligation of the maker may be modified in the case of alteration if, under Section 3-406, the maker is precluded from asserting the alteration.

§ 28:3-413. Obligation of acceptor.

(a) The acceptor of a draft is obliged to pay the draft (i) according to its terms at the time it was accepted, even though the acceptance states that the draft is payable "as originally drawn" or equivalent terms, (ii) if the acceptance varies the terms of the draft, according to the terms of the draft as varied, or (iii) if the acceptance is of a draft that is an incomplete instrument, according to its terms when completed, to the extent stated in sections 28:3-115 and 28:3-407. The obligation is owed to a person entitled to enforce the draft or to the drawer or an indorser who paid the draft under section 28:3-414 or 28:3-415.

(b) If the certification of a check or other acceptance of a draft states the amount certified or accepted, the obligation of the acceptor is that amount. If (i) the certification or acceptance does not state an amount, (ii) the amount of the instrument is subsequently raised, and (iii) the instrument is then negotiated to a holder in due course, the obligation of the acceptor is the amount of the instrument at the time it was taken by the holder in due course.

(Dec. 30, 1963, 77 Stat. 684, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-413.

1973 Ed., § 28:3-413.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

Subsection (a) is consistent with former Section 3-413(1). Subsection (b) has primary importance with respect to certified checks. It protects the holder in due course of a certified check that was altered after certification and

before negotiation to the holder in due course. A bank can avoid liability for the altered amount by stating on the check the amount the bank agrees to pay. The subsection applies to other accepted drafts as well.

§ 28:3-414. Obligation of drawer.

(a) This section does not apply to cashier's checks or other drafts drawn on the drawer.

(b) If an unaccepted draft is dishonored, the drawer is obliged to pay the draft (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the drawer signed an incomplete instrument, according to its terms when completed, to the extent stated in sections 28:3-115 and 28:3-407. The obligation is owed to a person entitled to enforce the draft or to an indorser who paid the draft under section 28:3-415.

(c) If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained.

(d) If a draft is accepted and the acceptor is not a bank, the obligation of the drawer to pay the draft if the draft is dishonored by the acceptor is the same as the obligation of an indorser under section 28:3-415(a) and (c).

(e) If a draft states that it is drawn "without recourse" or otherwise disclaims liability of the drawer to pay the draft, the drawer is not liable under subsection (b) of this section to pay the draft if the draft is not a check. A disclaimer of the liability stated in subsection (b) of this section is not effective if the draft is a check.

(f) If (i) a check is not presented for payment or given to a depository bank for collection within 30 days after its date, (ii) the drawee suspends payments after expiration of the 30-day period without paying the check, and (iii) because of the suspension of payments, the drawer is deprived of funds maintained with the drawee to cover payment of the check, the drawer to the extent deprived of funds may discharge its obligation to pay the check by assigning to the person entitled to enforce the check the rights of the drawer against the drawee with respect to the funds.

(Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-414.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) excludes cashier's checks because the obligation of the issuer of a cashier's check is stated in Section 3-412.

2. Subsection (b) states the obligation of the drawer on an unaccepted draft. It replaces former Section 3-413(2). The requirement under former Article 3 of notice of dishonor or protest has been eliminated. Under revised Article 3, notice of dishonor is necessary only with respect to indorser's liability. The liability of the drawer of an unaccepted draft is treated as a primary liability. Under former Section 3-102(1)(d) the term "secondary party" was used to refer to a drawer or indorser. The quoted term is not used in revised Article 3. The effect of a draft drawn without recourse is stated in subsection (e).

3. Under subsection (c) the drawer is discharged of liability on a draft accepted by a bank regardless of when acceptance was ob-

tained. This changes former Section 3-411(1) which provided that the drawer is discharged only if the holder obtains acceptance.

Holders that have a bank obligation do not normally rely on the drawer to guarantee the bank's solvency. A holder can obtain protection against the insolvency of a bank acceptor by a specific guaranty of payment by the drawer or by obtaining an indorsement by the drawer. Section 3-205(d).

4. Subsection (d) states the liability of the drawer if a draft is accepted by a drawee other than a bank and the acceptor dishonors. The drawer of an unaccepted draft is the only party liable on the instrument. The drawee has no liability on the draft. Section 3-408. When the draft is accepted, the obligations change. The drawee, as acceptor, becomes primarily liable and the drawer's liability is that of a person secondarily liable as a guarantor of payment.

The drawer's liability is identical to that of an indorser, and subsection (d) states the drawer's liability that way. The drawer is liable to pay the person entitled to enforce the draft or any indorser that pays pursuant to Section 3-415. The drawer in this case is discharged if notice of dishonor is required by Section 3-503 and is not given in compliance with that section. A drawer that pays has a right of recourse against the acceptor. Section 3-413(a).

5. Subsection (e) does not permit the drawer of a check to avoid liability under subsection (b) by drawing the check without recourse. There is no legitimate purpose served by issuing a check on which nobody is liable. Drawing without recourse is effective to disclaim liability of the drawer if the draft is not a check. Suppose, in a documentary sale, Seller draws a draft on Buyer for the price of goods shipped to Buyer. The draft is payable upon delivery to the drawee of an order bill of lading covering the goods. Seller delivers the draft with the bill of lading to Finance Company that is named as payee of the draft. If Seller draws without recourse Finance Company takes the risk that Buyer will dishonor. If Buyer dishonors, Finance Company has no recourse against Seller but it can obtain reimbursement by selling the goods which it controls through the bill of lading.

6. Subsection (f) is derived from former Section 3-502(1)(b). It is designed to protect the drawer of a check against loss resulting from suspension of payments by the drawee bank when the holder of the check delays collection of the check. For example, X writes a check payable to Y for \$1,000. The check is covered by

funds in X's account in the drawee bank. Y delays initiation of collection of the check for more than 30 days after the date of the check. The drawee bank suspends payments after the 30-day period and before the check is presented for payment. If the \$1,000 of funds in X's account have not been withdrawn, X has a claim for those funds against the drawee bank and, if subsection (e) were not in effect, X would be liable to Y on the check because the check was dishonored. Section 3-502(e). If the suspension of payments by the drawee bank will result in payment to X of less than the full amount of the \$1,000 in the account or if there is a significant delay in payment to X, X will suffer a loss which would not have been suffered if Y had promptly initiated collection of the check. In most cases, X will not suffer any loss because of the existence of federal bank deposit insurance that covers accounts up to \$100,000. Thus, subsection (e) has relatively little importance. There might be some cases, however, in which the account is not fully insured because it exceeds \$100,000 or because the account doesn't qualify for deposit insurance. Subsection (f) retains the phrase "deprived of funds maintained with the drawee" appearing in former Section 3-502(1)(b). The quoted phrase applies if the suspension of payments by the drawee prevents the drawer from receiving the benefit of funds which would have paid the check if the holder had been timely in initiating collection. Thus, any significant delay in obtaining full payment of the funds is a deprivation of funds. The drawer can discharge drawer's liability by assigning rights against the drawee with respect to the funds to the holder.

§ 28:3-415. Obligation of indorser.

(a) Subject to subsections (b), (c), (d), and (e) of this section and section 28:3-419(d), if an instrument is dishonored, an indorser is obliged to pay the amount due on the instrument (i) according to the terms of the instrument at the time it was indorsed, or (ii) if the indorser indorsed an incomplete instrument, according to its terms when completed, to the extent stated in sections 28:3-115 and 28:3-407. The obligation of the indorser is owed to a person entitled to enforce the instrument or to a subsequent indorser who paid the instrument under this section.

(b) If an indorsement states that it is made "without recourse" or otherwise disclaims liability of the indorser, the indorser is not liable under subsection (a) of this section to pay the instrument.

(c) If notice of dishonor of an instrument is required by section 28:3-503 and notice of dishonor complying with that section is not given to an indorser, the liability of the indorser under subsection (a) of this section is discharged.

(d) If a draft is accepted by a bank after an indorsement is made, the liability of the indorser under subsection (a) of this section is discharged.

(e) If an indorser of a check is liable under subsection (a) of this section and

the check is not presented for payment, or given to a depository bank for collection, within 30 days after the day the indorsement was made, the liability of the indorser under subsection (a) of this section is discharged.

(Dec. 30, 1963, 77 Stat. 684, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in §§ 28:3-413 and 28:3-503.

Prior Codifications. — 1981 Ed., § 28:3-415.
1973 Ed., § 28:3-414.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsections (a) and (b) restate the substance of former Section 3-414(1). Subsection (2) of former Section 3-414 has been dropped because it is superfluous. Although notice of dishonor is not mentioned in subsection (a), it must be given in some cases to charge an indorser. It is covered in subsection (c). Regulation CC s 229.35(b) provides that a bank handling a check for collection or return is liable to a bank that subsequently handles the check to the extent the latter bank does not receive payment for the check. This liability applies whether or not the bank incurring the liability indorsed the check.

2. Section 3-503 states when notice of dishonor is required and how it must be given. If required notice of dishonor is not given in compliance with Section 3-503, subsection (c) of Section 3-415 states that the effect is to discharge the indorser's obligation.

3. Subsection (d) is similar in effect to Section 3-414(c) if the draft is accepted by a bank after the indorsement is made. See Comment 3 to Section 3-414. If a draft is accepted by a bank before the indorsement is made, the indorser incurs the obligation stated in subsection (a).

4. Subsection (e) modified former Sections 3-503(2)(b) and 3-502(1)(a) by stating a 30-day rather than a seven-day period, and stating it as an absolute rather than a presumptive period.

5. As stated in subsection (a), the obligation of an indorser to pay the amount due on the instrument is generally owed not only to a person entitled to enforce the instrument but also to a subsequent indorser who paid the instrument. But if the prior indorser and the subsequent indorser are both anomalous indorsers, this rule does not apply. In that case, Section 3-116 applies. Under Section 3-116(a), the anomalous indorsers are jointly and severally liable and if either pays the instrument the indorser who pays has a right of contribution against the other. Section 3-116(b). The right to contribution in Section 3-116(b) is subject to "agreement of the affected parties." Suppose the subsequent indorser can prove an agreement with the prior indorser under which the prior indorser agreed to treat the subsequent indorser as a guarantor of the obligation of the prior indorser. Rights of the two indorsers between themselves would be governed by the agreement. Under suretyship law, the subsequent indorser under such an agreement is referred to as a sub-surety. Under the agreement, if the subsequent indorser pays the instrument there is a right to reimbursement from the prior indorser; if the prior indorser pays the instrument, there is no right of recourse against the subsequent indorser. See PEB Commentary No. 11, dated February 10, 1994 [Uniform Laws Annotated, UCC, APP II, Comment 11].

CASE NOTES

Accommodation parties.

Individuals who endorsed note as sureties, assuming liability for maker's debt if it failed to pay, were "accommodation parties," having

same obligations as other endorsers without surety status. D.C. Code § 28:3-415(1, 2). *McLachlen Nat'l Bank v. Fields*, 364 A.2d 1191, 1976 D.C. App. LEXIS 390 (1976).

§ 28:3-416. Transfer warranties.

(a) A person who transfers an instrument for consideration warrants to the

transferee and, if the transfer is by indorsement, to any subsequent transferee that:

- (1) The warrantor is a person entitled to enforce the instrument;
- (2) All signatures on the instrument are authentic and authorized;
- (3) The instrument has not been altered;
- (4) The instrument is not subject to a defense or claim in recoupment of any party which can be asserted against the warrantor; and
- (5) The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer.

(b) A person to whom the warranties under subsection (a) of this section are made and who took the instrument in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach.

(c) The warranties stated in subsection (a) of this section cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) of this section is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(d) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

(Dec. 30, 1963, 77 Stat. 685, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-416.

1973 Ed., § 28:3-416.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) is taken from subsection (2) of former Section 3-417. Subsections (3) and (4) of former Section 3-417 are deleted. Warranties under subsection (a) in favor of the immediate transferee apply to all persons who transfer an instrument for consideration whether or not the transfer is accompanied by indorsement. Any consideration sufficient to support a simple contract will support those warranties. If there is an indorsement the warranty runs with the instrument and the remote holder may sue the indorser-warrantor directly and thus avoid a multiplicity of suits.

2. Since the purpose of transfer (Section 3-203(a)) is to give the transferee the right to enforce the instrument, subsection (a)(1) is a warranty that the transferor is a person entitled to enforce the instrument (Section 3-301). Under Section 3-203(b) transfer gives the

transferee any right of the transferor to enforce the instrument. Subsection (a)(1) is in effect a warranty that there are no unauthorized or missing indorsements that prevent the transferor from making the transferee a person entitled to enforce the instrument.

3. The rationale of subsection (a)(4) is that the transferee does not undertake to buy an instrument that is not enforceable in whole or in part, unless there is a contrary agreement. Even if the transferee takes as a holder in due course who takes free of the defense or claim in recoupment, the warranty gives the transferee the option of proceeding against the transferor rather than litigating with the obligor on the instrument the issue of the holder-in-due-course status of the transferee. Subsection (3) of former Section 3-417 which limits this warranty is deleted. The rationale is that while the

purpose of a “no recourse” indorsement is to avoid a guaranty of payment, the indorsement does not clearly indicate an intent to disclaim warranties.

4. Under subsection (a)(5) the transferor does not warrant against difficulties of collection, impairment of the credit of the obligor or even insolvency. The transferee is expected to determine such questions before taking the obligation. If insolvency proceedings as defined in Section 1-201(22) have been instituted against the party who is expected to pay and the transferor knows it, the concealment of that fact amounts to a fraud upon the transferee, and the warranty against knowledge of such proceedings is provided accordingly.

5. Transfer warranties may be disclaimed with respect to any instrument except a check. Between the immediate parties disclaimer may be made by agreement. In the case of an indorser, disclaimer of transferor’s liability, to be effective, must appear in the indorsement with words such as “without warranties” or some

other specific reference to warranties. But in the case of a check, subsection (c) of Section 3-416 provides that transfer warranties cannot be disclaimed at all. In the check collection process the banking system relies on these warranties.

6. Subsection (b) states the measure of damages for breach of warranty. There is no express provision for attorney’s fees, but attorney’s fees are not meant to be necessarily excluded. They could be granted because they fit within the phrase “expenses * * * incurred as a result of the breach.” The intention is to leave to other state law the issue as to when attorney’s fees are recoverable.

7. Since the traditional term “cause of action” may have been replaced in some states by “claim for relief” or some equivalent term, the words “cause of action” in subsection (d) have been bracketed to indicate that the words may be replaced by an appropriate substitute to conform to local practice.

CASE NOTES

ANALYSIS

Guaranty.

Limitation of actions.

Without recourse indorsement.

Guaranty.

If consideration for settlement of promissory note holder’s suit against maker and others was in reality paid on maker’s behalf, then it was partial performance by the principal obligor and discharged the guarantor’s secondary obligation to that extent. *Allen v. Yates*, 870 A.2d 39, 2005 D.C. App. LEXIS 44 (2005).

Any part of consideration which did not come from promissory note maker or persons in privity with it when maker and others settled holder’s suit did not reduce guarantor’s liability as secondary obligor. *Allen v. Yates*, 870 A.2d 39, 2005 D.C. App. LEXIS 44 (2005).

Any consideration, whether monetary or otherwise, received by the obligee from the principal obligor in payment of the obligation reduces the creditor’s entitlement against the secondary obligor. *Allen v. Yates*, 870 A.2d 39, 2005 D.C. App. LEXIS 44 (2005).

Guarantor’s liability on promissory notes was limited to amounts not paid by or on behalf of the maker, defaulting obligor; the guarantor guarantied payment of the total indebtedness evidenced by the notes remaining unpaid following maker’s default. *Allen v. Yates*, 870 A.2d 39, 2005 D.C. App. LEXIS 44 (2005).

Guarantor was liable only to the extent that holder had not recovered on the promissory notes. *Allen v. Yates*, 870 A.2d 39, 2005 D.C. App. LEXIS 44 (2005).

Release of promissory note maker and prejudicial dismissal of claims after settlement with holder did not extinguish holder’s rights against guarantor; the dismissal of the maker, the principal obligor, was not unconditional, but the holder expressly preserved his right to maintain his action against the guarantor. *Allen v. Yates*, 870 A.2d 39, 2005 D.C. App. LEXIS 44 (2005).

As a general rule, an obligee’s release of the principal obligor discharges the principal’s debt and thereby relieves the secondary obligor of liability; however, this rule has no application where obligee has preserved his rights against the secondary obligor. *Allen v. Yates*, 870 A.2d 39, 2005 D.C. App. LEXIS 44 (2005).

Settlement of claims against maker of promissory notes did not discharge guarantor; the notes expressly authorized holder to release any party from liability from the indebtedness reflected in the notes without affecting his rights against other obligors, and the settlement agreement stated that guarantor was not released to the extent he was liable to any parties to the agreement. *Allen v. Yates*, 870 A.2d 39, 2005 D.C. App. LEXIS 44 (2005).

Guaranty on promissory note, pursuant to which signer “personally guaranteed [sic] the due payment of the within indebtedness,” obligated signer as guarantor of payment rather than merely as guarantor of collection; under statute, if words of guaranty were ambiguous, guaranty had to be construed as one of payment, and there was no language in guaranty indicating that signer would become liable only after holder had reduced claim against primary

guarantor to judgment and execution had been returned unsatisfied or if it would be futile to pursue primary guarantor. D.C. Code 1981, § 28:3-416(3). *Cusimano v. First Md. Sav. & Loan*, 639 A.2d 553, 1994 D.C. App. LEXIS 33 (1994).

Limitation of actions.

Lender's transferee's proposed second amended complaint of June, 1973 alleging that until 1973 lender fraudulently concealed from transferee the fact that lender was concerned, before loan was entered into in 1960, that such a loan might violate Loan Shark Act was not barred by statute of limitations, where there was no indication that transferee should have learned of lender's alleged conduct any earlier than it did. D.C. Code § 26-601 et seq. *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

Where lender's transferee purchased note and deed of trust in 1961, all installments due were paid until 1966 when borrower's grantee filed petition for reorganization, transferee filed a proof of claim later that year, trustee in bankruptcy objected to the claim in 1968 on ground that the loan was made in violation of Loan Shark Act, and loan and accompanying deed were declared void in 1971, action instituted by transferee in December, 1972 to recover its loss from lender was not barred by District of Columbia three-year limitation period for actions based on contract, despite argument that transferee's claim accrued when it purchased the note and deed. D.C. Code §§ 12-301(7), 26-601 et seq. *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

In light of 1971 Court of Appeals decision invalidating loan as being in violation of Loan Shark Law, lender's transferee, which had purchased note and deed of trust, would have been better advised to proceed immediately against lender in 1968 when trustee in bankruptcy for borrower's grantee objected to transferee's proof of claim on ground that loan violated Loan Shark Act, rather than engaging in a protracted and ultimately futile legal battle with the trustee, but it would be grossly inequitable to determine that transferee's cause of action against lender accrued in 1968 prior to the Court of Appeals' decision. D.C. Code § 26-

601 et seq. *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

Without recourse indorsement.

In view of fact that legal effect of a "without recourse" endorsement is defined by Uniform Commercial Code, issue of whether "without recourse" endorsement on note transferred by lender to its transferee barred transferee's claims against lender would be determined with reference to principles of commercial law established therein. D.C. Code § 28:3-417(2)(d), (3). *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

Where at all times lender was fully aware of facts relevant to subsequent judicial determination that note transferred by it was unenforceable because of illegality of underlying loan, lender's ignorance of law was no excuse, and lender's transferee's claims against lender were not barred by "without recourse" endorsement on the note. D.C. Code §§ 28:1-103, 28:3-417(2)(d), (3). *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

By endorsing note "without recourse," transferor still warranted to transferee that it had no knowledge of any fact which would establish existence of a good defense against the note. D.C. Code § 28:3-417(2)(d), (3). *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

A "without recourse" endorsement is a qualified endorsement and does not eliminate all obligations owed by transferor of an instrument to his transferee. D.C. Code § 28:3-417(2)(d), (3). *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

Although, with respect to unenforceability of note endorsed "without recourse" because of illegality of underlying loan, transferee had full knowledge of same facts as its transferor and made the same "mistake" of law, transferee did not subjectively know when it accepted the note that a good defense existed against it, and thus was entitled to coverage of warranty. D.C. Code §§ 28:1-103, 28:1-201(19), 28:3-417(2). *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

§ 28:3-417. Presentment warranties.

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee making payment or accepting the draft in good faith that:

(1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) The draft has not been altered; and

(3) The warrantor has no knowledge that the signature of the drawer of the draft is unauthorized.

(b) A drawee making payment may recover from any warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor. If the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from any warrantor for breach of warranty the amounts stated in this subsection.

(c) If a drawee asserts a claim for breach of warranty under subsection (a) of this section based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under section 28:3-404 or 28:3-405 or the drawer is precluded under section 28:3-406 or 28:4-406 from asserting against the drawee the unauthorized indorsement or alteration.

(d) If (i) a dishonored draft is presented for payment to the drawer or an indorser or (ii) any other instrument is presented for payment to a party obliged to pay the instrument, and (iii) payment is received, the following rules apply:

(1) The person obtaining payment and a prior transferor of the instrument warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the instrument, a person entitled to enforce the instrument or authorized to obtain payment on behalf of a person entitled to enforce the instrument.

(2) The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (d) of this section cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) or (d) of this section is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(f) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

(Dec. 30, 1963, 77 Stat. 685, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in § 28:3-418.

Prior Codifications. — 1981 Ed., § 28:3-417.

1973 Ed., § 28:3-417.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section replaces subsection (1) of former Section 3-417. The former provision was difficult to understand because it purported to state in one subsection all warranties given to any person paying any instrument. The result was a provision replete with exceptions that could not be readily understood except after close scrutiny of the language. In revised Section 3-417, presentment warranties made to drawees of uncertified checks and other unaccepted drafts are stated in subsection (a). All other presentment warranties are stated in subsection (d).

2. Subsection (a) states three warranties. Subsection (a)(1) in effect is a warranty that there are no unauthorized or missing indorsements. "Person entitled to enforce" is defined in Section 3-301. Subsection (a)(2) is a warranty that there is no alteration. Subsection (a)(3) is a warranty of no knowledge that there is a forged drawer's signature. Subsection (a) states that the warranties are made to the drawee and subsections (b) and (c) identify the drawee as the person entitled to recover for breach of warranty. There is no warranty made to the drawer under subsection (a) when presentment is made to the drawee. Warranty to the drawer is governed by subsection (d) and that applies only when presentment for payment is made to the drawer with respect to a dishonored draft. In *Sun 'N Sand, Inc. v. United California Bank*, 582 P.2d 920 (Cal.1978), the court held that under former Section 3-417(1) a warranty was made to the drawer of a check when the check was presented to the drawee for payment. The result in that case is rejected.

3. Subsection (a)(1) retains the rule that the drawee does not admit the authenticity of indorsements and subsection (a)(3) retains the rule of *Price v. Neal*, 3 Burr. 1354 (1762), that the drawee takes the risk that the drawer's signature is unauthorized unless the person presenting the draft has knowledge that the drawer's signature is unauthorized. Under subsection (a)(3) the warranty of no knowledge that the drawer's signature is unauthorized is also given by prior transferors of the draft.

4. Subsection (d) applies to presentment for payment in all cases not covered by subsection (a). It applies to presentment of notes and accepted drafts to any party obliged to pay the instrument, including an indorser, and to presentment of dishonored drafts if made to the drawer or an indorser. In cases covered by

subsection (d), there is only one warranty and it is the same as that stated in subsection (a)(1). There are no warranties comparable to subsections (a)(2) and (a)(3) because they are appropriate only in the case of presentment to the drawee of an unaccepted draft. With respect to presentment of an accepted draft to the acceptor, there is no warranty with respect to alteration or knowledge that the signature of the drawer is unauthorized. Those warranties were made to the drawee when the draft was presented for acceptance (Section 3-417(a)(2) and (3)) and breach of that warranty is a defense to the obligation of the drawee as acceptor to pay the draft. If the drawee pays the accepted draft the drawee may recover the payment from any warrantor who was in breach of warranty when the draft was accepted. Section 3-417(b). Thus, there is no necessity for these warranties to be repeated when the accepted draft is presented for payment. Former Section 3-417(1)(b)(iii) and (c)(iii) are not included in revised Section 3-417 because they are unnecessary. Former Section 3-417(1)(c)(iv) is not included because it is also unnecessary. The acceptor should know what the terms of the draft were at the time acceptance was made.

If presentment is made to the drawer or maker, there is no necessity for a warranty concerning the signature of that person or with respect to alteration. If presentment is made to an indorser, the indorser had itself warranted authenticity of signatures and that the instrument was not altered. Section 3-416(a)(2) and (3).

5. The measure of damages for breach of warranty under subsection (a) is stated in subsection (b). There is no express provision for attorney's fees, but attorney's fees are not meant to be necessarily excluded. They could be granted because they fit within the language "expenses * * * resulting from the breach." Subsection (b) provides that the right of the drawee to recover for breach of warranty is not affected by a failure of the drawee to exercise ordinary care in paying the draft. This provision follows the result reached under former Article 3 in *Hartford Accident & Indemnity Co. v. First Pennsylvania Bank*, 859 F.2d 295 (3d Cir.1988).

6. Subsection (c) applies to checks and other unaccepted drafts. It gives to the warrantor the benefit of rights that the drawee has against the drawer under Section 3-404, 3-405, 3-406,

or 4-406. If the drawer's conduct contributed to a loss from forgery or alteration, the drawee should not be allowed to shift the loss from the drawer to the warrantor.

7. The first sentence of subsection (e) recognizes that checks are normally paid by automated means and that payor banks rely on warranties in making payment. Thus, it is not appropriate to allow disclaimer of warranties appearing on checks that normally will not be examined by the payor bank. The second sen-

tence requires a breach of warranty claim to be asserted within 30 days after the drawee learns of the breach and the identity of the warrantor.

8. Since the traditional term "cause of action" may have been replaced in some states by "claim for relief" or some equivalent term, the words "cause of action" in subsection (f) have been bracketed to indicate that the words may be replaced by an appropriate substitute to conform to local practice.

CASE NOTES

Without recourse indorsement.

In view of fact that legal effect of a "without recourse" endorsement is defined by Uniform Commercial Code, issue of whether "without recourse" endorsement on note transferred by lender to its transferee barred transferee's claims against lender would be determined with reference to principles of commercial law established therein. D.C. Code § 28:3-417(2)(d), (3). *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

Where at all times lender was fully aware of facts relevant to subsequent judicial determination that note transferred by it was unen-

forceable because of illegality of underlying loan, lender's ignorance of law was no excuse, and lender's transferee's claims against lender were not barred by "without recourse" endorsement on the note. D.C. Code §§ 28:1-103, 28:3-417(2)(d), (3). *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

A "without recourse" endorsement is a qualified endorsement and does not eliminate all obligations owed by transferor of an instrument to his transferee. D.C. Code § 28:3-417(2)(d), (3). *Hartford Life Ins. Co. v. Title Guarantee Co.*, 520 F.2d 1170, 1975 U.S. App. LEXIS 12398 (C.A.D.C. 1975).

§ 28:3-418. Payment or acceptance by mistake.

(a) Except as provided in subsection (c) of this section, if the drawee of a draft pays or accepts the draft and the drawee acted on the mistaken belief that (i) payment of the draft had not been stopped pursuant to section 28:4-403 or (ii) the signature of the drawer of the draft was authorized, the drawee may recover the amount of the draft from the person to whom or for whose benefit payment was made or, in the case of acceptance, may revoke the acceptance. Rights of the drawee under this subsection are not affected by failure of the drawee to exercise ordinary care in paying or accepting the draft.

(b) Except as provided in subsection (c) of this section, if an instrument has been paid or accepted by mistake and the case is not covered by subsection (a) of this section, the person paying or accepting may, to the extent permitted by the law governing mistake and restitution, (i) recover the payment from the person to whom or for whose benefit payment was made or (ii) in the case of acceptance, may revoke the acceptance.

(c) The remedies provided by subsection (a) or (b) of this section may not be asserted against a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment or acceptance. This subsection does not limit remedies provided by section 28:3-417 or 28:4-407.

(d) Notwithstanding section 28:4-215, if an instrument is paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance under subsection (a) or (b) of this section, the instrument is deemed not to have been paid or accepted and is treated as dishonored, and the person from whom

payment is recovered has rights as a person entitled to enforce the dishonored instrument.

(Dec. 30, 1963, 77 Stat. 686, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in § 28:3-301.

Prior Codifications. — 1981 Ed., § 28:3-418.

1973 Ed., § 28:3-418.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. This section covers payment or acceptance by mistake and replaces former Section 3-418. Under former Article 3, the remedy of a drawee that paid or accepted a draft by mistake was based on the law of mistake and restitution, but that remedy was not specifically stated. It was provided by Section 1-103. Former Section 3-418 was simply a limitation on the unstated remedy under the law of mistake and restitution. Under revised Article 3, Section 3-418 specifically states the right of restitution in subsections (a) and (b). Subsection (a) allows restitution in the two most common cases in which the problem is presented: payment or acceptance of forged checks and checks on which the drawer has stopped payment. If the drawee acted under a mistaken belief that the check was not forged or had not been stopped, the drawee is entitled to recover the funds paid or to revoke the acceptance whether or not the drawee acted negligently. But in each case, by virtue of subsection (c), the drawee loses the remedy if the person receiving payment or acceptance was a person who took the check in good faith and for value or who in good faith changed position in reliance on the payment or acceptance. Subsections (a) and (c) are consistent with former Section 3-418 and the rule of *Price v. Neal*. The result in the two cases covered by subsection (a) is that the drawee in most cases will not have a remedy against the person paid because there is usually a person who took the check in good faith and for value or who in good faith changed position in reliance on the payment or acceptance.

2. If a check has been paid by mistake and the payee receiving payment did not give value for the check or did not change position in reliance on the payment, the drawee bank is entitled to recover the amount of the check under subsection (a) regardless of how the check was paid. The drawee bank normally pays a check by a credit to an account of the collecting bank that presents the check for payment. The payee of the check normally receives the payment by a credit to the payee's account in the depository bank. But in some

cases the payee of the check may have received payment directly from the drawee bank by presenting the check for payment over the counter. In those cases the payee is entitled to receive cash, but the payee may prefer another form of payment such as a cashier's check or teller's check issued by the drawee bank. Suppose Seller contracted to sell goods to Buyer. The contract provided for immediate payment by Buyer and delivery of the goods 20 days after payment. Buyer paid by mailing a check for \$10,000 drawn on Bank payable to Seller. The next day Buyer gave a stop payment order to Bank with respect to the check Buyer had mailed to Seller. A few days later Seller presented Buyer's check to Bank for payment over the counter and requested a cashier's check as payment. Bank issued and delivered a cashier's check for \$10,000 payable to Seller. The teller failed to discover Buyer's stop order. The next day Bank discovered the mistake and immediately advised Seller of the facts. Seller refused to return the cashier's check and did not deliver any goods to Buyer.

Under Section 4-215, Buyer's check was paid by Bank at the time it delivered its cashier's check to Seller. See Comment 3 to Section 4-215. Bank is obliged to pay the cashier's check and has no defense to that obligation. The cashier's check was issued for consideration because it was issued in payment of Buyer's check. Although Bank has no defense on its cashier's check, it may have a right to recover \$10,000, the amount of Buyer's check, from Seller under Section 3-418(a). Bank paid Buyer's check by mistake. Seller did not give value for Buyer's check because the promise to deliver goods to Buyer was never performed. Section 3-303(a)(1). And, on these facts, Seller did not change position in reliance on the payment of Buyer's check. Thus, the first sentence of Section 3-418(c) does not apply and Seller is obliged to return \$10,000 to Bank. Bank is obliged to pay the cashier's check but it has a counterclaim against Seller based on its rights under Section 3-418(a). This claim can be asserted against Seller, but it cannot be as-

serted against some other person with rights of a holder in due course of the cashier's check. A person without rights of a holder in due course of the cashier's check would take subject to Bank's claim against Seller because it is a claim in recoupment. Section 3-305(a)(3).

If Bank recovers from Seller under Section 3-418(a), the payment of Buyer's check is treated as unpaid and dishonored. Section 3-418(d). One consequence is that Seller may enforce Buyer's obligation as drawer to pay the check. Section 3-414. Another consequence is that Seller's rights against Buyer on the contract of sale are also preserved. Under Section 3-310(b) Buyer's obligation to pay for the goods was suspended when Seller took Buyer's check and remains suspended until the check is either dishonored or paid. Under Section 3-310(b)(1)* the obligation is discharged when the check is paid. Since Section 3-418(d) treats Buyer's check as unpaid and dishonored, Buyer's obligation is not discharged and suspension of the obligation terminates. Under Section 3-310(b)(3), Seller may enforce either the contract of sale or the check subject to defenses and claims of Buyer. * Previous incorrect cross reference corrected by Permanent Editorial Board action November 1992.

If Seller had released the goods to Buyer before learning about the stop order, Bank would have no recovery against Seller under Section 3-418(a) because Seller in that case gave value for Buyer's check. Section 3-418(c). In this case Bank's sole remedy is under Section 4-407 by subrogation.

3. Subsection (b) covers cases of payment or acceptance by mistake that are not covered by subsection (a). It directs courts to deal with those cases under the law governing mistake and restitution. Perhaps the most important class of cases that falls under subsection (b), because it is not covered by subsection (a), is that of payment by the drawee bank of a check with respect to which the bank has no duty to the drawer to pay either because the drawer has no account with the bank or because available funds in the drawer's account are not sufficient to cover the amount of the check. With respect to such a case, under Restatement of Restitution s 29, if the bank paid because of a mistaken belief that there were available funds in the drawer's account sufficient to cover the amount of the check, the bank is entitled to

restitution. But s 29 is subject to Restatement of Restitution s 33 which denies restitution if the holder of the check receiving payment paid value in good faith for the check and had no reason to know that the check was paid by mistake when payment was received.

The result in some cases is clear. For example, suppose Father gives Daughter a check for \$10,000 as a birthday gift. The check is drawn on Bank in which both Father and Daughter have accounts. Daughter deposits the check in her account in Bank. An employee of Bank, acting under the belief that there were available funds in Father's account to cover the check, caused Daughter's account to be credited for \$10,000. In fact, Father's account was overdrawn and Father did not have overdraft privileges. Since Daughter received the check gratuitously there is clear unjust enrichment if she is allowed to keep the \$10,000 and Bank is unable to obtain reimbursement from Father. Thus, Bank should be permitted to reverse the credit to Daughter's account. But this case is not typical. In most cases the remedy of restitution will not be available because the person receiving payment of the check will have given value for it in good faith.

In some cases, however, it may not be clear whether a drawee bank should have a right of restitution. For example, a check-kiting scheme may involve a large number of checks drawn on a number of different banks in which the drawer's credit balances are based on uncollected funds represented by fraudulently drawn checks. No attempt is made in Section 3-418 to state rules for determining the conflicting claims of the various banks that may be victimized by such a scheme. Rather, such cases are better resolved on the basis of general principles of law and the particular facts presented in the litigation.

4. The right of the drawee to recover a payment or to revoke an acceptance under Section 3-418 is not affected by the rules under Article 4 that determine when an item is paid. Even though a payor bank may have paid an item under Section 4-215, it may have a right to recover the payment under Section 3-418. *National Savings & Trust Co. v. Park Corp.*, 722 F.2d 1303 (6th Cir.1983), cert. denied, 466 U.S. 939 (1984), correctly states the law on the issue under former Article 3. Revised Article 3 does not change the previous law.

§ 28:3-419. Instruments signed for accommodation.

(a) If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given

for the instrument, the instrument is signed by the accommodation party “for accommodation”.

(b) An accommodation party may sign the instrument as maker, drawer, acceptor, or indorser and, subject to subsection (d) of this section, is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation.

(c) A person signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature is an anomalous indorsement or is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument. Except as provided in section 28:3-605, the obligation of an accommodation party to pay the instrument is not affected by the fact that the person enforcing the obligation had notice when the instrument was taken by that person that the accommodation party signed the instrument for accommodation.

(d) If the signature of a party to an instrument is accompanied by words indicating unambiguously that the party is guaranteeing collection rather than payment of the obligation of another party to the instrument, the signer is obliged to pay the amount due on the instrument to a person entitled to enforce the instrument only if (i) execution of judgment against the other party has been returned unsatisfied, (ii) the other party is insolvent or in an insolvency proceeding, (iii) the other party cannot be served with process, or (iv) it is otherwise apparent that payment cannot be obtained from the other party.

(e) An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. An accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party.

(Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-419.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Section 3-419 replaces former Sections 3-415 and 3-416. An accommodation party is a person who signs an instrument to benefit the accommodated party either by signing at the time value is obtained by the accommodated party or later, and who is not a direct beneficiary of the value obtained. An accommodation party will usually be a co-maker or anomalous indorser. Subsection (a) distinguishes between direct and indirect benefit. For example, if X cosigns a note of Corporation that is given for a loan to Corporation, X is an accommodation

party if no part of the loan was paid to X or for X's direct benefit. This is true even though X may receive indirect benefit from the loan because X is employed by Corporation or is a stockholder of Corporation, or even if X is the sole stockholder so long as Corporation and X are recognized as separate entities.

2. It does not matter whether an accommodation party signs gratuitously either at the time the instrument is issued or after the instrument is in the possession of a holder. Subsection (b) of Section 3-419 takes the view

stated in Comment 3 to former Section 3-415 that there need be no consideration running to the accommodation party: "The obligation of the accommodation party is supported by any consideration for which the instrument is taken before it is due. Subsection (2) is intended to change occasional decisions holding that there is no sufficient consideration where an accommodation party signs a note after it is in the hands of a holder who has given value. The [accommodation] party is liable to the holder in such a case even though there is no extension of time or other concession."

3. As stated in Comment 1, whether a person is an accommodation party is a question of fact. But it is almost always the case that a co-maker who signs with words of guaranty after the signature is an accommodation party. The same is true of an anomalous indorser. In either case a person taking the instrument is put on notice of the accommodation status of the co-maker or indorser. This is relevant to Section 3-605(h). But, under subsection (c), signing with words of guaranty or as an anomalous indorser also creates a presumption that the signer is an accommodation party. A party challenging accommodation party status would have to rebut this presumption by producing evidence that the signer was in fact a direct beneficiary of the value given for the instrument.

An accommodation party is always a surety. A surety who is not a party to the instrument, however, is not an accommodation party. For example, if M issues a note payable to the order of P, and S signs a separate contract in which S agrees to pay P the amount of the instrument if it is dishonored, S is a surety but is not an accommodation party. In such a case, S's rights and duties are determined under the general law of suretyship. In unusual cases two parties to an instrument may have a surety relationship that is not governed by Article 3 because the requirements of Section 3-419(a) are not met. In those cases the general law of suretyship applies to the relationship. See PEB Commentary No. 11, dated February 10, 1994 [Uniform Laws Annotated, UCC, App. 11, Comment 11].

4. Subsection (b) states that an accommodation party is liable on the instrument in the capacity in which the party signed the instrument. In most cases that capacity will be either that of a maker or indorser of a note. But subsection (d) provides a limitation on subsection (b). If the signature of the accommodation party is accompanied by words indicating unambiguously that the party is guaranteeing collection rather than payment of the instrument, liability is limited to that stated in subsection (d), which is based on former Section 3-416(2).

Former Article 3 was confusing because the obligation of a guarantor was covered both in Section 3-415 and in Section 3-416. The latter section suggested that a signature accompanied by words of guaranty created an obligation distinct from that of an accommodation party. Revised Article 3 eliminates that confusion by stating in Section 3-419 the obligation of a person who uses words of guaranty. Portions of former Section 3-416 are preserved. Former Section 3-416(2) is reflected in Section 3-419(d) and former Section 3-416(4) is reflected in Section 3-419(c). Words added to an anomalous indorsement indicating that payment of the instrument is guaranteed by the indorser do not change the liability of the indorser as stated in Section 3-415. This is a change from former Section 3-416(5). See PEB Commentary No. 11.

5. Subsection (e) like former 3-415(5), provides that an accommodation party that pays the instrument is entitled to enforce the instrument against the accommodated party. Since the accommodation party that pays the instrument is entitled to enforce the instrument against the accommodated party, the accommodation party also obtains rights to any security interest or other collateral that secures payment of the instrument. Subsection (e) also provides that an accommodation party that pays the instrument is entitled to reimbursement from the accommodated party. See PEB Commentary No. 11.

6. In occasional cases, the accommodation party might pay the instrument even though the accommodated party had a defense to its obligation that was available to the accommodation party under Section 3-305(d). In such cases, the accommodation party's right to reimbursement may conflict with the accommodated party's right to raise its defense. For example, suppose the accommodation party pays the instrument without being aware of the defense. In that case the accommodation party should be entitled to reimbursement. Suppose the accommodation party paid the instrument with knowledge of the defense. In that case, to the extent of the defense, reimbursement ordinarily would not be justified, but under some circumstances reimbursement may be justified depending upon the facts of the case. The resolution of this conflict is left to the general law of suretyship. Section 1-103. See PEB Commentary No. 11.

7. Section 3-419, along with Section 3-116(a) and (b), Section 3-305(d) and Section 3-605, provides rules governing the rights of accommodation parties. In addition, except to the extent that it is displaced by provisions of this Article, the general law of suretyship also applies to the rights of accommodation parties. Section 1-103. See PEB Commentary No. 11.

§ 28:3-420. Conversion of instrument.

(a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.

(b) In an action under subsection (a) of this section, the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.

(c) A representative, other than a depository bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.

(Dec. 30, 1963, 77 Stat. 686, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in § 28:4-203.

Prior Codifications. — 1981 Ed., § 28:3-420.

1973 Ed., § 28:3-419.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Section 3-420 is a modification of former Section 3-419. The first sentence of Section 3-420(a) states a general rule that the law of conversion applicable to personal property also applies to instruments. Paragraphs (a) and (b) of former Section 3-419(1) are deleted as inappropriate in cases of noncash items that may be delivered for acceptance or payment in collection letters that contain varying instructions as to what to do in the event of nonpayment on the day of delivery. It is better to allow such cases to be governed by the general law of conversion that would address the issue of when, under the circumstances prevailing, the presenter's right to possession has been denied. The second sentence of Section 3-420(a) states that an instrument is converted if it is taken by transfer other than a negotiation from a person not entitled to enforce the instrument or taken for collection or payment from a person not entitled to enforce the instrument or receive payment. This covers cases in which a depository or payor bank takes an instrument bearing a forged indorsement. It also covers cases in which an instrument is payable to two persons and the two persons are not alternative payees, e.g., a check payable to John and Jane Doe. Under Section 3-110(d) the check can be negotiated or enforced only by

both persons acting jointly. Thus, neither payee acting without the consent of the other, is a person entitled to enforce the instrument. If John indorses the check and Jane does not, the indorsement is not effective to allow negotiation of the check. If Depository Bank takes the check for deposit to John's account, Depository Bank is liable to Jane for conversion of the check if she did not consent to the transaction. John, acting alone, is not the person entitled to enforce the check because John is not the holder of the check. Section 3-110(d) and Comment 4 to Section 3-110. Depository Bank does not get any greater rights under Section 4-205(1). If it acted for John as its customer, it did not become holder of the check under that provision because John, its customer, was not a holder.

Under former Article 3, the cases were divided on the issue of whether the drawer of a check with a forged indorsement can assert rights against a depository bank that took the check. The last sentence of Section 3-420(a) resolves the conflict by following the rule stated in *Stone & Webster Engineering Corp. v. First National Bank & Trust Co.*, 184 N.E.2d 358 (Mass.1962). There is no reason why a drawer should have an action in conversion. The check

represents an obligation of the drawer rather than property of the drawer. The drawer has an adequate remedy against the payor bank for recredit of the drawer's account for unauthorized payment of the check.

There was also a split of authority under former Article 3 on the issue of whether a payee who never received the instrument is a proper plaintiff in a conversion action. The typical case was one in which a check was stolen from the drawer or in which the check was mailed to an address different from that of the payee and was stolen after it arrived at that address. The thief forged the indorsement of the payee and obtained payment by depositing the check to an account in a depository bank. The issue was whether the payee could bring an action in conversion against the depository bank or the drawee bank. In revised Article 3, under the last sentence of Section 3-420(a), the payee has no conversion action because the check was never delivered to the payee. Until delivery, the payee does not have any interest in the check. The payee never became the holder of the check nor a person entitled to enforce the check. Section 3-301. Nor is the payee injured by the fraud. Normally the drawer of a check intends to pay an obligation owed to the payee. But if the check is never delivered to the payee, the obligation owed to the payee is not affected. If the check falls into the hands of a thief who obtains payment after forging the signature of the payee as an indorsement, the obligation owed to the payee continues to exist after the thief receives payment. Since the payee's right to enforce the underlying obligation is unaffected by the fraud of the thief, there is no reason to give any additional remedy to the payee. The drawer of the check has no conversion remedy, but the drawee is not entitled to charge the drawer's account when the drawee wrongfully honored the check. The remedy of the drawee is against the depository bank for breach of warranty under Section 3-417(a)(1) or 4-208(a)(1). The loss will fall on the person who gave value to the thief for the check.

The situation is different if the check is delivered to the payee. If the check is taken for an obligation owed to the payee, the last sentence of Section 3-310(b)(4) provides that the obligation may not be enforced to the extent of the amount of the check.

The payee's rights are restricted to enforcement of the payee's rights in the instrument. In this event the payee is injured by the theft and has a cause of action for conversion.

The payee receives delivery when the check comes into the payee's possession, as for example when it is put into the payee's mailbox. Delivery to an agent is delivery to the payee. If a check is payable to more than one payee, delivery to one of the payees is deemed to be delivery to all of the payees. Occasionally, the

person asserting a conversion cause of action is an indorsee rather than the original payee. If the check is stolen before the check can be delivered to the indorsee and the indorsee's indorsement is forged, the analysis is similar. For example, a check is payable to the order of A. A indorses it to B and puts it into an envelope addressed to B. The envelope is never delivered to B. Rather, Thief steals the envelope, forges B's indorsement to the check and obtains payment. Because the check was never delivered to B, the indorsee, B has no cause of action for conversion, but A does have such an action. A is the owner of the check. B never obtained rights in the check. If A intended to negotiate the check to B in payment of an obligation, that obligation was not affected by the conduct of Thief. B can enforce that obligation. Thief stole A's property not B's.

2. Subsection (2) of former Section 3-419 is amended because it is not clear why the former law distinguished between the liability of the drawee and that of other converters. Why should there be a conclusive presumption that the liability is face amount if a drawee refuses to pay or return an instrument or makes payment on a forged indorsement, while the liability of a maker who does the same thing is only presumed to be the face amount? Moreover, it was not clear under former Section 3-419(2) what face amount meant. If a note for \$10,000 is payable in a year at 10% interest, it is common to refer to \$10,000 as the face amount, but if the note is converted the loss to the owner also includes the loss of interest. In revised Article 3, Section 3-420(b), by referring to "amount payable on the instrument," allows the full amount due under the instrument to be recovered.

The "but" clause in subsection (b) addresses the problem of conversion actions in multiple payee checks. Section 3-110(d) states that an instrument cannot be enforced unless all payees join in the action. But an action for conversion might be brought by a payee having no interest or a limited interest in the proceeds of the check. This clause prevents such a plaintiff from receiving a windfall. An example is a check payable to a building contractor and a supplier of building material. The check is not payable to the payees alternatively. Section 3-110(d). The check is delivered to the contractor by the owner of the building. Suppose the contractor forges supplier's signature as an indorsement of the check and receives the entire proceeds of the check. The supplier should not, without qualification, be able to recover the entire amount of the check from the bank that converted the check. Depending upon the contract between the contractor and the supplier, the amount of the check may be due entirely to the contractor, in which case there should be no recovery, entirely to the supplier, in which case

recovery should be for the entire amount, or part may be due to one and the rest to the other, in which case recovery should be limited to the amount due to the supplier.

3. Subsection (3) of former Section 3-419 drew criticism from the courts, that saw no reason why a depository bank should have the defense stated in the subsection. See *Knesz v. Central Jersey Bank & Trust Co.*, 477 A.2d 806 (N.J.1984). The depository bank is ultimately liable in the case of a forged indorsement check because of its warranty to the payor bank under Section 4-208(a)(1) and it is usually the

most convenient defendant in cases involving multiple checks drawn on different banks. There is no basis for requiring the owner of the check to bring multiple actions against the various payor banks and to require those banks to assert warranty rights against the depository bank. In revised Article 3, the defense provided by Section 3-420(c) is limited to collecting banks other than the depository bank. If suit is brought against both the payor bank and the depository bank, the owner, of course, is entitled to but one recovery.

CASE NOTES

ANALYSIS

Commercially reasonable standards.

Damages.

Defenses.

Commercially reasonable standards.

Under section of the District of Columbia Uniform Commercial Code (U.C.C.) whereby depository bank is not liable in conversion beyond amount of proceeds remaining in its hands if it acted in accordance with reasonable commercial standards, commercial reasonableness is generally a question of fact for the jury rather than an issue to be decided as a matter of law. D.C. Code 1981, § 28:3-419(3); U.C.C. § 3-419(3). *Kuwait Airways Corp. v. American Sec. Bank, N.A.*, 890 F.2d 456, 1989 U.S. App. LEXIS 17944 (C.A.D.C. 1989).

Damages.

For purposes of entitlement to prejudgment interest with respect to depository bank's allowing employee of corporate customer to open a corporate account without any documentation and taking for deposit in that account checks on missing or forged endorsements, amount for breach of contract claim was not liquidated, but, under District of Columbia law, prejudgment interest would be allowable on conversion claim to extent that it would make the injured party whole. D.C. Code 1981, §§ 15-108, 15-109. *Kuwait Airways Corp. v. American Sec. Bank, N.A.*, 890 F.2d 456, 1989 U.S. App. LEXIS 17944 (C.A.D.C. 1989).

Bank was not liable for punitive damages in allowing opening of corporate account without

documentation and accepting checks for deposit in that account on missing and forged endorsements where only evidence of reckless indifference to rights of customers was study showing that bank lacked corporate documentation in 47% of its corporate accounts at the branch in question. *Kuwait Airways Corp. v. American Sec. Bank, N.A.*, 890 F.2d 456, 1989 U.S. App. LEXIS 17944 (C.A.D.C. 1989).

Defenses.

The scope of the defense under District of Columbia Uniform Commercial Code (U.C.C.) section relating to negligent contribution to alteration or unauthorized signature is coextensive with the scope of the substantive wrong of conversion of an instrument by paying it on a forged endorsement, and thus the former section provides a defense to conversion claims under the latter section, including cases where payee's endorsement is missing. D.C. Code 1981, §§ 28:3-406, 28:3-419(1)(c), (2); U.C.C. §§ 3-406, 3-419, 3-419(1)(c). *Kuwait Airways Corp. v. American Sec. Bank, N.A.*, 890 F.2d 456, 1989 U.S. App. LEXIS 17944 (C.A.D.C. 1989).

Depository bank that has not acted in a commercially reasonable manner in taking checks over forged endorsements is not absolutely liable but may have available to it defenses of ratification and apparent authority. D.C. Code 1981, § 28:3-419. *Kuwait Airways Corp. v. American Sec. Bank, N.A.*, 890 F.2d 456, 1989 U.S. App. LEXIS 17944 (C.A.D.C. 1989).

Part 5. Dishonor.

§ 28:3-501. Presentment.

(a) "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank, or (ii) to accept a draft made to the drawee.

(b) The following rules are subject to Article 4, agreement of the parties, and clearing-house rules and the like:

(1) Presentment may be made at the place of payment of the instrument and must be made at the place of payment if the instrument is payable at a bank in the United States; may be made by any commercially reasonable means, including an oral, written, or electronic communication; is effective when the demand for payment or acceptance is received by the person to whom presentment is made; and is effective if made to any one of 2 or more makers, acceptors, drawees, or other payors.

(2) Upon demand of the person to whom presentment is made, the person making presentment must (i) exhibit the instrument, (ii) give reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority to do so, and (iii) sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made.

(3) Without dishonoring the instrument, the party to whom presentment is made may (i) return the instrument for lack of a necessary indorsement, or (ii) refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.

(4) The party to whom presentment is made may treat presentment as occurring on the next business day after the day of presentment if the party to whom presentment is made has established a cut-off hour not earlier than 2 p.m. for the receipt and processing of instruments presented for payment or acceptance and presentment is made after the cut-off hour.

(Dec. 30, 1963, 77 Stat. 687, Pub. L. 88-243, § 1; Aug. 30, 1964, 78 Stat. 679, Pub. L. 88-509, § 5; Mar. 16, 1982, D.C. Law 4-85, § 6, 29 DCR 309; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Section references. — This section is referred to in §§ 28:3-103, 28:4-104, and 28:4-212.

Prior Codifications. — 1981 Ed., § 28:3-501.

1973 Ed., § 28:3-501.

Legislative history of Law 4-85. — Law 4-85, the "Uniform Commercial Code Amendments Act of 1981," was introduced in Council and assigned Bill No. 4-89, which was referred to the Committee on the Judiciary. The Bill was

adopted on first and second readings on November 24, 1981, and December 8, 1981, respectively. Signed by the Mayor on January 18, 1982, it was assigned Act No. 4-139 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

Subsection (a) defines presentment. Subsection (b)(1) states the place and manner of presentment. Electronic presentment is authorized. The communication of the demand for payment or acceptance is effective when received. Subsection (b)(2) restates former Section 3-505. Subsection (b)(2)(i) allows the person to whom presentment is made to require

exhibition of the instrument, unless the parties have agreed otherwise as in an electronic presentment agreement. Former Section 3-507(3) is the antecedent of subsection (b)(3)(i). Since a payor must decide whether to pay or accept on the day of presentment, subsection (b)(4) allows the payor to set a cut-off hour for receipt of instruments presented.

§ 28:3-502. Dishonor.

(a) Dishonor of a note is governed by the following rules:

(1) If the note is payable on demand, the note is dishonored if presentment is duly made to the maker and the note is not paid on the day of presentment.

(2) If the note is not payable on demand and is payable at or through a bank or the terms of the note require presentment, the note is dishonored if presentment is duly made and the note is not paid on the day it becomes payable or the day of presentment, whichever is later.

(3) If the note is not payable on demand and paragraph (2) of this subsection does not apply, the note is dishonored if it is not paid on the day it becomes payable.

(b) Dishonor of an unaccepted draft other than a documentary draft is governed by the following rules:

(1) If a check is duly presented for payment to the payor bank otherwise than for immediate payment over the counter, the check is dishonored if the payor bank makes timely return of the check or sends timely notice of dishonor or nonpayment under section 28:4-301 or 28:4-302, or becomes accountable for the amount of the check under section 28:4-302.

(2) If a draft is payable on demand and paragraph (1) of this subsection does not apply, the draft is dishonored if presentment for payment is duly made to the drawee and the draft is not paid on the day of presentment.

(3) If a draft is payable on a date stated in the draft, the draft is dishonored if (i) presentment for payment is duly made to the drawee and payment is not made on the day the draft becomes payable or the day of presentment, whichever is later, or (ii) presentment for acceptance is duly made before the day the draft becomes payable and the draft is not accepted on the day of presentment.

(4) If a draft is payable on elapse of a period of time after sight or acceptance, the draft is dishonored if presentment for acceptance is duly made and the draft is not accepted on the day of presentment.

(c) Dishonor of an unaccepted documentary draft occurs according to the rules stated in subsection (b)(2), (3), and (4) of this section, except that payment or acceptance may be delayed without dishonor until no later than the close of the third business day of the drawee following the day on which payment or acceptance is required by those paragraphs.

(d) Dishonor of an accepted draft is governed by the following rules:

(1) If the draft is payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and the draft is not paid on the day of presentment.

(2) If the draft is not payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and payment is not made on the day it becomes payable or the day of presentment, whichever is later.

(e) In any case in which presentment is otherwise required for dishonor under this section and presentment is excused under section 28:3-504, dishonor occurs without presentment if the instrument is not duly accepted or paid.

(f) If a draft is dishonored because timely acceptance of the draft was not made and the person entitled to demand acceptance consents to a late acceptance, from the time of acceptance the draft is treated as never having been dishonored.

(Dec. 30, 1963, 77 Stat. 689, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-502.

1973 Ed., § 28:3-507.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Section 3-415 provides that an indorser is obliged to pay an instrument if the instrument is dishonored and is discharged if the indorser is entitled to notice of dishonor and notice is not given. Under Section 3-414, the drawer is obliged to pay an unaccepted draft if it is dishonored. The drawer, however, is not entitled to notice of dishonor except to the extent required in a case governed by Section 3-414(d). Part 5 tells when an instrument is dishonored (Section 3-502) and what it means to give notice of dishonor (Section 3-503). Often dishonor does not occur until presentment (Section 3-501), and frequently presentment and notice of dishonor are excused (Section 3-504).

2. In the great majority of cases presentment and notice of dishonor are waived with respect to notes. In most cases a formal demand for payment to the maker of the note is not contemplated. Rather, the maker is expected to send payment to the holder of the note on the date or dates on which payment is due. If payment is not made when due, the holder usually makes a demand for payment, but in the normal case in which presentment is waived, demand is irrelevant and the holder can proceed against indorsers when payment is not received. Under former Article 3, in the small minority of cases in which presentment and dishonor were not waived with respect to notes, the indorser was discharged from liability (former Section 3-502(1)(a)) unless the holder made presentment to the maker on the exact day the note was due (former Section 3-503(1)(c)) and gave notice of dishonor to the indorser before midnight of the third business day after dishonor (former Section 3-508(2)). These provisions are omitted from Revised Article 3 as inconsistent with practice which seldom involves face-to-face dealings.

3. Subsection (a) applies to notes. Subsection (a)(1) applies to notes payable on demand. Dishonor requires presentment, and dishonor occurs if payment is not made on the day of presentment. There is no change from previous

Article 3. Subsection (a)(2) applies to notes payable at a definite time if the note is payable at or through a bank or, by its terms, presentment is required. Dishonor requires presentment, and dishonor occurs if payment is not made on the due date or the day of presentment if presentment is made after the due date. Subsection (a)(3) applies to all other notes. If the note is not paid on its due date it is dishonored. This allows holders to collect notes in ways that make sense commercially without having to be concerned about a formal presentment on a given day.

4. Subsection (b) applies to unaccepted drafts other than documentary drafts. Subsection (b)(1) applies to checks. Except for checks presented for immediate payment over the counter, which are covered by subsection (b)(2), dishonor occurs according to rules stated in Article 4. When a check is presented for payment through the check-collection system, the drawee bank normally makes settlement for the amount of the check to the presenting bank. Under Section 4-301 the drawee bank may recover this settlement if it returns the check within its midnight deadline (Section 4-104). In that case the check is not paid and dishonor occurs under Section 3-502(b)(1). If the drawee bank does not return the check or give notice of dishonor or nonpayment within the midnight deadline, the settlement becomes final payment of the check. Section 4-215. Thus, no dishonor occurs regardless of whether the check is retained or is returned after the midnight deadline. In some cases the drawee bank might not settle for the check when it is received. Under Section 4-302 if the drawee bank is not also the depository bank and retains the check without settling for it beyond midnight of the day it is presented for payment, the bank becomes "accountable" for the amount of the check, i.e. it is obliged to pay the amount of the check. If the drawee bank is also the depository bank, the bank is accountable for the amount of the check if the bank does not pay the check or

return it or send notice of dishonor within the midnight deadline. In all cases in which the drawee bank becomes accountable, the check has not been paid and, under Section 3-502(b)(1), the check is dishonored. The fact that the bank is obliged to pay the check does not mean that the check has been paid. When a check is presented for payment, the person presenting the check is entitled to payment not just the obligation of the drawee to pay. Until that payment is made, the check is dishonored. To say that the drawee bank is obliged to pay the check necessarily means that the check has not been paid. If the check is eventually paid, the drawee bank no longer is accountable.

Subsection (b)(2) applies to demand drafts other than those governed by subsection (b)(1). It covers checks presented for immediate payment over the counter and demand drafts other than checks. Dishonor occurs if presentment for payment is made and payment is not made on the day of presentment.

Subsection (b)(3) and (4) applies to time drafts. An unaccepted time draft differs from a time note. The maker of a note knows that the note has been issued, but the drawee of a draft may not know that a draft has been drawn on it. Thus, with respect to drafts, presentment for payment or acceptance is required. Subsection (b)(3) applies to drafts payable on a date stated in the draft. Dishonor occurs if presentment for payment is made and payment is not made on the day the draft becomes payable or the day of presentment if presentment is made after the due date. The holder of an unaccepted draft payable on a stated date has the option of presenting the draft for acceptance before the day the draft becomes payable to establish whether the drawee is willing to assume liability by accepting. Under subsection (b)(3)(ii)

dishonor occurs when the draft is presented and not accepted. Subsection (b)(4) applies to unaccepted drafts payable on elapse of a period of time after sight or acceptance. If the draft is payable 30 days after sight, the draft must be presented for acceptance to start the running of the 30-day period. Dishonor occurs if it is not accepted. The rules in subsection (b)(3) and (4) follow former Section 3-501(1)(a).

5. Subsection (c) gives drawees an extended period to pay documentary drafts because of the time that may be needed to examine the documents. The period prescribed is that given by Section 5-112 in cases in which a letter of credit is involved.

6. Subsection (d) governs accepted drafts. If the acceptor's obligation is to pay on demand the rule, stated in subsection (d)(1), is the same as for that of a demand note stated in subsection (a)(1). If the acceptor's obligation is to pay at a definite time the rule, stated in subsection (d)(2), is the same as that of a time note payable at a bank stated in subsection (b)(2).

7. Subsection (e) is a limitation on subsection (a)(1) and (2), subsection (b), subsection (c), and subsection (d). Each of those provisions states dishonor as occurring after presentment. If presentment is excused under Section 3-504, dishonor occurs under those provisions without presentment if the instrument is not duly accepted or paid.

8. Under subsection (b)(3)(ii) and (4) if a draft is presented for acceptance and the draft is not accepted on the day of presentment, there is dishonor. But after dishonor, the holder may consent to late acceptance. In that case, under subsection (f), the late acceptance cures the dishonor. The draft is treated as never having been dishonored. If the draft is subsequently presented for payment and payment is refused dishonor occurs at that time.

CASE NOTES

In general.

Payee's delay in presenting draft for payment did not discharge drawer where drawee bank did not become insolvent during delay. D.C.

Code 1981, § 28:3-502. Family Fed. Sav. & Loan v. Davis (In re Davis), 172 B.R. 437, 1994 Bankr. LEXIS 1497 (1994).

§ 28:3-503. Notice of dishonor.

(a) The obligation of an indorser stated in section 28:3-415(a) and the obligation of a drawer stated in section 28:3-414(d) may not be enforced unless (i) the indorser or drawer is given notice of dishonor of the instrument complying with this section or (ii) notice of dishonor is excused under section 28:3-504(b).

(b) Notice of dishonor may be given by any person; may be given by any commercially reasonable means, including an oral, written, or electronic communication; and is sufficient if it reasonably identifies the instrument and indicates that the instrument has been dishonored or has not been paid or

accepted. Return of an instrument given to a bank for collection is sufficient notice of dishonor.

(c) Subject to section 28:3-504(c), with respect to an instrument taken for collection by a collecting bank, notice of dishonor must be given (i) by the bank before midnight of the next banking day following the banking day on which the bank receives notice of dishonor of the instrument, or (ii) by any other person within 30 days following the day on which the person receives notice of dishonor. With respect to any other instrument, notice of dishonor must be given within 30 days following the day on which dishonor occurs.

(Dec. 30, 1963, 77 Stat. 689, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-503.

1973 Ed., § 28:3-508.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

1. Subsection (a) is consistent with former Section 3-501(2)(a), but notice of dishonor is no longer relevant to the liability of a drawer except for the case of a draft accepted by an acceptor other than a bank. Comments 2 and 4 to Section 3-414. There is no reason why drawers should be discharged on instruments they draw until payment or acceptance. They are entitled to have the instrument presented to the drawee and dishonored (Section 3-414(b)) before they are liable to pay, but no notice of

dishonor need be made to them as a condition of liability. Subsection (b), which states how notice of dishonor is given, is based on former Section 3-508(3).

2. Subsection (c) replaces former Section 3-508(2). It differs from that section in that it provides a 30-day period for a person other than a collecting bank to give notice of dishonor rather than the three-day period allowed in former Article 3. Delay in giving notice of dishonor may be excused under Section 3-504(c).

§ 28:3-504. Excused presentment and notice of dishonor.

(a) Presentment for payment or acceptance of an instrument is excused if (i) the person entitled to present the instrument cannot with reasonable diligence make presentment, (ii) the maker or acceptor has repudiated an obligation to pay the instrument or is dead or in insolvency proceedings, (iii) by the terms of the instrument presentment is not necessary to enforce the obligation of indorsers or the drawer, (iv) the drawer or indorser whose obligation is being enforced has waived presentment or otherwise has no reason to expect or right to require that the instrument be paid or accepted, or (v) the drawer instructed the drawee not to pay or accept the draft or the drawee was not obligated to the drawer to pay the draft.

(b) Notice of dishonor is excused if (i) by the terms of the instrument notice of dishonor is not necessary to enforce the obligation of a party to pay the instrument, or (ii) the party whose obligation is being enforced waived notice of dishonor. A waiver of presentment is also a waiver of notice of dishonor.

(c) Delay in giving notice of dishonor is excused if the delay was caused by circumstances beyond the control of the person giving the notice and the person giving the notice exercised reasonable diligence after the cause of the delay ceased to operate.

(Dec. 30, 1963, 77 Stat. 690, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-504.

1973 Ed., § 28:3-511.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

Section 3-504 is largely a restatement of former Section 3-511. Subsection (4) of former Section 3-511 is replaced by Section 3-502(f).

§ 28:3-505. Evidence of dishonor.

(a) The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor stated:

(1) A document regular in form as provided in subsection (b) of this section which purports to be a protest;

(2) A purported stamp or writing of the drawee, payor bank, or presenting bank on or accompanying the instrument stating that acceptance or payment has been refused unless reasons for the refusal are stated and the reasons are not consistent with dishonor;

(3) A book or record of the drawee, payor bank, or collecting bank, kept in the usual course of business which shows dishonor, even if there is no evidence of who made the entry.

(b) A protest is a certificate of dishonor made by a United States consul or vice consul, or a notary public or other person authorized to administer oaths by the law of the place where dishonor occurs. It may be made upon information satisfactory to that person. The protest must identify the instrument and certify either that presentment has been made or, if not made, the reason why it was not made, and that the instrument has been dishonored by nonacceptance or nonpayment. The protest may also certify that notice of dishonor has been given to some or all parties.

(Dec. 30, 1963, 77 Stat. 690, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-505.

1973 Ed., § 28:3-510.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

Protest is no longer mandatory and must be requested by the holder. Even if requested, protest is not a condition to the liability of indorsers or drawers. Protest is a service provided by the banking system to establish that

dishonor has occurred. Like other services provided by the banking system, it will be available if market incentives, interbank agreements, or governmental regulations require it, but liabilities of parties no longer rest on it.

Protest may be a requirement for liability on international drafts governed by foreign law which this Article cannot affect.

Part 6. Discharge and Payment.

§ 28:3-601. Discharge and effect of discharge.

(a) The obligation of a party to pay the instrument is discharged as stated in this article or by an act or agreement with the party which would discharge an obligation to pay money under a simple contract.

(b) Discharge of the obligation of a party is not effective against a person acquiring rights of a holder in due course of the instrument without notice of the discharge.

(Dec. 30, 1963, 77 Stat. 691, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-601.
1973 Ed., § 28:3-601.

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

Legislative history of Law 10-249. — For

UNIFORM COMMERCIAL CODE COMMENT

Subsection (a) replaces subsections (1) and (2) of former Section 3-601. Subsection (b) restates former Section 3-602. Notice of discharge is not treated as notice of a defense that prevents holder in due course status. Section 3-302(b). Discharge is effective against a holder in due course only if the holder had notice of the

discharge when holder in due course status was acquired. For example, if an instrument bearing a canceled indorsement is taken by a holder, the holder has notice that the indorser has been discharged. Thus, the discharge is effective against the holder even if the holder is a holder in due course.

CASE NOTES

In general.

An unsatisfied judgment against maker of note does not bar a subsequent action against

an endorser. D.C. Code §§ 28:1-103, 28:3-601. *McLachlen Nat'l Bank v. Fields*, 364 A.2d 1191, 1976 D.C. App. LEXIS 390 (1976).

§ 28:3-602. Payment.

(a) Subject to subsection (b) of this section, an instrument is paid to the extent payment is made (i) by or on behalf of a party obliged to pay the instrument, and (ii) to a person entitled to enforce the instrument. To the extent of the payment, the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument under section 28:3-306 by another person.

(b) The obligation of a party to pay the instrument is not discharged under subsection (a) of this section if:

(1) A claim to the instrument under section 28:3-306 is enforceable against the party receiving payment and (i) payment is made with knowledge by the payor that payment is prohibited by injunction or similar process of a court of competent jurisdiction, or (ii) in the case of an instrument other than

a cashier's check, teller's check, or certified check, the party making payment accepted, from the person having a claim to the instrument, indemnity against loss resulting from refusal to pay the person entitled to enforce the instrument; or

(2) The person making payment knows that the instrument is a stolen instrument and pays a person it knows is in wrongful possession of the instrument.

(Dec. 30, 1963, 77 Stat. 691, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-602.

1973 Ed., § 28:3-603.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

This section replaces former Section 3-603(1). The phrase "claim to the instrument" in subsection (a) means, by reference to Section 3-306, a claim of ownership or possession and not a claim in recoupment. Subsection (b)(1)(ii) is added to conform to Section 3-411. Section 3-411 is intended to discourage an obligated bank from refusing payment of a cashier's check, certified check or dishonored teller's check at the request of a claimant to the check who provided the bank with indemnity against loss. See Comment 1 to Section 3-411. An obligated bank that refuses payment under those circumstances not only remains liable on the check but may also be liable to the holder of the check for consequential damages. Section 3-602(b)(1)(ii) and Section 3-411, read together,

change the rule of former Section 3-603(1) with respect to the obligation of the obligated bank on the check. Payment to the holder of a cashier's check, teller's check, or certified check discharges the obligation of the obligated bank on the check to both the holder and the claimant even though indemnity has been given by the person asserting the claim. If the obligated bank pays the check in violation of an agreement with the claimant in connection with the indemnity agreement, any liability that the bank may have for violation of the agreement is not governed by Article 3, but is left to other law. This section continues the rule that the obligor is not discharged on the instrument if payment is made in violation of an injunction against payment. See Section 3-411(c)(iv).

§ 28:3-603. Tender of payment.

(a) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument, the effect of tender is governed by principles of law applicable to tender of payment under a simple contract.

(b) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of the amount of the tender, of the obligation of an indorser or accommodation party having a right of recourse with respect to the obligation to which the tender relates.

(c) If tender of payment of an amount due on an instrument is made to a person entitled to enforce the instrument, the obligation of the obligor to pay interest after the due date on the amount tendered is discharged. If presentment is required with respect to an instrument and the obligor is able and ready to pay on the due date at every place of payment stated in the instrument, the obligor is deemed to have made tender of payment on the due date to the person entitled to enforce the instrument.

(Dec. 30, 1963, 77 Stat. 682, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-603.

1973 Ed., § 28:3-604.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

Section 3-603 replaces former Section 3-604. Subsection (a) generally incorporates the law of tender of payment applicable to simple contracts. Subsections (b) and (c) state particular rules. Subsection (b) replaces former Section 3-604(2). Under subsection (b) refusal of a ten-

der of payment discharges any indorser or accommodation party having a right of recourse against the party making the tender. Subsection (c) replaces former Section 3-604(1) and (3).

§ 28:3-604. Discharge by cancellation or renunciation.

(a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

(b) Cancellation or striking out of an indorsement pursuant to subsection (a) of this section does not affect the status and rights of a party derived from the indorsement.

(Dec. 30, 1963, 77 Stat. 692, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-604.

1973 Ed., § 28:3-605.

Legislative history of Law 10-249. — For

legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

UNIFORM COMMERCIAL CODE COMMENT

Section 3-604 replaces former Section 3-605.

§ 28:3-605. Discharge of indorsers and accommodation parties.

(a) In this section, the term "indorser" includes a drawer having the obligation described in section 28:3-414(d).

(b) Discharge, under section 28:3-604, of the obligation of a party to pay an instrument does not discharge the obligation of an indorser or accommodation party having a right of recourse against the discharged party.

(c) If a person entitled to enforce an instrument agrees, with or without consideration, to an extension of the due date of the obligation of a party to pay the instrument, the extension discharges an indorser or accommodation party

having a right of recourse against the party whose obligation is extended to the extent the indorser or accommodation party proves that the extension caused loss to the indorser or accommodation party with respect to the right of recourse.

(d) If a person entitled to enforce an instrument agrees, with or without consideration, to a material modification of the obligation of a party other than an extension of the due date, the modification discharges the obligation of an indorser or accommodation party having a right of recourse against the person whose obligation is modified to the extent the modification causes loss to the indorser or accommodation party with respect to the right of recourse. The loss suffered by the indorser or accommodation party as a result of the modification is equal to the amount of the right of recourse unless the person enforcing the instrument proves that no loss was caused by the modification or that the loss caused by the modification was an amount less than the amount of the right of recourse.

(e) If the obligation of a party to pay an instrument is secured by an interest in collateral and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of an indorser or accommodation party having a right of recourse against the obligor is discharged to the extent of the impairment. The value of an interest in collateral is impaired to the extent (i) the value of the interest is reduced to an amount less than the amount of the right of recourse of the party asserting discharge, or (ii) the reduction in value of the interest causes an increase in the amount by which the amount of the right of recourse exceeds the value of the interest. The burden of proving impairment is on the party asserting discharge.

(f) If the obligation of a party is secured by an interest in collateral not provided by an accommodation party and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of any party who is jointly and severally liable with respect to the secured obligation is discharged to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution, if impairment had not occurred. If the party asserting discharge is an accommodation party not entitled to discharge under subsection (e) of this section, the party is deemed to have a right to contribution based on joint and several liability rather than a right to reimbursement. The burden of proving impairment is on the party asserting discharge.

(g) Under subsection (e) or (f) of this section, impairing value of an interest in collateral includes (i) failure to obtain or maintain perfection or recordation of the interest in collateral, (ii) release of collateral without substitution of collateral of equal value, (iii) failure to perform a duty to preserve the value of collateral owed, under Article 9 or other law, to a debtor or surety or other person secondarily liable, or (iv) failure to comply with applicable law in disposing of collateral.

(h) An accommodation party is not discharged under subsection (c), (d), or (e) of this section unless the person entitled to enforce the instrument knows of the accommodation or has notice under section 28:3-419(c) that the instrument was signed for accommodation.

(i) A party is not discharged under this section if (i) the party asserting discharge consents to the event or conduct that is the basis of the discharge, or (ii) the instrument or a separate agreement of the party provides for waiver of discharge under this section either specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral.

(Dec. 30, 1963, 77 Stat. 692, Pub. L. 88-243, § 1; Mar. 23, 1995, D.C. Law 10-249, § 2(d), 42 DCR 467.)

Prior Codifications. — 1981 Ed., § 28:3-605.

1973 Ed., § 28:3-606.

Legislative history of Law 10-249. — For legislative history of D.C. Law 10-249, see Historical and Statutory Notes following § 28:3-101.

Editor's notes. — Many of the cases appearing in the notes to this article were decided under the former statutes in effect prior to the 1995 revision. These earlier cases have been moved to pertinent sections of the revised material where they may be useful in interpreting the current statutes.

UNIFORM COMMERCIAL CODE COMMENT

1. Section 3-605, which replaces former Section 3-606, can be illustrated by an example. Bank lends \$10,000 to Borrower who signs a note under which Borrower is obliged to pay \$10,000 to Bank on a due date stated in the note. Bank insists, however, that Accommodation Party also become liable to pay the note. Accommodation Party can incur this liability by signing the note as a co-maker or by indorsing the note. In either case the note is signed for accommodation and Borrower is the accommodated party. Rights and obligations of Accommodation Party in this case are stated in Section 3-419. Suppose that after the note is signed, Bank agrees to a modification of the rights and obligations between Bank and Borrower. For example, Bank agrees that Borrower may pay the note at some date after the due date, or that Borrower may discharge Borrower's \$10,000 obligation to pay the note by paying Bank \$3,000, or that Bank releases collateral given by Borrower to secure the note. Under the law of suretyship Borrower is usually referred to as the principal debtor and Accommodation Party is referred to as the surety. Under that law, the surety can be discharged under certain circumstances if changes of this kind are made by Bank, the creditor, without the consent of Accommodation Party, the surety. Rights of the surety to discharge in such cases are commonly referred to as suretyship defenses.

Section 3-605 is concerned with this kind of problem in the context of a negotiable instrument to which the principal debtor and the surety are parties. But Section 3-605 has a wider scope. It also applies to indorsers who are not accommodation parties. Unless an indorser signs without recourse, the indorser's liability under Section 3-415(a) is that of a guarantor of

payment. If Bank in our hypothetical case indorsed the note and transferred it to Second Bank, Bank has rights given to an indorser under Section 3-605 if it is Second Bank that modifies rights and obligations of Borrower. Both accommodation parties and indorsers will be referred to in these Comments as sureties. The scope of Section 3-605 is also widened by subsection (e) which deals with rights of a non-accommodation party co-maker when collateral is impaired.

2. The importance of suretyship defenses is greatly diminished by the fact that they can be waived. The waiver is usually made by a provision in the note or other writing that represents the obligation of the principal debtor. It is standard practice to include a waiver of suretyship defenses in notes given to financial institutions or other commercial creditors. Section 3-605(i) allows waiver. Thus, Section 3-605 applies to the occasional case in which the creditor did not include a waiver clause in the instrument or in which the creditor did not obtain the permission of the surety to take the action that triggers the suretyship defense.

3. Subsection (b) addresses the effect of discharge under Section 3-604 of the principal debtor. In the hypothetical case stated in Comment 1, release of Borrower by Bank does not release Accommodation Party. As a practical matter, Bank will not gratuitously release Borrower. Discharge of Borrower normally would be part of a settlement with Borrower if Borrower is insolvent or in financial difficulty. If Borrower is unable to pay all creditors, it may be prudent for Bank to take partial payment, but Borrower will normally insist on a release of the obligation. If Bank takes \$3,000 and releases Borrower from the \$10,000 debt, Accommodation Party is not injured. To the extent

of the payment Accommodation Party's obligation to Bank is reduced. The release of Borrower by Bank does not affect the right of Accommodation Party to obtain reimbursement from Borrower or to enforce the note against Borrower if Accommodation Party pays Bank. Section 3-419(e). Subsection (b) is designed to allow a creditor to settle with the principal debtor without risk of losing rights against sureties. Settlement is in the interest of sureties as well as the creditor. Subsection (b), however, is not intended to apply to a settlement of a disputed claim which discharges the obligation.

Subsection (b) changes the law stated in former Section 3-606 but the change relates largely to formalities rather than substance. Under former Section 3-606, Bank in the hypothetical case stated in Comment 1 could settle with and release Borrower without releasing Accommodation Party, but to accomplish that result Bank had to either obtain the consent of Accommodation Party or make an express reservation of rights against Accommodation Party at the time it released Borrower. The reservation of rights was made in the agreement between Bank and Borrower by which the release of Borrower was made. There was no requirement in former Section 3-606 that any notice be given to Accommodation Party. Section 3-605 eliminates the necessity that Bank formally reserve rights against Accommodation Party in order to retain rights of recourse against Accommodation Party. See PEB Commentary No. 11, dated February 10, 1994 [Uniform Laws Annotated, UCC, APP II, Comment 11].

4. Subsection (c) relates to extensions of the due date of the instrument. In most cases an extension of time to pay a note is a benefit to both the principal debtor and sureties having recourse against the principal debtor. In relatively few cases the extension may cause loss if deterioration of the financial condition of the principal debtor reduces the amount that the surety will be able to recover on its right of recourse when default occurs. Former Section 3-606(1)(a) did not take into account the presence or absence of loss to the surety. For example, suppose the instrument is an installment note and the principal debtor is temporarily short of funds to pay a monthly installment. The payee agrees to extend the due date of the installment for a month or two to allow the debtor to pay when funds are available. Under former Section 3-606 surety was discharged if consent was not given unless the payee expressly reserved rights against the surety. It did not matter that the extension of time was a trivial change in the guaranteed obligation and that there was no evidence that the surety suffered any loss because of the extension. *Wilmington Trust Co. v. Gesullo*, 29 U.C.C. Rep.

144 (Del.Super.Ct. 1980). Under subsection (c) an extension of time results in discharge only to the extent the surety proves that the extension caused loss. For example, if the extension is for a long period the surety might be able to prove that during the period of extension the principal debtor became insolvent, thus reducing the value of the right of recourse of the surety. By putting the burden on the surety to prove loss, subsection (c) more accurately reflects what the parties would have done by agreement, and it facilitates workouts.

Under other provisions of Article 3, what is the effect of an extension agreement between the holder of a note and the maker who is an accommodated party? The question is illustrated by the following case:

Case #1. A borrows money from Lender and issues a note payable on April 1, 1992. B signs the note for accommodation at the request of Lender. B signed the note either as co-maker or as an anomalous indorser. In either case Lender subsequently makes an agreement with A extending the due date of A's obligation to pay the note to July 1, 1992. In either case B did not agree to the extension.

What is the effect of the extension agreement on B? Could Lender enforce the note against B if the note is not paid on April 1, 1992? A's obligation to Lender to pay the note on April 1, 1992 may be modified by the agreement of Lender. If B is an anomalous indorser Lender cannot enforce the note against B unless the note has been dishonored. Section 3-415(a). Under Section 3-502(a)(3) dishonor occurs if it is not paid on the day it becomes payable. Since the agreement between A and Lender extended the due date of A's obligation to July 1, 1992 there is no dishonor because A was not obligated to pay Lender on April 1, 1992. If B is a co-maker the analysis is somewhat different. Lender has no power to amend the terms of the note without the consent of both A and B. By an agreement with A, Lender can extend the due date of A's obligation to Lender to pay the note but B's obligation is to pay the note according to the terms of the note at the time of issue. Section 3-412. However, B's obligation to pay the note is subject to a defense because B is an accommodation party. B is not obliged to pay Lender if A is not obliged to pay Lender. Under Section 3-305(d), B as an accommodation party can assert against Lender any defense of A. A has a defense based on the extension agreement. Thus, the result is that Lender could not enforce the note against B until July 1, 1992. This result is consistent with the right of B if B is an anomalous indorser.

As a practical matter an extension of the due date will normally occur when the accommodated party is unable to pay on the due date. The interest of the accommodation party normally is to defer payment to the holder rather

than to pay right away and rely on an action against the accommodated party that may have little or no value. But in unusual cases the accommodation party may prefer to pay the holder on the original due date. In such cases, the accommodation party may do so. This is because the extension agreement between the accommodated party and the holder cannot bind the accommodation party to a change in its obligation without the accommodations party's consent. The effect on the recourse of the accommodation party against the accommodated party of performance by the accommodation party on the original due date is not addressed in s 3-419 and is left to the general law of suretyship.

Even though an accommodation party has the option of paying the instrument on the original due date, the accommodation party is not precluded from asserting its rights to discharge under Section 3-605(c) if it does not exercise that option. The critical issue is whether the extension caused the accommodation party a loss by increasing the difference between its cost of performing its obligation on the instrument and the amount recoverable from the accommodated party pursuant to Section 3-419(e). The decision by the accommodation party not to exercise its option to pay on the original due date may, under the circumstances, be a factor to be considered in the determination of that issue. See PEB Commentary No. 11.

5. Former Section 3-606 applied to extensions of the due date of a note but not to other modifications of the obligation of the principal debtor. There was no apparent reason why former Section 3-606 did not follow general suretyship law in covering both. Under Section 3-605(d) a material modification of the obligation of the principal debtor, other than an extension of the due date, will result in discharge of the surety to the extent the modification caused loss to the surety with respect to the right of recourse. The loss caused by the modification is deemed to be the entire amount of the right of recourse unless the person seeking enforcement of the instrument proves that no loss occurred or that the loss was less than the full amount of the right of recourse.

In the absence of that proof, the surety is completely discharged. The rationale for having different rules with respect to loss for extensions of the due date and other modifications is that extensions are likely to be beneficial to the surety and they are often made. Other modifications are less common and they may very well be detrimental to the surety. Modification of the obligation of the principal debtor without permission of the surety is unreasonable unless the modification is benign. Subsection (d) puts the burden on the person seeking enforcement of the instrument

to prove the extent to which loss was not caused by the modification.

The following is an illustration of the kind of case to which Section 3-605(d) would apply:

Case #2. Corporation borrows money from Lender and issues a note payable to Lender. X signs the note as accommodation party for Corporation. The loan agreement under which the note was issued states various events of default which allow Lender to accelerate the due date of the note. Among the events of default are breach of covenants not to incur debt beyond specified limits and not to engage in any line of business substantially different from that currently carried on by Corporation. Without consent of X, Lender agrees to modify the covenants to allow Corporation to enter into a new line of business that X considers to be risky, and to incur debt beyond the limits specified in the loan agreement to finance the new venture. This modification releases X unless Lender proves that the modification did not cause loss to X or that the loss caused by the modification was less than X's right of recourse.

Sometimes there is both an extension of the due date and some other modification. In that case both subsections (c) and (d) apply. The following is an example:

Case #3. Corporation was indebted to Lender on a note payable on April 1, 1992 and X signed the note as a accommodation party for Corporation. The interest rate on the note was 12 percent. Lender and Corporation agreed to a six-month extension of the due date of the note to October 1, 1992 and an increase in the interest rate to 14 percent after April 1, 1992. Corporation defaulted on October 1, 1992. Corporation paid no interest during the six-month extension period. Corporation is insolvent and has no assets from which unsecured creditors can be paid. Lender demanded payment from X.

Assume X is an anomalous indorser. First consider Section 3-605(c) alone. If there had been no change in the interest rate, the fact that Lender gave an extension of six months to Corporation would not result in discharge unless X could prove loss with respect to the right of recourse because of the extension. If the financial condition of Corporation on April 1, 1992 would not have allowed any recovery on the right of recourse, X can't show any loss as a result of the extension with respect to the amount due on the note on April 1, 1992. Since the note accrued interest during the six-month extension, is there a loss equal to the accrued interest? Since the interest rate was not raised, only Section 3-605(c) would apply and X probably could not prove any loss. The obligation of X includes interest on the note until the note is paid. To the extent payment was delayed X had the use of the money that X otherwise would have had to pay to Lender. X could have pre-

vented the running of interest by paying the debt. Since X did not do so, X suffered no loss as the result of the extension.

If the interest rate was raised, Section 3-605(d) also must be considered. If X is an anomalous indorser, X's liability is to pay the note according to its terms at the time of indorsement. Section 3-415(a). Thus, X's obligation to pay interest is measured by the terms of the note (12%) rather than by the increased amount of 14 percent. The same analysis applies if X had been a co-maker. Under Section 3-412 the liability of the issuer of a note is to pay the note according to its terms at the time it was issued. Either obligation could be changed by contract and that occurred with respect to Corporation when it agreed to the increase in the interest rate, but X did not join in that agreement and is not bound by it. Thus, the most that X can be required to pay is the amount due on the note plus interest at the rate of 12 percent.

Does the modification discharge X under Section 3-605(d)? Any modification that increases the monetary obligation of X is material. An increase of the interest rate from 12 percent to 14 percent is certainly a material modification. There is a presumption that X is discharged because Section 3-605(d) creates a presumption that the modification caused a loss to X equal to the amount of the right of recourse. Thus, Lender has the burden of proving absence of loss or a loss less than the amount of the right of recourse. Since Corporation paid no interest during the six-month period, the issue is like the issue presented under Section 3-605(c) which we have just discussed. The increase in the interest rate could not have affected the right of recourse because no interest was paid by Corporation. X is in the same position as X would have been in if there had been an extension without an increase in the interest rate.

The analysis with respect to Section 3-605(c) and (d) would have been different if we change the assumptions. Suppose Corporation was not insolvent on April 1, 1992, that Corporation paid interest at the higher rate during the six-month period, and that Corporation was insolvent at the end of the six-month period. In this case it is possible that the extension and the additional burden placed on Corporation by the increased interest rate may have been detrimental to X.

There are difficulties in properly allocating burden of proof when the agreement between Lender and Corporation involves both an extension under Section 3-605(c) and a modification under Section 3-605(d). The agreement may have caused loss to X but it may be difficult to identify the extent to which the loss was caused by the extension or the other modification. If neither Lender nor X introduces evidence on the issue, the result is full discharge

because Section 3-605(d) applies. Thus, Lender has the burden of overcoming the presumption in Section 3-605(d). In doing so, Lender should be entitled to a presumption that the extension of time by itself caused no loss. Section 3-605(c) is based on such a presumption and X should be required to introduce evidence on the effect of the extension on the right of recourse. Lender would have to introduce evidence on the effect of the increased interest rate. Thus both sides will have to introduce evidence. On the basis of this evidence the court will have to make a determination of the overall effect of the agreement on X's right of recourse. See PEB Commentary No. 11.

6. Subsection (e) deals with discharge of sureties by impairment of collateral. It generally conforms to former Section 3-606(1)(b). Subsection (g) states common examples of what is meant by impairment. By using the term "includes," it allows a court to find impairment in other cases as well. There is extensive case law on impairment of collateral. The surety is discharged to the extent the surety proves that impairment was caused by a person entitled to enforce the instrument. For example, suppose the payee of a secured note fails to perfect the security interest. The collateral is owned by the principal debtor who subsequently files in bankruptcy. As a result of the failure to perfect, the security interest is not enforceable in bankruptcy. If the payee obtains payment from the surety, the surety is subrogated to the payee's security interest in the collateral. In this case the value of the security interest is impaired completely because the security interest is unenforceable. If the value of the collateral is as much or more than the amount of the note there is a complete discharge.

In some states a real property grantee who assumes the obligation of the grantor as maker of a note secured by the real property becomes by operation of law a principal debtor and the grantor becomes a surety. The meager case authority was split on whether former Section 3-606 applied to release the grantor if the holder released or extended the obligation of the grantee. Revised Article 3 takes no position on the effect of the release of the grantee in this case. Section 3-605(b) does not apply because the holder has not discharged the obligation of a "party," a term defined in Section 3-103(a)(8) as "party to an instrument." The assuming grantee is not a party to the instrument. The resolution of this question is governed by general principles of law, including the law of suretyship. See PEB Commentary No. 11.

7. Subsection (f) is illustrated by the following case. X and Y sign a note for \$1,000 as co-makers. Neither is an accommodation party. X grants a security interest in X's property to secure the note. The collateral is worth more than \$1,000. Payee fails to perfect the security

interest in X's property before X files in bankruptcy. As a result the security interest is not enforceable in bankruptcy. Had Payee perfected the security interest, Y could have paid the note and gained rights to X's collateral by subrogation. If the security interest had been perfected, Y could have realized on the collateral to the extent of \$500 to satisfy its right of contribution against X. Payee's failure to perfect deprived Y of the benefit of the collateral. Subsection (f) discharges Y to the extent of its loss. If there are no assets in the bankruptcy for unsecured claims, the loss is \$500, the amount of Y's contribution claim against X which now has a zero value. If some amount is payable on unsecured claims, the loss is reduced by the amount receivable by Y. The same result follows if Y is an accommodation party but Payee has no knowledge of the accommodation or notice under Section 3-419(c). In that event Y is not discharged under subsection (e), but subsection (f) applies because X and Y are jointly and severally liable on the note. Under subsection (f), Y is treated as a co-maker with a right of contribution rather than an accommodation party with a right of reimbursement. Y is discharged to the extent of \$500. If Y is the principal debtor and X is the accommodation party subsection (f) doesn't apply. Y, as principal debtor, is not injured by the impairment of collateral because Y would have been obliged to reimburse X for the entire \$1,000 even if Payee had obtained payment from sale of the collateral.

8. Subsection (i) is a continuation of former law which allowed suretyship defenses to be waived. As the subsection provides, a party is not discharged under this section if the instrument or a separate agreement of the party waives discharge either specifically or by general language indicating that defenses based on suretyship and impairment of collateral are waived. No particular language or form of agreement is required, and the standards for enforcing such a term are the same as the standards for enforcing any other term in an instrument or agreement.

Subsection (i), however, applies only to a "discharge under this section." The right of an accommodation party to be discharged under Section 3-605(e) because of an impairment of collateral can be waived. But with respect to a note secured by personal property collateral, Article 9 also applies. If an accommodation party is a "debtor" under Section 9-105(1)(d), the accommodation party has rights under Article 9. Under Section 9-501(3)(b) rights of an Article 9 debtor under Section 9-504(3) and 9-505(1), which deal with disposition of collateral, cannot be waived except as provided in Article 9. These Article 9 rights are independent of rights under Section 3-605. Since Section 3-605(i) is specifically limited to discharge under Section 3-605, a waiver of rights with respect to Section 3-605 has no effect on rights under Article 9. With respect to Article 9 rights, Section 9-501(3)(b) controls. See PEB Commentary No. 11.

CASE NOTES

ANALYSIS

Assumption contracts.

—In general.

—Sureties, assumption contracts.

In general.

Assumption contracts.

— In general.

Whether an assumption of a mortgage by grantee occurs depends on existence of an agreement between grantor and grantee; such agreement, as between grantor and his grantee, can be implied as well as express, and may be separate from deed conveying the property. *Yasuna v. Miller*, 399 A.2d 68, 1979 D.C. App. LEXIS 309 (1979).

Existence of an assumption contract between mortgagor and grantee bears on mortgagor's right to reimbursement but does not prevent mortgagee from proceeding against mortgagor, and in fact, enlarges his remedy by permitting an election to sue mortgagor, grantee or seek foreclosure; in effect, mortgagor becomes third-party creditor beneficiary of assumption con-

tract between grantor and grantee, and, as such, he is entitled to performance based on contract and can enforce that right directly against assuming grantee. *Yasuna v. Miller*, 399 A.2d 68, 1979 D.C. App. LEXIS 309 (1979).

— Sureties, assumption contracts.

A three-party agreement to suretyship status must exist before a modification of principal obligation by lender and grantee releases original mortgagor. *Yasuna v. Miller*, 399 A.2d 68, 1979 D.C. App. LEXIS 309 (1979).

In proving his surety status by virtue of subsequent assumption of mortgage, mortgagor may establish requisite three-party agreement where an assumption by buyer is coupled with lender's consent, ratification or unambiguous recognition of grantee's primary liability. *Yasuna v. Miller*, 399 A.2d 68, 1979 D.C. App. LEXIS 309 (1979).

Evidence did not establish that parties, who were the holder of note securing deed of trust, maker-vendor and vendees, agreed that vendees would assume full responsibility for the note, thereby making vendor a surety. *Yasuna v.*

Miller, 399 A.2d 68, 1979 D.C. App. LEXIS 309 (1979).

By executing a promissory note, a maker binds himself unconditionally to pay the instrument according to its terms, unless discharged. D.C. Code § 28:3-307(2). *Yasuna v. Miller*, 399 A.2d 68, 1979 D.C. App. LEXIS 309 (1979).

In general.

A discharge from liability on a promissory note is effected by any act or agreement which would discharge a simple contract for payment of money. *Yasuna v. Miller*, 399 A.2d 68, 1979 D.C. App. LEXIS 309 (1979).

Although a transaction involves both a negotiable instrument and a trust deed, liability of maker-mortgagor rests on underlying debt. *Yasuna v. Miller*, 399 A.2d 68, 1979 D.C. App. LEXIS 309 (1979).

Uniform Commercial Code provisions governing procedural matters apply to trials of actions commenced after its effective date even where transactions subject to litigation took place prior to its effective date. D.C. Code § 28:1-101 et seq. *Yasuna v. Miller*, 399 A.2d 68, 1979 D.C. App. LEXIS 309 (1979).

